

**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 REPLIES TO COMPLAINT COUNSEL'S
PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

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Intuit’s Reply to Complaint Counsel’s Proposed Conclusions of Law

INTUIT’S REPLY TO COMPLAINT COUNSEL’S PROPOSED FINDINGS OF FACT¹

Intuit submits the following Reply to Complaint Counsel’s Post-Trial Proposed Findings of Fact and Conclusions of Law. Complaint Counsel’s submissions routinely distort the factual record, misstate the governing law, and seek relief for which there is no justification in fact or law.

Intuit incorporates into each of the responses its own Proposed Findings of Fact and Conclusions of Law. Intuit also incorporates into this reply its post-trial brief and reply to Complaint Counsel’s post-trial brief, which further demonstrate the errors in Complaint Counsel’s proposed findings and conclusions. Consistent with the Court’s Order on Post-Trial Filings, this reply “use[s] the same outline headings as used by [Complaint Counsel].” Intuit does not agree with the substance of those headings, as is often made clear by its responses to proposed findings or conclusions under those headings.

I. Background

A. The Parties

1. The Federal Trade Commission (“FTC”) is an independent agency of the United States Government created by the FTC Act, 15 U.S.C. §§ 41-58.

Response to Finding No. 1:

Intuit has no specific response.

¹ References to the parties’ Proposed Findings of Fact and Conclusions of Law are abbreviated as follows:

PFF – Intuit’s Proposed Findings of Fact

COL – Intuit’s Proposed Conclusions of Law

CCFF – Complaint Counsel’s Proposed Findings of Fact

CCCL – Complaint Counsel’s Proposed Conclusions of Law

2. The FTC enforces Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), which prohibits unfair or deceptive acts or practices in or affecting commerce.

Response to Finding No. 2:

Intuit has no specific response.

3. Respondent Intuit Inc. is a Delaware corporation with its principal office or place of business at 2700 Coast Ave., Mountain View, California 94043. (Compl. ¶ 1; Answer ¶ 1; JX-1 ¶ 6). Intuit is publicly traded with annual revenues of \$6.8 billion in 2019, \$7.7 billion in 2020, \$9.6 billion in 2021, and \$12.7 billion in 2022. (GX342 (Complaint Counsel), ¶ 9.b & GX288 (Intuit) at 5, 36 & 39; Intuit 2022 SEC Form 10-K (Sep. 2, 2022) at Item 1 (Intuit “generated revenue of \$12.7 billion in our fiscal year which ended July 31, 2022.”), publicly available at https://www.sec.gov/ix?doc=/Archives/edgar/data/896878/000089687822000028/intu-20220731.htm#i355069ae3df44bdb90bff538d4bca755_247).

Response to Finding No. 3:

Intuit has no specific response except to note that Intuit’s annual revenues, the majority of which are obtained through the sale of non-TurboTax products and services, are not relevant to any issues in this proceeding.

B. TurboTax Services

4. Intuit advertises, markets, promotes, distributes, and sells TurboTax, an online tax preparation service. (Answer ¶ 2; JX-1 ¶ 6).

Response to Finding No. 4:

The Proposed Finding is incorrect. TurboTax is the brand name for a suite of online tax-preparation products and services offered by Intuit. (JX-1 ¶8). Intuit neither advertises, markets, promotes, distributes, nor sells “TurboTax.” (See CCF ¶6).

5. Intuit’s tax preparation products and services, including TurboTax, “have a significant and distinct seasonal pattern as sales and revenue from [them] are typically concentrated in the period from November through April.” (GX288 (Intuit) at CC-00006018.)

Response to Finding No. 5:

The Proposed Finding is inaccurate because “TurboTax” is not a tax-preparation product or service. TurboTax is the brand name for a suite of online tax-preparation products and services offered by Intuit. (JX-1 ¶8; CCFF ¶6).

6. “TurboTax” is the brand name of a suite of online tax preparation products and services offered by Intuit that enable consumers to prepare and file their individual federal and state income tax returns. (JX-1 ¶8).

Response to Finding No. 6:

Intuit has no specific response.

7. Intuit’s TurboTax dominates the market for online tax preparation services—in May 2021, TurboTax’s share of sales in the United States was 73%, three percentage points higher than in July 2020 and ten percentage points higher than in April 2019. (GX342 (Complaint Counsel) ¶ 10 & GX289 (Complaint Counsel) at CC-00006221).

Response to Finding No. 7:

The Proposed Finding is inaccurate and misleading because it suggests that TurboTax “dominates” the online tax-preparation market in some nefarious way. Intuit was founded in 1984 with the mission of helping customers manage their finances through innovative technology. (PFF ¶29). For nearly 40 years, Intuit has followed a customer-focused business model, delivering leading financial software products that provide unmatched value and benefits. (PFF ¶¶30-32, 48; *see also* PFF ¶¶33-38). Consumers have an array of alternatives to choose from and can easily switch between competitors. (PFF ¶¶41, 46-47, 55). TurboTax succeeded in the highly competitive tax-preparation industry because it delivered a superior product that adhered to Intuit’s values.

The Proposed Finding is also misleading because TurboTax’s market share does not support an inference that the challenged ads were deceptive. To the contrary, the market share demonstrates that many millions of consumers have used and are familiar with TurboTax

products, such that they are unlikely to have been deceived by the challenged ads in the manner alleged. (See PFF ¶¶48, 93, 649-652; RX814 (Intuit) at -6784; RX58-A (Intuit) at 78-79). In fact, each year, nearly [REDACTED] of TurboTax customers are returning customers. (PFF ¶93; PFF ¶¶48; RX58-A (Intuit) at 78-89; RX814 (Intuit) at -6784). That familiarity with TurboTax's products, including paid products, would prevent reasonable consumers from believing that all TurboTax products were free. (See 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. (See PFF ¶671). Complaint Counsel have offered no evidence that consumers who previously used TurboTax's free or paid SKUs are likely to have been misled by the challenged ads, or that the challenged ads had any impact on their decision to continue using TurboTax to file their tax returns. TurboTax's consistently high market share also demonstrates that consumers choose to return and use TurboTax over its competitors, evidencing that they do not feel deceived by TurboTax advertising. (See PFF ¶¶43, 47-48, 93, 649-652; RX814 (Intuit) at -6784; RX58-A (Intuit) at 78-79).

Moreover, that fact that TurboTax's market share has grown each year from 2019 to 2021 (Tax Years 2018-2020) is at odds with Complaint Counsel's theory of deception. If Intuit had been engaged in a multi-faceted deceptive advertising campaign, TurboTax's share of sales would likely decrease over that time, not increase, because consumers who were deceived would not be likely to use TurboTax again. (PFF ¶649). That increase in market share is consistent with the various other metrics that establish that reasonable consumers were not deceived by the challenged ads. (See PFF ¶¶650-683).

8. At least one of TurboTax's competitors, Cash App Taxes (formerly Credit Karma Tax), has offered an online tax preparation and filing service at no charge to all consumers for five years. (GX115 (Intuit) at CC-00001124 ("While most competitors have a 'complexity-based lineup,' new entrants (Credit Karma) with large customer bases and

significant resources are disrupting status quo, entering the tax prep industry with entirely free tax prep offers.”); Answer ¶ 35 (“Intuit admits that at least one company has offered a free online tax preparation and filing service to all customers for five years.”); see also Cash App Taxes, cash.app/taxes (last visited Feb. 17, 2023) (“Is Cash App Taxes really free? Yes. Cash App Taxes is 100% free for state and federal returns. Even if you’re taking deductions or credits, it won’t cost you a penny to file your taxes.”)).

Response to Finding No. 8:

The Proposed Finding is incorrect because Cash App Taxes has *not* offered “an online tax preparation and filing service at no charge to all consumers for five years.” (PFF ¶496).

Contrary to Complaint Counsel’s assertion, many taxpayers cannot use Cash App Taxes and it is thus not available to all consumers. (PFF ¶496). For instance, Cash App Taxes is not available to taxpayers who wish to file multiple state tax returns, part-year state tax returns, or non-resident state tax returns; who want to claim earned foreign income or foreign tax credits; who are married but file separately in a community property state like California; or who require any of almost two dozen different forms for their federal or state returns. (PFF ¶496). Instead of being free for all consumers, Cash App Taxes is free only for those consumers who qualify to use that product. (PFF ¶496).

The Proposed Finding is also incorrect, unsupported, and misleading because it states that “[a]t least one” TurboTax competitor has offered an online tax-preparation product for free to all consumers for five years. The Proposed Finding, and the evidence offered in support, identify only a *single* TurboTax competitor that supposedly offered an online tax-preparation product for free to all consumers. As explained above, the Proposed Finding is incorrect that even Cash App Taxes offered such a free product. The finding is also misleading in suggesting that there were other TurboTax competitors that offered an online tax-preparation product for free to all consumers. The undisputed evidence establishes that there are no free tax-preparation products available to all consumers for all tax situations. (PFF ¶497). Instead, TurboTax’s major

competitors in the online tax-preparation market all offer and advertise free federal tax filing products with qualifications based on customers' tax complexity. (PFF ¶¶58, 453). And those competitors advertise their free tax-preparation products as being available for consumers with simple returns. (PFF ¶¶141, 454).

Further, the Proposed Finding does not support an inference that reasonable consumers seeing a challenged ad would believe that all TurboTax products were free. Cash App Taxes engages in "[REDACTED]" and is used by relatively few consumers. (PFF ¶495). It is thus unlikely that a significant minority of reasonable consumers would even be aware of that offer, let alone rely on it (while ignoring the practices of the major market participants) to form their understanding of other companies' offerings in the tax-preparation industry. (PFF ¶495). The evidence instead establishes that reasonable consumers are familiar with the free offers for consumers with simple tax returns that are ubiquitous in the online tax-preparation industry. (PFF ¶482). Given that familiarity, reasonable consumers are unlikely to necessarily believe that a free tax-preparation product is free for them, and they also understand that their ability to qualify for that offering depends on the complexity of their tax returns, even without being told that is the case. (PFF ¶483; *see also* PFF ¶¶470-527). Because Cash App Taxes—like every other online tax-preparation product—is not available for free to all consumers, reasonable consumers would not rely on Cash App Taxes to conclude that all TurboTax SKUs are free. (PFF ¶498).

The Proposed Finding also is not supported by the cited source, GX115. First, GX115's reference to Credit Karma's free tax offering (later Cash App Taxes) as an "entirely free tax prep offer" meant that Credit Karma did not offer paid tax-preparation services. (GX115 (Intuit) at -

1124). That statement offers no support for the assertion that Cash App Taxes was available to “all consumers” (it was not).

Moreover, Complaint Counsel failed to present GX115 to any fact witness at the trial (Complaint Counsel’s Exhibit Index at 5 (May 23, 2023)), and therefore Complaint Counsel’s reliance on and selective quoting from that exhibit should be accorded little weight and Complaint Counsel should not be permitted to rely on any inferences from the exhibit.

9. Since Tax Year (“TY”) 2017 (*i.e.*, taxes filed in 2018 for income earned in 2017), Intuit has called the free version of TurboTax’s do-it-yourself offering “TurboTax Free Edition.” (Answer ¶ 13). In TY 2016, Intuit called the free version of TurboTax “TurboTax Federal Free Edition.” (Answer ¶ 13; JX-1 ¶ 9). Since TY 2020, Intuit has also offered the Basic version of its TurboTax Live offerings for free to taxpayers with “simple” tax returns, as defined by Intuit, through a promotion early in the tax season (TurboTax Live is alternative to TurboTax’s do-it-yourself offerings; in TurboTax Live, consumers can utilize “Assisted,” a do-it-with-me offering in which tax experts assist consumers with their taxes, or “Full Service,” a do-it-for-me offering in which tax experts do consumers’ taxes for them). (Johnson (Intuit) Tr. 571-73, 622; Ryan (Intuit) Tr. 690-91, 693-94, 741-43, 749-50; Rubin (Intuit) Tr. 1503, 1541-42, 1573; RX1224-A (Intuit)). Intuit Senior Vice President for Marketing Cathleen Ryan testified that offering free TurboTax Live “was an extension of our free strategy, so focus on customer acquisition.” (Ryan (Intuit) Tr. 742-43).

Response to Finding No. 9:

The Proposed Finding is inaccurate and misleading because Intuit has always aligned its use of “simple tax returns” with the IRS’s definition: returns filed using the most basic form for an individual income-tax return, without any schedules. (PFF ¶¶119, 122; *see also* PFF ¶123).

As Ms. Ryan explained, Intuit chose to use “simple tax return” “[REDACTED]” “[REDACTED],” and it “[REDACTED].” (PFF ¶123; *see also* PFF ¶¶23, 130-145, 458).

The Proposed Finding is also incorrect because it misstates the period when free TurboTax Live offers were available. TurboTax Live was not available for free “early in the tax season.” Instead, starting in Tax Year 2020 and every year since, TurboTax Live Basic has been

free from the start of the tax-filing season through the end of March (or in Tax Year 2020, the beginning of May, shortly before the extended tax-filing deadline). (PFF ¶¶109-110, 707; GX650 (Intuit) at 1; RX1447 (Intuit)). That means that TurboTax Live Basic was free to consumers for the entire period leading up to Tax Day except for the final two weeks of the tax season.

Further, the Proposed Finding is incomplete and misleading because Ms. Ryan's cited testimony is taken out of context and the finding offers only an abbreviated description of TurboTax's strategy related to free tax preparation. (See PFF ¶¶83, 85-91). Ms. Ryan explained that Intuit offers free TurboTax SKUs as part of a long-term growth strategy to attract and retain customers with simple tax returns. (PFF ¶83). By delivering an exceptional experience in its free TurboTax SKUs, Intuit aims to develop a long-term relationship with simple filers so that they will continue to use TurboTax as their tax situations become more complex over time. (PFF ¶83).

10. Intuit has never offered a product called TurboTax Free. (Answer ¶ 32).

Response to Finding No. 10:

The Proposed Finding is incomplete and misleading because through Tax Year 2018 Intuit referred to TurboTax Free Edition as "TurboTax Free." To start, the Proposed Finding misstates the relevant portion from Intuit's Answer, which reads, "Intuit has never offered a product or service named only 'TurboTax Free'—those words have always been a component of longer names such as 'TurboTax Free Edition.'" (Answer ¶32). That statement is consistent with trial testimony explaining that the "TurboTax Free" reference was meant to convey the specific TurboTax Free Edition SKU being advertised, as reflected in the written disclosure appearing on the same title card as the phrase "TurboTax Free" at the end of the advertisements. (PFF ¶228). As Mr. Rubin explained, the reference to "TurboTax Free" in TurboTax Free Edition

advertisements from Tax Year 2018, with the word “Free” appearing in lighter font weight than the “TurboTax” brand, was consistent with Intuit’s logo branding for all of its SKUs that year. (PFF ¶¶228).

The Proposed Finding also does not support an inference that advertisements that stated “TurboTax Free” were likely to mislead reasonable consumers. As noted, “TurboTax Free” was a reference to Free Edition. The fact that an advertisement stated that “*TurboTax Free* is free” is alone sufficient to prevent reasonable consumers from believing that all TurboTax products were free. (PFF ¶¶317, 319-321). Moreover, all advertisements that included the language “TurboTax Free” also stated in writing that the free offer was for the “Free Edition product only,” “[f]or simple U.S. returns,” or that “Free Edition is for simple U.S. returns only,” and instructed consumers to “[s]ee details at TurboTax.com.” (PFF ¶227; *see also, e.g.*, GX329 (Intuit)).

C. Eligibility for TurboTax Free Edition

11. TurboTax Free Edition is available only to consumers with “simple” tax returns, as defined by Intuit. (Answer ¶¶ 14–18).

Response to Finding No. 11:

The Proposed Finding is inaccurate. TurboTax Free Edition has been and is available to additional consumers beyond those with simple tax returns. Currently, taxpayers who do not have simple tax returns because they have student loan interest can use TurboTax Free Edition. (PFF ¶149). In Tax Year 2020, taxpayers who did not have simple tax returns because they had unemployment income could use TurboTax Free Edition. (PFF ¶148). In addition, active-duty members of the military can use any TurboTax SKU without paying, regardless of the complexity of their tax return. (PFF ¶¶118, 151-152).

Thus, it is unsurprising that the Proposed Finding is not supported by the cited source. Intuit’s Answer to Complaint Counsel’s Administrative Complaint did not admit that only

consumers with “simple” tax returns can use TurboTax Free Edition. (Answer ¶¶14-18).

Paragraph 14 of the Administrative Complaint alleged that “[t]he ‘freemium’ version of TurboTax is available only to consumers with ‘simple’ tax returns, as defined by Intuit.” (RX260 (FTC) ¶14). Intuit responded accurately “that consumers with simple tax returns are eligible to prepare and file their taxes for free using TurboTax Free Edition,” and denied the remainder of the paragraph. (Answer ¶14). Paragraphs 15 through 18 of the Administrative Complaint, and Intuit’s answers thereto, only address the forms that were simple tax returns during certain years, and do not support finding that TurboTax Free Edition is only available for consumers with simple tax returns. (See RX260 (FTC) ¶¶15-18; Answer ¶¶15-18).

12. Consumers that don’t have “simple” tax returns as defined by Intuit, must upgrade to paid versions of TurboTax to file their taxes with TurboTax. (See, e.g., GX261 (Complaint Counsel) (showing TY 2020 screenshot for consumers reporting self-employment income and listing “Deluxe” for \$49 and “Self-Employed” for \$99); GX275 (Complaint Counsel) (telling consumers wishing to claim the educator expenses deduction in TY 2021 they can “claim this credit by upgrading to TurboTax Deluxe” for \$39)). Upgrading to a paid version of TurboTax can cost consumers up to \$119 to file their taxes using a DIY (Do It Yourself) version. See <https://turbotax.intuit.com/personal-taxes/online/> (last visited on Feb. 17, 2023) (this past tax season Self-employed was the most expensive DIY version of TurboTax, discounted at \$89, with a regular price of \$119).

Response to Finding No. 12:

The Proposed Finding is inaccurate. TurboTax Free Edition has been and is available to additional consumers beyond those with simple tax returns. Currently, taxpayers who do not have simple tax returns because they have student loan interest can use TurboTax Free Edition. (PFF ¶149). In Tax Year 2020, taxpayers who did not have simple tax returns because they had unemployment income could use TurboTax Free Edition. (PFF ¶148). In addition, active-duty members of the military can use any TurboTax SKU without paying, regardless of the complexity of their tax return. (PFF ¶¶118, 151-152).

Moreover, the Proposed Finding is inaccurate and misleading because Intuit has always aligned its use of “simple tax returns” with the IRS’s definition: returns filed using the most basic form for an individual income-tax return, without any schedules. (PFF ¶¶119, 122; *see also* PFF ¶123). As Ms. Ryan explained, Intuit chose to use “simple tax return” “ [REDACTED] [REDACTED] ” “ [REDACTED] ,” and it “ [REDACTED] .” (PFF ¶123; *see also* PFF ¶¶23, 130-145, 458).

Further, the Proposed Finding is not supported by the cited sources because the two exhibits cited by Complaint Counsel, GX261 and GX275, do not establish that all consumers without simple tax returns must upgrade to file in a paid TurboTax product. (GX261 (FTC); GX275 (FTC)). GX261 and GX275 merely reflect that two specific tax situations do not qualify for TurboTax Free Edition. (GX261 (FTC); GX275 (FTC)). Further, the cost of upgrading is far less than the \$119 identified in the finding. (GX261 (FTC) (showing a cost of \$49 to upgrade to Deluxe); GX275 (FTC) (showing a cost of \$39 to upgrade to Deluxe)).

The Proposed Finding is also misleading to the extent it implies that consumers who do start in a free TurboTax SKU but do not qualify to use that SKU “must” upgrade to paid versions of TurboTax. Taxpayers are free to choose among a variety of tax-preparation options, and they are aware that they can switch to another option after starting their return with TurboTax. (PFF ¶¶451-452). The record reflects that consumers do sometimes abandon their TurboTax returns after being prompted to upgrade, confirming that consumers are aware that it is not something they “must” do. (PFF ¶¶451-452). Additionally, consumers prompted to switch to a paid TurboTax SKU can choose to continue filing in a free TurboTax SKU, for example, by choosing to forego additional deductions or credits on Schedules A or 3. (PFF ¶673; Johnson (Intuit) Tr. 675-676).

Further, the Proposed Finding is misleading insofar as it implies that consumers who upgrade were likely to spend \$119. That \$119 figure was the regular price of the most comprehensive and most expensive TurboTax SKU, TurboTax Self-Employed, during Tax Year 2022. (CCFF ¶12). Most consumers, particularly those who upgrade, do not end up using TurboTax Self-Employed. From Tax Years 2014 through 2021, only [REDACTED]

[REDACTED]

[REDACTED] — [REDACTED]

[REDACTED]

[REDACTED]. (RX575 (Intuit); RX820 (Intuit); RX821 (Intuit)).

Moreover, many customers likely pay the discounted price of \$89 for TurboTax Self-Employed, which is available for much of the tax season. (Rubin (Intuit) Tr. 1571-1572 (stating that the discount price is typically available until sometime in March); *see also* RX944 (Intuit); RX1221 (Intuit); RX1219 (Intuit); RX1218 (Intuit); RX222 (Intuit) (showing discount pricing for Self-Employed ranging from \$89 to \$90)). The regular prices of Intuit's other two paid DIY products, Deluxe and Premier, are typically lower than the discount price for the Self-Employed product. (RX944 (Intuit); RX1221 (Intuit); RX1219 (Intuit); RX1218 (Intuit); RX222 (Intuit) (showing regular prices ranging from \$54.99 to \$60 for Deluxe and \$79.99 to \$90 for Premier)). And Deluxe and Premier are also available at a discount for much of the tax season. (Rubin (Intuit) Tr. 1571-1572; *see also* RX944 (Intuit); RX1221 (Intuit); RX1219 (Intuit); RX1218 (Intuit); RX222 (Intuit) (showing discount prices ranging from \$34.99 to \$40 for Deluxe and \$54.99 to \$70 for Premier)).

13. Intuit's definition of "simple tax return" has changed over time. (*See* Compl. ¶¶ 15–17; Answer ¶¶ 15–17; GX342 (Complaint Counsel) ¶¶ 127, 197).

Response to Finding No. 13:

The Proposed Finding is incorrect. Intuit has always aligned its use of “simple tax return” with the federal government’s definition: returns filed using the most basic form for an individual income-tax return, without any schedules. (PFF ¶¶119-125). Before Tax Year 2018, the most basic IRS forms available were Forms 1040EZ and 1040A. (PFF ¶120). Accordingly, returns filed using Forms 1040EZ and 1040A were simple tax returns. (PFF ¶¶120, 124). Then, in response to tax-reform legislation, the IRS discontinued Forms 1040EZ and 1040A and replaced them with Form 1040. (PFF ¶121). Because Intuit aligns its use of the term simple tax return with the IRS’s definition, beginning in Tax Year 2018—after the IRS’s elimination of Forms 1040EZ and 1040A—Intuit used the term simple tax return to refer to a return filed on a Form 1040 with no attached schedules. (PFF ¶¶68, 124). Intuit had no control over the changes to the tax code, and if it had not aligned its definition of simple tax returns to the IRS’s definition after tax reform, no one would have qualified for TurboTax Free Edition. (PFF ¶125).

While Intuit has extended eligibility for TurboTax Free Edition beyond “simple tax returns” in certain years in response to unprecedented events, such as the COVID-19 pandemic, those changes did not alter the definition of simple tax returns. (PFF ¶¶148-149). Intuit expanded eligibility for free TurboTax SKUs when it was “the right thing” to do for customers and, in the process, forwent substantial short-term revenue in doing so. (PFF ¶146). For instance, in Tax Year 2020, in response to the severe impact of the COVID-19 pandemic, Intuit allowed [REDACTED] [REDACTED]. (PFF ¶148).

Similarly, in Tax Year 2021, during “the height of student loan defaults,” Intuit allowed taxpayers claiming the student-loan-interest deduction to file their taxes for free. (PFF ¶149). Intuit has never expanded eligibility for free TurboTax SKUs “in an effort to mislead

consumers,” and Complaint Counsel presented no evidence that these changes were intended to mislead. Instead, Intuit expanded eligibility for its free TurboTax SKUs to assist its customers in times of crisis, and it did so with the understanding that [REDACTED]. (PFF ¶¶146, 148-149). Again, Intuit’s decisions to expand eligibility for free TurboTax SKUs did not alter the definition of “simple tax returns.” (PFF ¶¶146-147; Ryan (Intuit) Tr. 705-706, *see also* Ryan (Intuit) Tr. 800-801; GX155 (Rubin (Intuit) IHT) at 50-51)).

In any event, the Proposed Finding is irrelevant because Complaint Counsel’s theory is that Intuit’s ads misled consumers to believe that “TurboTax is free,” i.e., that *all* TurboTax products are free. (Complaint Counsel’s Post-Trial Br. 50 (May 23, 2023)). Whatever “for simple tax returns only” means, its inclusion in the challenged ads plainly did not convey that all TurboTax products are free for all tax situations. (PFF ¶322; *see also* PFF ¶¶239, 314, 334). Thus, no reasonable consumer viewing a challenged ad with the language “simple tax returns only” was misled into believing that all TurboTax products are free, or even that TurboTax would necessarily be free for them regardless of their tax situation. (PFF ¶¶322, 334; *see also* PFF ¶¶239, 314).

14. For consumers to determine whether a tax return is simple or not requires consumers to consider substantial amounts of detailed tax information. (RX1018 (Golder Expert Report) ¶ 114 (“Because the U.S. tax code itself is complex, a substantial amount of detailed tax information may be required to fully identify whether a particular return would be simple or complex.”; GX342 (Complaint Counsel) ¶ 185, at CC-00006995 (“I observed that consumers who started in TurboTax Free Edition but were not eligible to use it because of their tax situation would not discover that until they had already invested significant time and effort creating an account and inputting their sensitive personal and financial information into the TurboTax product”); GX240 (Complaint Counsel) (video capture showing that it takes nearly quarter of an hour and pages of data entry to reach the hard stop related to student loan interest deductions); GX631 (Intuit) at CC-00013297 (Intuit interrogatory response stating that [REDACTED] was the median time spent by consumers in Tax Year [REDACTED] between beginning their tax return in TurboTax Free Edition and their first encountering a “Hard Stop” (a prompt within TurboTax Free Edition where customers are offered an opportunity to upgrade to a more comprehensive [usually paid] version of TurboTax based on the tax information provided by the

customer, (*see generally*, GX631 (Intuit) at CC-00013280-81 (Intuit interpretation of the term “Hard Stop”))).

Response to Finding No. 14:

The Proposed Finding is not supported by the cited sources because none of them establish that consumers must consider substantial amounts of detailed tax information to identify whether their return is simple or complex. Complaint Counsel misleadingly quote Professor Golder’s expert report and take it entirely out of context. The paragraph cited actually states that “[b]ecause the U.S. tax code itself is complex, a substantial amount of detailed tax information may be required to fully identify whether a particular return would be simple or complex.” (RX1018 (Golder Expert Report) ¶114). It does not state that all or even most consumers must review substantial amounts of detailed tax information to determine if they have a simple tax return or, as Complaint Counsel seem to suggest, that it would take a long time to do so. (RX1018 (Golder Expert Report) ¶114). To the contrary, the very next sentence states that “[m]any taxpayers are familiar with their personal tax situation and, from previous experience preparing their taxes, understand where they fall on the IRS continuum.” (RX1018 (Golder Expert Report) ¶114). And he goes on to explain that for those consumers who “are entirely unfamiliar, Intuit’s Simple Returns Disclosure puts consumers on notice that there are eligibility restrictions related to complexity.” (RX1018 (Golder Expert Report) ¶114). He also explains that the TurboTax website helps to minimize any uncertainty consumers might experience as a result of the complexity of the tax code because “the more individualized work of identifying whether an individual’s return is simple or complex is performed on the TurboTax website, which helps guide consumers to the product that fits their particular tax situation.” (RX1018 (Golder Expert Report) ¶114; *see also* PFF ¶¶408-418, 788-792). That same paragraph of Professor Golder’s report also provides that “Intuit makes clear in its ads that [the TurboTax

website] is where consumers should look for this information and again, reasonable consumers who are comfortable enough with preparing their taxes online would know that this is where they should go for additional details.” (RX1018 (Golder Expert Report) ¶114). Thus, Professor Golder’s report plainly does not support Complaint Counsel’s assertion that consumers must consider substantial amounts of detailed tax information to determine if they have a simple return, or the insinuation that it is time-consuming for consumers who do not know anything about their tax situation to identify whether their return is simple.

The other sources Complaint Counsel cite for support do not relate whatsoever to the information consumers must consider in determining whether they have a simple tax return. Instead, those exhibits reflect that consumers who start preparing their tax returns using TurboTax (which would occur only after seeing the detailed information about free TurboTax SKU’s qualifications on the Product & Pricing page are elsewhere on the TurboTax website) are quickly told they need to switch products if the product they are in does not cover their tax situation. For instance, GX240 is a video Ms. Shiller made when posing as a TurboTax customer that shows that she was told she would need to switch to a different TurboTax SKU based on the information she entered only 15 minutes after creating a TurboTax account, and only 13 minutes after choosing to start in Free Edition. (GX240 (FTC)). And during that recording, the Products & Pricing page is the first page that appears on the screen after Ms. Shiller logged in. (GX240 (FTC)). The video also shows that Ms. Shiller bypasses the SKU selector tool on the Products & Pricing page, even though one of the SKU selector tiles stated, “I am paying off student loans,” which was the tax information she subsequently entered when posing as a TurboTax customer. (GX240 (FTC); *see also* RX1390 (Shiller (FTC) Dep.) at 150-151, 156). Complaint Counsel also rely on Ms. Shiller’s declaration (GX342 (FTC) ¶185). Apart from having no relation to the

Proposed Finding, that declaration provides no support for the assertion that she “observed that consumers who started in TurboTax Free Edition but were not eligible ... invested significant time and effort creating an account and inputting their sensitive personal and financial information” before realizing that they were not eligible for the product. (GX342 (FTC) ¶185). Instead, it is clear that she did not observe any consumers doing anything—instead, that statement is based only on her limited experiences posing as a TurboTax customer, where she (or Complaint Counsel) hand-picked the information that was entered, as well as the order in which it was entered, in an effort to capture examples of upgrade prompts. (GX342 (FTC) ¶185; *see also* GX342 (FTC) ¶¶174-175). As Ms. Shiller conceded during her deposition, she simulated and recorded certain tax situations in TurboTax SKUs “at the direction of the lead attorney” because she “was instructed to.” (RX1390 (Shiller (FTC) Dep.) at 148-149; *see also* Shiller (FTC) Tr. 207). She did not attempt to recreate the experience of any particular consumer, and she admitted to having no basis for believing that her limited, curated experiences were consistent with the experiences of reasonable consumers. (RX1390 (Shiller (FTC) Dep.) at 158, 160). In fact, she had no idea whether these tax situations were commonly experienced. (RX1390 (Shiller (FTC) Dep.) at 149).

The final source cited, Intuit’s interrogatory responses, is likewise unrelated to Complaint Counsel’s assertion and in fact contradicts any insinuation that consumers must spend considerable time on the TurboTax website before learning if they can use a free TurboTax SKU. The cited interrogatory response states that the median time for consumers who started in TurboTax Free Edition but later entered information indicating that their tax situation was not covered by that SKU received an upgrade prompt after only [REDACTED]. (GX631 (Intuit) at - 3297). On its face, spending [REDACTED] entering information does not support an inference that

reasonable consumers must spend a significant amount of time before they determine if they qualify for a free TurboTax SKU. Moreover, that [REDACTED] overstates how long consumers actually spent entering their information. (PFF ¶¶450, 668). For example, if a consumer stepped away for a ten-minute phone call without closing her browser, those ten minutes would have counted towards the elapsed time. (PFF ¶¶668). Complaint Counsel's reliance on that figure also ignores trial testimony reflecting that updated data shows that the already small group of consumers who start in Free Edition and ultimately do not qualify spend "a lot less than 28 minutes" entering their information before learning that fact. (PFF ¶¶793). And any suggestion that most, or even many, consumers spent that much time entering information before learning that they did not qualify for a free TurboTax SKU also ignores that the vast majority of consumers start and finish their return in the same SKU. (PFF ¶¶81). In Tax Year 2021, for example, only 14% of TurboTax customers saw an upgrade screen. (PFF ¶¶447).

15. In 2017 and 2018, when consumers filed their taxes for Tax Year 2016 and 2017 (*i.e.*, taxes filed in 2017 for income earned in 2016, and taxes filed in 2018 for income earned in 2017), Intuit defined a "simple" tax return as a return that can be filed using a 1040A or 1040EZ tax form. (Compl. ¶ 15; Answer ¶ 15; JX-1 ¶ 10).

Response to Finding No. 15:

Intuit has no specific response except to note that it has always aligned its use of the phrase "simple tax returns" with the IRS's definition: returns filed using the most basic form for an individual income-tax return, without any schedules. (PFF ¶¶119-125). Before Tax Year 2018, the most basic IRS forms available were Forms 1040EZ and 1040A. (PFF ¶¶120). Accordingly, before Tax Year 2018, returns filed using Forms 1040EZ and 1040A were simple tax returns. (PFF ¶¶120, 124).

16. In 2019 and 2020, when consumers filed tax returns for TY 2018 and 2019, Intuit defined a "simple" tax return as a return that can be filed on a Form 1040, with no attached schedules. (Compl. ¶ 16; Answer ¶ 16; JX-1 ¶¶ 10, 13).

Response to Finding No. 16:

Intuit has no specific response except to note that it has always aligned its use of the phrase “simple tax returns” with the IRS’s definition: returns filed using the most basic form for an individual income-tax return, without any schedules. (PFF ¶¶119-125). Accordingly, beginning in Tax Year 2018—after the IRS’s elimination of Forms 1040EZ and 1040A—Intuit used the term simple tax return to refer to a return filed on a Form 1040 with no attached schedules. (PFF ¶¶68, 124). Intuit had no control over the changes to the tax code, and if it had not aligned its definition of simple tax returns to the IRS’s definition after tax reform, no one would have qualified for TurboTax Free Edition. (PFF ¶125).

Intuit further notes that it took measures to ensure that customers who had previously filed their taxes using TurboTax Free Edition before tax reform, but who no longer qualified because of the changes to the tax laws and forms, were aware of that fact prior to starting their return. (GX100 (Intuit) at 1-5; GX150 (Goode (Intuit) IHT) at 199-203; *see also* RX723 (Intuit) at -9051). Upon signing into TurboTax in Tax Year 2018, these customers were shown a screen explaining that the IRS tax forms had changed, and that based on their previous year’s tax return, they would need to file a form that is not covered by TurboTax Free Edition. (GX100 (Intuit) at 1-5; GX150 (Goode (Intuit) IHT) at 199-203; *see also* RX723 (Intuit) at -9051). Intuit provided notice to these customers because it “always want[s] to be clear with [its] customers and not surprise them.” (GX150 (Goode (Intuit) IHT) at 202).

17. In 2021, when consumers filed their taxes for TY 2020, Intuit defined a “simple” tax return as one that can be filed on a Form 1040, with no attached schedules, except to claim unemployment income. (Compl. ¶ 17; Answer ¶ 17; GX184 (“A simple tax return is Form 1040 only OR Form 1040 + Unemployment Income.”)).

Response to Finding No. 17:

The Finding is incorrect because Intuit did not use the term “simple tax returns” in Tax Year 2020 to refer to returns that could “be filed on a Form 1040, with no attached schedules, except to claim unemployment income.” As always, Intuit instead aligned its use of “simple tax return” to the IRS’s most basic tax form offered at that time, namely a Form 1040 with no attached schedules. (PFF ¶68).

Intuit did expand eligibility for free TurboTax SKUs beyond simple tax returns in Tax Year 2020, but that did not change the meaning of the term “simple tax return.” (PFF ¶147; Ryan (Intuit) Tr. 705-706, *see also* Ryan (Intuit) Tr. 800-801; GX155 (Rubin (Intuit) IHT) at 50-51). In response to the unemployment crisis caused by the COVID-19 pandemic, Intuit expanded eligibility for free TurboTax SKUs to cover taxpayers who claimed unemployment income. (PFF ¶¶146-148). Intuit did so because it was “the right thing” to do for its customers and Intuit lost substantial short-term revenue by doing so. (PFF ¶146). Had Intuit not expanded eligibility, taxpayers with otherwise simple tax situations would have had to [REDACTED]

[REDACTED] (PFF ¶148). That is not evidence of deception, it is evidence of compassion.

Moreover, the Proposed Finding is incorrect insofar as it implies that the definition of “simple tax return” changed from Tax Year 2019 to Tax Year 2020. Intuit continued to use the term to refer to a return filed on a Form 1040 with no attached schedules. (PFF ¶¶68, 147; Ryan (Intuit) Tr. 705-706; *see also* PFF ¶122).

Intuit’s Answer to the Administrative Complaint does not support the Proposed Finding. Intuit’s answer to paragraph 17 of the Complaint admitted that a simple tax return in Tax Year 2020 was “a return that could be filed on a Form 1040, with no attached schedules,” and that eligibility for TurboTax Free Edition that tax year included returns with unemployment income.

(Answer ¶17; *see also* PFF ¶147). GX184 also does not support the Proposed Finding. (PFF ¶¶68, 122; *see also* RX594 (Intuit) at 39 (stating that in Tax Year 2020, Intuit was [REDACTED] [REDACTED]” because “[REDACTED] [REDACTED]”)). The key takeaway from GX184 is that Intuit made consumers aware that unemployment income was covered by free TurboTax SKUs that year, preventing any confusion about what tax situations were covered by the free SKUs that year.

18. In 2022, when consumers filed their taxes for TY 2021, Intuit defined a “simple” tax return as one that can be filed on a Form 1040, with certain attached schedules to cover distinct tax situations, including student loan interest. (*See* Answer ¶ 18; GX342 (Complaint Counsel) ¶ 197; GX484 (Complaint Counsel) (“A simple tax return is Form 1040 only. Situations covered by TurboTax Free Edition . . . [1.] W-2 income[, 2.] Limited interest and dividend income reported on a 1099-INT or 1099 DIV[, 3.] Claiming the standard deduction[, 4.] Earned Income Tax Credit (EIC)[, 5.] Child tax credits[, 6.] Student Loan Interest deduction[.] Situations not covered by TurboTax Free Edition . . . [1.] Itemized deductions[, 2.] Unemployment income reported on a 1099-G[, 3.] Business or 1099-NEC income[, 4.] Stock sales[, 5.] Rental property income[, 6.] Credits, deductions and income reported on schedules 1-3”). Reporting unemployment income is not one of those tax situations. (GX342 (Complaint Counsel) ¶ 197; GX484 (Complaint Counsel)).

Response to Finding No. 18:

The Proposed Finding is incorrect and not supported by the evidence cited because Intuit did not use the term “simple tax returns” in Tax Year 2021 to refer to a return that can be filed on a Form 1040 with certain attached schedules to cover distinct tax situations. The exhibits on which the Proposed Finding rely contradict Complaint Counsel’s assertion. For example, GX484, a pop-up on the TurboTax website from Tax Year 2021 detailing the qualifications for free TurboTax SKUs, states, “A simple tax return is Form 1040 only.” (GX484 (FTC)). Ms. Shiller’s declaration, GX342, similarly shows that the pop-up screen displayed after she clicked the hyperlinked disclosure “For simple tax returns only” stated, “A simple tax return is Form

1040 only.” (GX342 (FTC) ¶197). Intuit’s answer also does not support the Proposed Finding. It does not state, contrary to Complaint Counsel’s suggestion, that “Intuit defined a ‘simple’ tax return as one that can be filed on a Form 1040, with certain attached schedules to cover distinct tax situations, including student loan interest.” (*Cf.* Answer ¶18). And the answer’s suggestion that the definition of simple tax returns included certain attached schedules was an inartful articulation of the tax situations covered by free TurboTax SKUs that has since been clarified by the record.

As the cited exhibits make clear, a simple tax return continued to be defined in Tax Year 2021 as “Form 1040 only,” and the eligibility for free TurboTax SKUs was expanded in limited ways to allow consumers with other tax situations to file for free. (GX484 (FTC) (listing the tax situations covered by free TurboTax SKUs as including student loan interest deduction)).

Intuit did expand eligibility for free TurboTax SKUs beyond simple tax returns in Tax Year 2021, but that did not affect the meaning of the term “simple tax return.” (PFF ¶147; Ryan (Intuit) Tr. 705-706, *see also* Ryan (Intuit) Tr. 800-801; GX155 (Rubin (Intuit) IHT) at 50-51). As Ms. Ryan explained, during “the height of student loan defaults,” Intuit allowed taxpayers claiming the student-loan-interest deduction to file their taxes for free. (PFF ¶149; Ryan (Intuit) Tr. 706; RX435 (Intuit)). Similar to when Intuit expanded free eligibility to cover unemployment income during the COVID-19 pandemic, Intuit expanded free eligibility in Tax Year 2021 to cover the student-loan-interest deduction because it was “the right thing to do” for its customers. (Ryan (Intuit) Tr. 706).

The Proposed Finding is also incorrect insofar as it implies that the definition of “simple tax return” changed from Tax Year 2020 to Tax Year 2021. (PFF ¶¶122, 146-149). Instead, as noted, Intuit expanded eligibility for free TurboTax SKUs in Tax Year 2021 to include taxpayers

claiming the student-loan-interest deduction in Tax Year 2021. (PFF ¶¶146-147, 149).

Moreover, by Tax Year 2021, the unprecedented unemployment levels caused by the COVID-19 pandemic had subsided, and Intuit reverted to its pre-COVID treatment of unemployment income with respect to its free TurboTax SKUs. (GX395 (Intuit) at -7339; *see also* RX810 (Intuit) at -6761 (“[REDACTED]

[REDACTED]”). Neither of those changes, which impacted the tax situations covered by TurboTax SKUs, altered Intuit’s definition of simple tax returns. (PFF ¶¶146-147, 150).

19. Consumers who receive income reported through certain types of IRS Form 1099, for example a 1099-MISC, including consumers who receive independent contractor or small business income are not eligible for TurboTax Free Edition. (*See* GX342 (Complaint Counsel) ¶ 200; GX221 (Complaint Counsel) (showing independent contractor hard stop in TY 2018), GX239 (Complaint Counsel) (showing self-employment hard stop in TY 2019), GX261 (Complaint Counsel) (showing self-employment hard stop in TY 2020), GX279 (Complaint Counsel) (showing self-employment hard stop in TY 2021); GX294 (Intuit) at INTUIT-FFA-FTC-000432351-027 & -028 (“Situations not covered in TurboTax Free Edition include: ... Business or 1099-MISC income”); GX150 (Goode (Intuit) IHT) 215-217 & GX47 (Intuit) at INTUIT-FFA-FTC-000240219 (in a 2015 document: “Business Objective[;] What do you want to achieve with the marketing? Improve take rates and conversion of Free customers with a 1099-Misc who are required to upgrade to Deluxe (as our biggest opportunity)”; GX150 (Goode (Intuit) IHT) 239-240, 243-244, 248 (in part: “If the customer has a 1099-MISC ... and they want to complete with TurboTax, they would need to upgrade to Deluxe or Self-Employed”), & GX101 (Complaint Counsel) at 2; GX152 (Johnson (Intuit) IHT) 134; GX157 (Smith (Intuit) IHT) 116-117, 125-127, 131 & GX45, at INTUIT-FFA-FTC-000240212; RX1359 (Intuit) (showing forms covered and not covered by Free Edition in TY 2022)).

Response to Finding No. 19:

The Proposed Finding is irrelevant because Intuit has never expressly stated or implied in any advertising for free TurboTax SKUs that consumers who receive income reported through a Form 1099-MISC are eligible for Free Edition. (PFF ¶¶214-308, 335-352, 367-441). Instead, the evidence shows that Intuit’s ads for free TurboTax SKUs conveyed that the specific SKU being advertised was free for consumers who qualify, (PFF ¶¶212; *see also* PFF ¶¶214-308),

those qualifications were tied to the complexity of a consumer's tax return, and that consumers can "see if they qualify" on the TurboTax website (PFF ¶¶323-327; *see also* PFF ¶¶364-441), which was integrated into TurboTax ads (PFF ¶328; CCF ¶455). As the exhibits cited in support of the Proposed Finding demonstrate, the TurboTax website expressly stated in multiple places that free TurboTax SKUs did not cover tax situations that required filing a Form 1099-MISC. For example, the Free Edition landing page on the TurboTax website lists all tax forms and schedules included and excluded from Free Edition. (RX1527 (Intuit); RX1528 (Intuit); RX1529 (Intuit); RX1530 (Intuit); RX1531 (Intuit); *see also* Rubin (Intuit) Tr. 1567-1569; Shiller (FTC) Tr. 223-227). That list clearly indicated that Form 1099-MISC is not included in free TurboTax SKUs. (RX1527 (Intuit) at 2; RX1528 (Intuit) at 1; RX1529 (Intuit) at 1; RX1530 (Intuit) at 1; RX1531 (Intuit) at 3).

In addition, the Proposed Finding is overbroad because certain filers whose returns included income reported on a Form 1099-MISC could file their taxes for free using TurboTax SKUs. For example, military members who may have personally had 1099-MISC income or filed jointly with a family member with 1099-MISC income could file for free using any DIY TurboTax SKU. (PFF ¶¶118, 151-152). Likewise, Intuit has offered promotions for Uber and Lyft drivers allowing them to file their taxes for free on TurboTax Self-Employed, even though they had 1099-MISC income. (PFF ¶118).

It is worth noting that the IRS does not allow income reported on Form 1099-MISC (Schedule C) to be reported on Form 1040 without attaching a schedule. Thus, this income is not considered by the IRS (or Intuit, or other industry participants) to be a simple tax return. (GX294 (Intuit) at 27 (Intuit free product eligibility); RX978 (showing that self-employment income is not covered by H&R Block, TurboTax, TaxAct, or TaxSlayer's free products)).

20. From at least TY 2018 through TY 2020, consumers who claimed the student loan interest deduction were not eligible for TurboTax Free Edition, regardless of their income. (See GX223 (Complaint Counsel) (showing student loan interest deduction hard stop in TY 2018), GX241 (Complaint Counsel) (showing student loan interest deduction hard stop in TY 2019), GX263 (Complaint Counsel) (showing student loan interest hard stop in TY 2020)).

Response to Finding No. 20:

The Proposed Finding is irrelevant because from Tax Year 2018 through Tax Year 2020, Intuit did not expressly state or imply in any advertising for free TurboTax SKUs that consumers claiming the student-loan-interest deduction were eligible for those free SKUs. (PFF ¶¶214-308, 337-352, 367-441). Instead, the evidence shows that Intuit’s ads for free TurboTax SKUs conveyed that the specific SKU being advertised was free for consumers who qualify (PFF ¶¶212; *see also* PFF ¶¶214-308), that those qualifications were tied to the complexity of a consumer’s tax return, and that consumers can “see if they qualify” on the TurboTax website (PFF ¶¶323-327; *see also* PFF ¶¶364-441), which was integrated into TurboTax ads (PFF ¶328; CCF ¶455). For example, the Free Edition landing page on the TurboTax website lists all tax forms and schedules included and excluded from free TurboTax SKUs. (RX1527 (Intuit); RX1528 (Intuit); RX1529 (Intuit); *see also* Rubin (Intuit) Tr. 1567-1569; Shiller (FTC) Tr. 223-227). In Tax Years 2018 through 2020, the Free Edition landing page clearly indicated that Form 1098-E, the Student Loan Interest Statement, was not included in free TurboTax SKUs. (RX1527 (Intuit) at 2; RX1528 (Intuit) at 1; RX1529 (Intuit) at 1).

In addition, the Proposed Finding is partially inaccurate and incomplete. For most of Tax Year 2018, certain taxpayers with otherwise simple tax returns who elected to deduct student loan interest could use TurboTax Deluxe for free. (RX307 (Intuit) at -9473, -9476).

And it is worth noting that in Tax Years 2018 to 2020, taxpayers who elected to deduct student loan interest on their federal taxes were not allowed by the IRS to file their taxes using

Form 1040 only and thus did not have simple tax returns as defined by the IRS, Intuit, or other industry participants. (*See* RX1527 (Intuit); RX1528 (Intuit); RX1529 (Intuit)).

21. Most consumers cannot file for free with TurboTax. (*See* GX342 (Complaint Counsel) ¶¶ 215–17 (calculating, based on IRS-reported data, that in TY 2018, 69.54% of returns filed were not “Returns that filed Form 1040 with no Schedules 1-6 or Schedule A attached”) & GX336 (Complaint Counsel) (publicly available IRS data); GX342 (Complaint Counsel) ¶¶ 215, 218–19 (calculating, based on IRS-reported data, that in TY 2019, 63.43% of returns filed were not “Returns that filed Form 1040 with no Schedules 1-6 or Schedule A attached”) & GX337 (Complaint Counsel) (publicly available IRS data); GX155 (Rubin (Intuit) IHT) 199:5-200:21 & GX115 (Intuit) at CC-00001125 (“To avoid further disruption from current and new competitors we should continue to look at ways to expand our free eligibility beyond the ~35% eligibility we have today, yet stopping short of a Free DIY prep solution for all situations.”); Hauser (Intuit) Tr. 875 (“Q. And roughly what percentage of taxpayers in the general population actually qualify to file for Free Edition? A. It’s roughly about a third.”); JX-1 ¶ 14).

Response to Finding No. 21:

The Proposed Finding is inaccurate and misleading because it uses an irrelevant denominator—all U.S. taxpayers—for assessing the proportion of consumers who qualify to file their taxes using free TurboTax SKUs. A more informative denominator—and the one Intuit looks at for most of its business purposes—is not all U.S. taxpayers, but rather taxpayers who would actually consider using an online tax-preparation product like TurboTax. When Complaint Counsel stated at trial that two-thirds of taxpayers did not qualify to use free TurboTax SKUs, the Court asked them to clarify whether they 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.” (PFF ¶463). 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 Mr. Rubin and Mr. Johnson explained (Johnson (Intuit) Tr. 592-593, 623; Rubin (Intuit) Tr. 1595-1596), a more informative group to consider when assessing TurboTax advertising are the approximately 75 million consumers who use

online tax-preparation products such as TurboTax (*see* PFF ¶129). Tens of millions of taxpayers do not even consider using an online tax-preparation product like TurboTax and instead “tune out” “[t]he minute they hear TurboTax.” (Rubin (Intuit) Tr. 1595-1596). Expert witness Professor Peter Golder likewise explained that 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).

Properly understood, “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.” Critically, the percentage of new TurboTax customers who file their taxes for free each year using Free Edition [REDACTED], reflecting that Intuit is successful at reaching qualifying consumers with its free advertising. (PFF ¶¶659-660).

The impropriety of Complaint Counsel’s efforts to use all taxpayers as the denominator when assessing the proportion of consumers who qualify for free TurboTax SKUs is confirmed by the standards governing deceptive-advertising claims. When assessing whether advertising is deceptive, the audience that must be considered are those “persons to whom the representation is addressed.” (*FTC Policy Statement on Deception*, 103 F.T.C. 174, 178 (1984)). And even among that population, that inquiry considers only the “[r]epresentative segment of the class of persons to whom the representation is addressed.” (*FTC Policy Statement on Deception*, 103

F.T.C. at 178). The approximately 85 million consumers who would not consider using an online-tax preparation product are not part of the representative segment of persons to whom advertising for free TurboTax SKUs is addressed. (*See* Rubin (Intuit) Tr. 1595-1596; PFF ¶¶188-204).

The Proposed Finding is also not supported by the cited sources. First, the percentages calculated by Ms. Shiller and the ratio in paragraph 14 of JX-1, as well as the IRS data they are based on, only account for taxpayers who actually filed a simple tax return in those tax years. (GX342 (FTC) ¶¶215-219; GX336 (FTC); GX337 (FTC); JX-1 ¶14). This data undercounts the number of consumers eligible for free TurboTax SKUs because it does not include consumers who could have filed their taxes on a Form 1040 only but chose not to, such as individuals who chose to claim additional deductions or credits (PFF ¶673), or married individuals who filed jointly but could have filed separately on a Form 1040 only (PFF ¶128). Even though those consumers did not in fact file a simple tax return, they had the option of filing a simple tax return and thus were eligible for free TurboTax SKUs. (PFF ¶673). Moreover, the Proposed Finding does not account for the number of consumers eligible for free TurboTax SKUs in Tax Years 2020 and 2021, when eligibility for those free SKUs extended beyond simple tax returns in response to unemployment caused by COVID-19 and the student debt crisis. (PFF ¶¶148-149).

Moreover, the Proposed Finding states that “most consumers cannot file for free with TurboTax,” but the sources cited relate only to the number of simple tax returns filed or the number of consumers eligible for free TurboTax SKUs. They do not provide any information on the number of consumers who can “file for free with TurboTax” using other TurboTax SKUs. (GX342 (FTC) ¶¶215-219; GX336 (FTC); GX337 (FTC); GX155 (Rubin (Intuit) IHT) 199-200; GX115 (Intuit) at -1125; Hauser (Intuit) Tr. 875; JX-1 ¶14). Those additional consumers include

enlisted military members (E-1 to E-9), all of whom are eligible to file for free in any TurboTax DIY SKU, (PFF ¶¶118, 151-152), as well as individuals offered coupons or discount codes allowing them to file for free in a paid TurboTax SKU (PFF ¶118; RX307 (Intuit) at -9473, -9476).

The remaining three sources cited also do not support the Proposed Finding. First, GX115 includes a discussion related to the eligibility for Free Edition specifically, not an assessment of how many taxpayers (or online filers) can file for free with TurboTax in total, including outside Free Edition. (GX115 (Intuit) at -9484). Nor was that exhibit discussing Intuit's advertising strategy, which reflects that the appropriate group to consider when assessing the impact of TurboTax advertising are consumers in the online tax-preparation market—most of whom qualify to file for free using TurboTax. (*See* Rubin (Intuit) Tr. 1595-1596; PFF ¶¶129, 464). Second, the cited pages of Mr. Rubin's investigational hearing testimony (GX155 (Rubin (Intuit) IHT) at 199-200) merely reference GX115 without any discussion of eligibility. (GX155 (Rubin (Intuit) IHT) at 200). Third, Dr. Hauser's quoted testimony (Hauser (Intuit) Tr. 875) was a summary of Complaint Counsel's theory of the case, not an endorsement of it or the Proposed Finding. (Hauser (Intuit) Tr. 874-876).

22. Approximately two-thirds of taxpayers are not eligible to file for free using TurboTax Free Edition. (Johnson (Intuit) Tr. 657 (“Q. Roughly a third are eligible for the – for TurboTax Free Edition, correct? A. Yes. They’re saying that there’s 150 million filers in the U.S., 50 million are eligible, approximately, and therefore I think that’s a third of filers are eligible. Q. And roughly two-thirds are not eligible, correct? A. Yes.”); Hauser (Intuit) Tr. 875 (“Q. And roughly what percentage of taxpayers in the general population actually qualify to file for Free Edition? A. It’s roughly about a third.”); GX654 (Intuit) at CC-00014104 (“If your returns fits on a 1040 with no additional schedules, you can file completely for free with TT Free Edition...Over 50 million taxpayers are eligible (1/3 of all tax filers.”)).

Response to Finding No. 22:

The Proposed Finding is inaccurate and misleading because it uses an irrelevant denominator—all U.S. taxpayers—for assessing the proportion of consumers who qualify to file their taxes using free TurboTax SKUs. A more informative denominator—and the one Intuit looks at for most of its business purposes—is not all U.S. taxpayers, but rather taxpayers who would actually consider using an online tax-preparation product like TurboTax. When Complaint Counsel stated at trial that two-thirds of taxpayers did not qualify to use free TurboTax SKUs, the Court asked them to clarify whether they 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.” (PFF ¶463). 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 Mr. Rubin and Mr. Johnson (Johnson (Intuit) Tr. 592-593, 623; Rubin (Intuit) Tr. 1596) explained, a more informative group to consider when assessing TurboTax advertising are the approximately 75 million consumers who use online tax-preparation products such as TurboTax. (Rubin (Intuit) Tr. 1595-1596; *see also* PFF ¶129). Tens of millions of taxpayers do not even consider using an online tax-preparation product like TurboTax and instead “tune out” “[t]he minute they hear TurboTax.” (Rubin (Intuit) Tr. 1595-1596). Expert witness Professor Peter Golder likewise explained that 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).

Properly understood, “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.” Critically, the percentage of new TurboTax customers who file their taxes for free each year using Free Edition [REDACTED], reflecting that Intuit is successful at reaching qualifying consumers with its free advertising. (PFF ¶¶659-660).

The impropriety of Complaint Counsel’s efforts to use all taxpayers as the denominator when assessing the proportion of consumers who qualify for free TurboTax SKUs is confirmed by the standards governing deceptive-advertising claims. When assessing whether advertising is deceptive, the audience that must be considered are those “persons to whom the representation is addressed.” (*FTC Policy Statement on Deception*, 103 F.T.C. 174, 178 (1984)). And even among that population, that inquiry considers only the “[r]epresentative segment of the class of persons to whom the representation is addressed.” (*FTC Policy Statement on Deception*, 103 F.T.C. at 178 (emphasis added)). The approximately 85 million consumers who would not consider using an online-tax preparation product are not part of the representative segment of persons to whom advertising for free TurboTax SKUs is addressed. (*See Rubin (Intuit) Tr.* 1595-1596; PFF ¶¶188-204).

The suggestion that it is appropriate to consider all taxpayers when assessing the impact of the challenged ads is also not supported by the cited evidence. First, Mr. Johnson’s testimony did not suggest that was the proper population to consider when assessing the challenged advertisements. To the contrary, Mr. Johnson testified that data showing that the majority of consumers who use online tax-preparation software have simple tax returns “lay the foundation

for” many of Intuit’s business choices, decisions and practices. (Johnson (Intuit) Tr. 591-592). Second, Dr. Hauser’s quoted testimony (Hauser (Intuit) Tr. 875) was provided in response to Complaint Counsel’s theory of the case, not as an endorsement of it. His testimony shows that even if it were appropriate to consider all taxpayers when assessing whether the challenged ads were deceptive, his Disclosure Efficacy Survey demonstrated that reasonable consumers were not likely deceived because the number of consumers who would likely start in a free SKU matched the total number of consumers who would qualify to use that free SKU. (Hauser (Intuit) Tr. 874-876). Third, GX654 is a single-page “Campaign Assignment Brief” provided to one of Intuit’s advertising agency partners. That it accurately recognized that *over* 50 million taxpayers from the general U.S. population qualify to file for free using free TurboTax SKUs (PFF ¶127) establishes neither the absolute number of those who do qualify nor that the general population is the appropriate denominator for assessing TurboTax advertising.

23. Approximately 100 million taxpayers are not eligible to file for free using TurboTax Free Edition. (See Johnson (Intuit) Tr. 657 (“Q. Roughly a third are eligible for the – for TurboTax Free Edition, correct? A. Yes. They’re saying that there’s 150 million filers in the U.S., 50 million are eligible, approximately, and therefore I think that’s a third of filers are eligible. Q. And roughly two-thirds are not eligible, correct? A. Yes.”); Hauser (Intuit) Tr. 875 (“Q. And roughly what percentage of taxpayers in the general population actually qualify to file for Free Edition? A. It’s roughly about a third.”); GX654 (Intuit) at CC-00014104 (“If your returns fits on a 1040 with no additional schedules, you can file completely for free with TT Free Edition...Over 50 million taxpayers are eligible (1/3 of all tax filers.”); *see also* Rubin (Intuit) Tr. 1594-95 (testifying that 60 million simple tax returns that would qualify to use TurboTax Free Edition were filed in 2022 out of the 160 million tax returns filed with the IRS); GX396 (Intuit) at CC-00007341 [REDACTED]

Response to Finding No. 23:

The Proposed Finding is inaccurate and misleading because it uses an irrelevant denominator—all U.S. taxpayers—for assessing the proportion of consumers who qualify to file their taxes using free TurboTax SKUs. A more informative denominator—and the one Intuit

looks at for most of its business purposes—is not all U.S. taxpayers, but rather taxpayers who would actually consider using an online tax-preparation product like TurboTax. When Complaint Counsel stated at trial that two-thirds of taxpayers did not qualify to use free TurboTax SKUs, the Court asked them to clarify whether they 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.” (PFF ¶463). 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 Mr. Rubin and Mr. Johnson (Johnson (Intuit) Tr. 592-593, 623; Rubin (Intuit) Tr. 1596) explained, a more informative group to consider when assessing TurboTax advertising are the approximately 75 million consumers who use online tax-preparation products such as TurboTax. (Rubin (Intuit) Tr. 1595-1596; *see also* PFF ¶129). Tens of millions of taxpayers do not even consider using an online tax-preparation product like TurboTax and instead “tune out” “[t]he minute they hear TurboTax.” (Rubin (Intuit) Tr. 1595-1596). Expert witness Professor Peter Golder likewise explained that 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).

Properly understood, “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.”

Critically, the percentage of new TurboTax customers who file their taxes for free each year using Free Edition [REDACTED]

[REDACTED], reflecting that Intuit is successful at reaching qualifying consumers with its free advertising. (PFF ¶¶659-660).

The impropriety of Complaint Counsel’s efforts to use all taxpayers in the denominator when assessing the proportion of consumers who qualify for free TurboTax SKUs is confirmed by the standards governing deceptive-advertising claims. When assessing whether advertising is deceptive, the audience that must be considered are those “persons to whom the representation is addressed.” (*FTC Policy Statement on Deception*, 103 F.T.C. 174, 178 (1984)). And even among that population, that inquiry considers only the “[r]epresentative segment of the class of persons to whom the representation is addressed.” (*FTC Policy Statement on Deception*, 103 F.T.C. at 178 (emphasis added)). The approximately 85 million consumers who would not consider using an online-tax preparation product are not part of the representative segment of persons to whom advertising for free TurboTax SKUs is addressed. (*See Rubin (Intuit) Tr.* 1595-1596; PFF ¶¶188-204).

D. Intuit’s “Free” TurboTax Strategy

24. TurboTax software services are part of Intuit’s “Consumer segment” and “are designed to enable customers to prepare and file their federal and state income tax returns.” (GX288 (Intuit) at CC-00006014; JX-1 ¶ 16).

Response to Finding No. 24:

The Proposed Finding is partially inaccurate. First, the preceding heading, “Intuit’s ‘Free’ TurboTax Strategy” puts “free” in scare quotes, suggesting that Complaint Counsel have reverted to the implications in their complaint that TurboTax’s free products are somehow not truly free. The record says otherwise. (PFF ¶¶69, 109-110, 112). Second, Intuit does not have a “Consumer segment,” it has as a business unit a “Consumer Group,” of which the TurboTax

brand software is a part. (Johnson (Intuit) Tr. 547, 586; Rubin (Intuit) Tr. 1501). Third, TurboTax is a brand for a suite of software “products and services that are designed to enable customers to prepare and file their federal and state income tax returns quickly and accurately. ... They are designed to be easy to use, yet sophisticated enough for complex tax returns.” (GX288 (Intuit) at -6014; *see also* PFF ¶(62)). Between Tax Years 2014 and 2021, over [REDACTED] consumers filed their federal tax returns *for free* using TurboTax Free Edition. (PFF ¶(113)). Those consumers on their own amount to approximately [REDACTED] who filed using any online tax-preparation service. (PFF ¶(116)).

25. [REDACTED] that involves, in part, growing Intuit’s customer base by offering free services to consumers [REDACTED] (Answer ¶¶ 9–10).

Response to Finding No. 25:

The Proposed Finding is inaccurate. Intuit offers free TurboTax SKUs as part of a long-term, retention-based growth strategy geared towards attracting new customers with simple tax returns by allowing them to file their taxes completely for free. Intuit hopes that it can retain those customers as their tax situations become more complex and might require paid TurboTax SKUs. (PFF ¶(83)). Intuit seeks to attract customers with simple returns because they offer significant long-term value, as they are less set in their ways, have lower acquisition costs, and are more likely to have tax situations that will become increasingly complex over time. (PFF ¶(85)). Intuit endeavors to retain such customers by delivering exceptional tax-preparation products that result in positive customer experiences. (PFF ¶(90)).

Intuit also offers free TurboTax SKUs in hopes that customers who file for free will recommend TurboTax to others. (PFF ¶(84)). Critically, Intuit’s TurboTax strategy must revolve around retaining customers because the tax-preparation industry consists of a relatively fixed set of consumers with low switching costs, and therefore tax-preparation firms—including Intuit and

its competitors—derive greater long-term value through repeat business than from one-off transactions. (PFF ¶¶88-89; *see also* PFF ¶¶56-59).

Intuit has been extraordinarily successful with TurboTax’s long-term growth and retention strategy. TurboTax has an industry-leading customer retention rate of approximately 80%, which is nearly [REDACTED]. (PFF ¶91). Around [REDACTED] of all TurboTax returns each year are filed by returning customers. (PFF ¶93). Moreover, Intuit’s customer retention rate for paid customers is *higher* than its rate for customers who file for free, which is inconsistent with Complaint Counsel’s theory that those customers paid for TurboTax after being misled into believing TurboTax would be free. (PFF ¶92). More broadly, the fact that TurboTax customers continue using its SKUs year after year is dramatically inconsistent with Complaint Counsel’s allegations of widespread deception. Put simply, customers would abandon TurboTax if they felt deceived (PFF ¶¶75, 83, 95-96), but customers are instead staying with TurboTax at industry-leading rates (PFF ¶¶91-93).

26. The “freemium” strategy also involves persuading consumers to upgrade from free to paid versions of TurboTax. (*See, e.g.*, GX291 (Intuit) at CC-00006227 (“We accelerated customer growth through focus on our price-sensitive value tier where we were under developed as a result of an imbalanced value-equation – first with our ‘value-tier’ initiative followed by two years now of Absolute Zero -> this fueled [sic] tremendous customer growth in both *Free and Paid / Simple and Complex*[.] We accelerated revenue growth by *monetizing them on tax complexity*, leveraging innovation and introducing value-added bundles[.] This sets the stage of our growth strategy over the next several years[.]” (emphasis added)); *see also* GX10 (Intuit) at CC-00000126 (In 2013, “Free customer within the Value Tier is an important part of our customer mix with 25% of New Free users and 35% of returning Free users upgrading to a Paid SKU. ‘Free’ customers generate — \$100M in revenue (e.g. 65% of Free customers also attach a State offering in taxable states”); GX113 (Intuit) at CC-00001117 (“customer expectations top of funnel around Free have never been higher making it even harder to monetize these customers directly in product.”)).

Response to Finding No. 26:

The Proposed Finding is incorrect because Intuit's actual business strategies do not involve persuading consumers to upgrade from free TurboTax SKUs to paid SKUs. (GX150 (Goode (Intuit) IHT) at 119-120; GX152 (Johnson (Intuit) IHT) at 124). As discussed (Response to CCFE ¶25), Intuit offers free TurboTax SKUs to attract new customers with simple tax returns with the hope that those customers will actually file their taxes *for free*. (PFF ¶83). Between 11 and 14 million taxpayers do so each year. (PFF ¶113).

As part of its *actual* business strategy, Intuit endeavors to start consumers in the TurboTax SKU that best suits their tax needs and to *avoid* prompting consumers to upgrade. (PFF ¶73). When consumers begin their return in the correct TurboTax SKU and are not prompted to upgrade to a more expensive SKU, they have a better overall experience and return in subsequent years. (PFF ¶75; *see also* PFF ¶76). As a result, Intuit has invested substantial time, effort, and other resources developing tools that help consumers identify the TurboTax SKU best for their tax situation. (PFF ¶¶77, 423). And Intuit has been successful in its efforts to get consumers started in the correct SKU, as the overwhelming majority of TurboTax consumers (████) start and complete their return in the same SKU. (PFF ¶81). Moreover, between 2014 and 2021, █████ of customers who began their tax returns in TurboTax Free Edition also filed their returns in Free Edition. (PFF ¶82).

Despite Intuit's efforts to start customers in the right SKU, customers sometimes start their tax returns in a free SKU for which they know they do not qualify. (PFF ¶¶431-433; Rubin (Intuit) Tr. 1559-1560; *see also* GX10 (Intuit) at -0126). For example, a *New York Times* Wirecutter article stated that it “think[s] most people should start with Free Edition” because “[e]ven if you might have some deductible expenses, such as mortgage interest or charitable donations, it’s better to start here and upgrade to Deluxe only if you’re required to.” (PFF ¶433).

Further, some consumers decide to upgrade to a paid SKU, even if they could file using a free SKU, because the paid SKU offer them greater overall value than filing for free, such as when itemizing deductions is advantageous. (GX152 (Johnson (Intuit) IHT) at 124). These are rational economic choices made by customers, not instances of deception nor any business strategy on Intuit's part that attempts to "persuad[e]" consumers to upgrade.

In addition, the exhibits that Complaint Counsel cite unsurprisingly do not support the Proposed Finding. To start, Complaint Counsel did not present any of the exhibits cited in the Proposed Finding (GX291 (Intuit); GX10 (Intuit); GX113 (Intuit)) to any fact witness at the trial (Complaint Counsel's Exhibit Index at 1, 5, 11 (May 23, 2023)), and therefore Complaint Counsel's selective quoting from those exhibits should be accorded little weight. Moreover, the exhibits themselves, as well as investigational hearing and deposition testimony that Complaint Counsel ignore, refute Complaint Counsel's Proposed Finding.

For example, Complaint Counsel ignore other portions of GX291 that make clear that "monetizing" customers based on tax complexity refers to customers using paid TurboTax SKUs as their tax situation evolves from simple to more complex over the years. (GX291 (Intuit) at - 6231). The exhibit goes on to state, for instance, that Intuit "monetize[s] customers based on their tax complexity" to "leverage Free filers as tax complexity increases." (GX291 (Intuit) at - 6231). In other words, Intuit "monetizes" those customers when they use paid TurboTax SKUs later when their tax complexity increases. (PFF ¶¶83, 85). The exhibit does not support that Intuit's strategy was to persuade customers to upgrade from a free TurboTax SKU to a paid SKU in any given year; in fact, Intuit has no short-term revenue goals for customers who use free TurboTax SKUs. (PFF ¶86). Rather, the exhibit is entirely consistent with Intuit's strategy of attracting simple filers and retaining them as customers as their taxes become more complex.

(GX291 (Intuit) at -6231; PFF ¶83). As GX291 recognizes (and as discussed *supra*, Response to CCF ¶25), Intuit has been successful with this strategy, undercutting any argument that Intuit needed to, or intended to, deceive consumers.

Complaint Counsel similarly take GX10 out of context. Complaint Counsel insinuate that Intuit tries to encourage customers to upgrade to paid TurboTax SKUs, but the exhibit itself describes Intuit's efforts to help consumers *avoid* prompts to upgrade by ensuring that they start their return in the right TurboTax SKU for their needs. (GX10 (Intuit) at -0125 (mentioning Intuit's plan to "re-imagine the SKU selection experience to ensure fast and easy starts with customers in the 'right' SKUs to drive satisfaction, reduce downgrade requests and increase conversion"), -0128). Such efforts are consistent with Intuit's desire to create a positive customer experience so that customers continue using TurboTax as their taxes become more complex, not an effort to deceive customers.

Further, Complaint Counsel omit important context from GX113. On the same page that Complaint Counsel cite, the exhibit explains that advertising free TurboTax SKUs "results in new acquisition" and also "drive[s] traffic and consideration for the [TurboTax] brand," which is consistent with Intuit's strategy to attract new customers who have simple tax returns and retain them over time. (GX113 (Intuit) at -1117; *see also* Responses to CCF ¶¶28-29). The exhibit also notes—consistent with Intuit's free TurboTax strategy—Intuit's plan to "create and innovate upon the most superior Free product in the industry" in order to "allow TurboTax to grow and maintain leadership in the tax prep industry, ... and provide shareholder value thru lifetime value creation." (GX113 (Intuit) at -1117). Further, the exhibit states, "At the end of FY18, nearly 50% of DIY customers paid nothing for Fed/State tax prep (up from 18% Free Fed in FY08) and represented 17% of the total tax prep category." (GX113 (Intuit) at -1117). This exhibit

therefore reflects Intuit's long-term growth and retention strategy, and shows that Intuit's free TurboTax strategy has improved consumer welfare, not that Intuit deceived consumers to pay to file taxes.

The Proposed Finding is also incorrect to the extent it suggests that Intuit's strategy involved encouraging customers who qualified for free TurboTax SKUs to upgrade or purchase optional add-on products. Intuit has no short-term revenue goals for customers who qualify for its free TurboTax SKUs. (PFF ¶86). And Intuit wants customers with simple tax returns to file their taxes for free with its free TurboTax SKUs (PFF ¶¶73-77), because doing so fosters lifelong relationships with those customers such that they will be more likely to pay for TurboTax when their tax situation requires (PFF ¶83). Customers would be less likely to do so if they were forced to upgrade or purchase paid add-ons to file their taxes. (PFF ¶¶76, 95-96).

27. The "freemium" strategy further involves "brand loyalty," or retention of consumers who previously filed their taxes for free in a free version of TurboTax returning to TurboTax in subsequent years when they are no longer eligible for the free version, and paying Intuit for a paid version of TurboTax. (See GX292 (Intuit) at CC-00006233 (a May 2016 "Monetization Playbook" opens with a "Playbook Objective": "At TurboTax, we put our customers first with a Freemium strategy that drives consumer growth, and produces lots of happy customers. In TY16, more consumer growth means continuing to perfect how we monetize our Free/Free customers. This gives not only the Monetization team, but all CTG [Consumer Tax Group] employees, the opportunity to provide more value, develop brand loyalty, and drive share and revenue to support greater business ventures we wouldn't otherwise have."); GX156 (Ryan (Intuit) IHT) at 87-89 (in part: "My understanding is that by offering a great experience with your simple taxes for free, our hope is that a customer grows with us as their life gets more complicated."); GX156 (Ryan (Intuit) IHT) at 118-119 (in part: "You know, generally speaking, we believe we have the best tax software out there, and getting simple tax filers to use our free software and grow with us as their life gets more complicated is my understanding of why we are willing to invest marketing dollars for customers that generate no revenue in a given year."); GX152 (Johnson (Intuit) IHT) at 124-126 (in part: "[A]s we have relationships and [consumers] trust us, over time, whether it's one year, two year, five years, they may need us for a service that's more advanced than their current simple tax filings. And as a consequence, they will – there is potential future revenue streams."); GX342 (Complaint Counsel) ¶ 188 (screenshot of TurboTax Free Edition disclaimer stating in part: "We hope that, over time, as our customers with simple returns need more capabilities as their financial situations change (for example owning a home, having a child, managing

investments), they have loved our products and services so much that they will choose our paid TurboTax offerings to prepare and file their returns.”); GX484 (Complaint Counsel) (Screenshot of TurboTax Free Edition disclaimer and addressing the question “How does TurboTax make any money?”); GX396 (Intuit) at CC-00007343 [REDACTED]

Response to Finding No. 27:

The Proposed Finding and exhibits cited therein are consistent with Intuit’s long-term growth and retention strategy, which seeks to attract customers with simple tax returns and build long-term relationships with those customers so that they might choose to use paid TurboTax products when their tax situations become more complex. (PFF ¶83; *see also* Responses to CCF ¶¶25-26). For instance, the Proposed Finding is correct in recognizing that Intuit’s strategy revolves around “brand loyalty” and retaining customers year over year, but ignores how this strategy is entirely inconsistent with Complaint Counsel’s theory of deception, since a strategy focused on brand loyalty and customer retention would engender resentment and customer switching. The Proposed Finding highlights several excerpts from exhibits that establish that Intuit’s strategy is to build lifelong relationships with customers with simple tax returns so that they might choose to use paid TurboTax SKUs when their taxes become more complex. (CCFF ¶27).

The Proposed Finding is also correct in noting that Intuit hopes that customers who filed their taxes for free using TurboTax have positive experiences and return in future years, and that Intuit hopes those customers choose to use paid TurboTax SKUs if their taxes become more complex in the future. (PFF ¶83, 85). Complaint Counsel also rightly recognize that Intuit’s business strategy includes offering customers, including those customers with simple tax returns, the “best tax software out there” so that they continue using TurboTax SKUs over time. (CCFF ¶27; GX156 (Ryan (Intuit) IHT) at 87-89, 118-119). Complaint Counsel also appropriately

highlight that Intuit intends to (and does) build trust, offer improved products, and provide more value to customers over time. (CCFF ¶27; PFF ¶¶98-99; GX152 (Johnson (Intuit) IHT) at 124-126). None of this is consistent with a strategy rooted in deception; rather, it reflects a customer-focused strategy based on providing customers with products that meet their expectations so that they will remain TurboTax customers for years to come.

Complaint Counsel are also correct that Intuit puts customers first and that, as a result, TurboTax has tens of millions of satisfied customers. (CCFF ¶27; GX292 (Intuit) at -6233). Because TurboTax products meet consumers' needs and expectations, TurboTax has overwhelmingly positive ratings and reviews, averaging 4.8 out of 5 stars for TurboTax Free Edition, and between 4.4 and 4.7 stars for Deluxe, Premier and Self-Employed SKUs in 2022. (PFF ¶¶650-654). As Mr. Rubin testified, Intuit's customer retention rates, high NPS scores, and positive ratings and reviews are inconsistent with widespread deception. (PFF ¶¶647, 652-653). If Intuit had run a "multiyear, multi-ad, multichannel, multimodal" deceptive advertising campaign, it would have received overwhelmingly negative reviews and voluminous complaints from customers. (PFF ¶¶647-652). That was not the case.

Further, the evidence shows that Intuit has continuously innovated free TurboTax offerings to improve customers' experiences and help foster long-term customer relationships. (PFF ¶¶98-112). As Mr. Johnson, Mr. Rubin, and Ms. Ryan testified, Intuit invests a significant amount of time, effort, and resources into making its free tax-preparation offerings superior to its competitors' so that customers will continue to use TurboTax in the future. (PFF ¶98). Intuit has expanded the scope, functionality, and features of its free TurboTax offerings—including by providing services for free that were previously only available for purchase—to give customers greater value and offer the "best customer experience" in the industry. (PFF ¶¶98-112). For

example, Intuit allows simple filers to review and import their prior year's tax return and receive professional live tax assistance for free. (PFF ¶¶105-110). Intuit's improvements save customers time and effort, as the average TurboTax Free Edition customer now completes their taxes in just 28 minutes. (PFF ¶449).

Altogether, the Proposed Finding demonstrates that TurboTax business strategy is inconsistent with Complaint Counsel's theory of deception. (PFF ¶¶647-652). A free TurboTax strategy rooted in deception would have "erode[d]" consumers' trust in the TurboTax brand and undermined Intuit's ability to retain customers, and repeat customers form the foundation of the TurboTax business model. (PFF ¶96; *see also* Rubin (Intuit) Tr. 1529-1530). As Mr. Rubin testified, Intuit "count[s] on every year over 80% of our business starting with returning customers from the prior year, and so repeat business, the trust that we earn with customers, the great experience that they have is the starting point, the foundation for our entire business." (Rubin (Intuit) Tr. 1529)). Intuit could not retain long-term relationships with TurboTax customers if it employed a business strategy based on widespread deception. Instead, Intuit has an incentive *not* to deceive consumers because such deception is both easy for consumers to identify and to punish, such as by switching tax-preparation firms or sharing negative experiences with others. (Rubin (Intuit) Tr. 1529-1530; PFF ¶¶95-96).

28. Intuit's advertising for TurboTax Free Edition is also advertising for the TurboTax brand in general—Intuit executives refer to this as a "halo effect." (Ryan (Intuit) Tr. 791–93; Rubin (Intuit) Tr. 1526; GX144 (Soukas (Intuit) Dep.) at 123–24); GX149 (Crosby (Intuit) Dep.) at 83–84; GX402 (Intuit) at CC-00007468; GX440 (Intuit) at CC-00007878); *see also* GX396 (Intuit) at CC-00007343 [REDACTED]

Response to Finding No. 28:

The Proposed Finding is misleading. The fact that ads for free TurboTax SKUs also raise awareness of the TurboTax brand does not indicate that the challenged ads misled reasonable

consumers into believing that all TurboTax is free. That an ad for a specific TurboTax product might generate interest in the TurboTax brand more broadly is unremarkable and does not bear on what claims the ad conveyed about the specific product advertised. (*See* Rubin (Intuit) Tr. 1528-1529; Ryan (Intuit) Tr. 794-795; GX146 (Ryan (Intuit) Dep.) at 37, 115).

At Intuit, the term “halo effect ... refers [to] when you advertise one form or offering of a brand, it tends to halo or it tends to benefit the consumer’s perception of the entire brand and its other products even if they are not interested in the advertised form, even if that advertised form is not for them.” (Rubin (Intuit) Tr. 1526; *see also* Ryan (Intuit) Tr. 791-793; GX160 (Rubin (Intuit) Dep.) at 82-83 (testifying that because advertising for free TurboTax SKUs “also mentions the TurboTax brand, it would also add the impact of driving awareness and consideration for other consumers of the overall brand”); GX149 (Crosby (Intuit) Dep.) at 83–85 (testifying that although “the intent of the TurboTax [] Free Edition campaign is to drive awareness for those who qualify, meaning those who have a simple return, that TurboTax offers a free option,” because “the [TurboTax] brand is [on the ads], it could also drive brand awareness”)). Mr. Rubin explained, for example, that BMW’s advertising for its high-end 7 Series model has a halo effect on its lower-end models, as the 7 Series advertising “creates a positive impression for the overall [BMW] brand, and it lets people know that there are multiple options for them to choose from and that they should come to the brand and look.” (Rubin (Intuit) Tr. 1526-1527). Thus, when Intuit advertises free TurboTax SKUs, that product advertising [REDACTED]

[REDACTED] (Ryan (Intuit) Tr. 791-793; *see also* Rubin (Intuit) Tr. 1526-1527; GX149 (Crosby (Intuit) Dep.) at 83–85). Similarly, when Intuit advertises paid TurboTax SKUs, that advertising drives incidentally drives interest in

free SKUs as well. (Ryan (Intuit) Tr. 791-793; Rubin (Intuit) Tr. 1526-1527; GX149 (Crosby (Intuit) Dep.) at 83–85; GX144 (Soukas (Intuit) Dep.) at 123–124).

Tellingly, Complaint Counsel failed to present any of the exhibits relied on in the Proposed Finding (GX402 (Intuit); GX440 (Intuit); GX396 (Intuit)) to any fact witness at the trial (Complaint Counsel’s Exhibit Index at 16-17 (May 23, 2023)), and therefore Complaint Counsel’s reliance on and selective quoting from those exhibits should be accorded little weight and Complaint Counsel should not be permitted to rely on any inferences from the exhibits.

29.

(See, e.g., GX401 (Intuit) at CC-00007442)

Response to Finding No. 29:

The Proposed Finding is misleading because it is intended to suggest that the estimated return on investment has something to do with the ads in question being deceptive. It does not. Intuit’s advertising for free TurboTax SKUs has a positive return on investment because, in addition to informing the targeted audience—consumers with simple tax returns—about TurboTax’s free offers, the advertising also “create[s] top of mind awareness for the overall [TurboTax] brand amongst consumers, even those who are not users of or eligible for the free offering.” (Rubin (Intuit) Tr. 1527-1529; *see also* Ryan (Intuit) Tr. 794-795; GX146 (Ryan (Intuit) Dep.) at 111; GX160 (Rubin (Intuit) Dep.) at 79-84). As Mr. Rubin testified when asked about the cited exhibit (GX401 (Intuit)) at his deposition, advertising for free TurboTax SKUs both (1) informs the intended audience (simple filers) about the free offer for which they qualify, and (2) drives awareness and consideration of the overall TurboTax brand among all consumers. (GX160 (Rubin (Intuit) Dep.) at 79-84; *see also* GX146 (Ryan (Intuit) Dep.) at 111 (testifying that “the TurboTax brand is part of the ad, and that drives awareness beyond simple filers ...

which we believe has an overall positive ROI”). The advertising thus leads consumers interested in both free and paid tax-preparation offerings to visit the TurboTax website to evaluate TurboTax’s SKUs—not with the belief that they can file for free, but rather with the understanding that TurboTax offers other tax-preparation options that may suit their needs. (Ryan (Intuit) Tr. 794-795; Rubin (Intuit) Tr. 1529, 1635; GX146 (Ryan (Intuit) Dep.) at 111; GX160 (Rubin (Intuit) Dep.) at 79-84).

Moreover, Complaint Counsel did not present the exhibit cited in the Proposed Finding (GX401 (Intuit)) to any witness at trial (Complaint Counsel's Exhibit Index at 16 (May 23, 2023)), nor did they elicit any testimony relating to the exhibit. Therefore, the exhibit should be accorded little weight and Complaint Counsel should not be permitted to seek unwarranted inferences from it. The Proposed Finding also purports to offer an example supporting the proposition by using an “e.g.” citation. But Complaint Counsel have identified no other evidence that supports the proposition, and it is improper to place the burden on Intuit or the Court to guess what other exhibits might exist that Complaint Counsel believe supports the Proposed Finding. For that reason, the only exhibit that should be considered is the exhibit cited, GX401, and as explained that exhibit should not be afforded any weight.

30. [REDACTED] (GX638 (Intuit) at CC-00013620–22; *see also* GX639 at CC-00013630–31).

Response to Finding No. 30:

The Proposed Finding is incorrect. To begin, it is entirely unclear what Complaint Counsel mean by “[REDACTED].” Further, [REDACTED]. If Complaint Counsel mean that Intuit is [REDACTED] that assertion is unsupported. The two cited exhibits are plainly draft documents, and it is unclear who drafted or reviewed them. Both GX638 and GX639 include

multiple comments from an unknown reviewer or reviewers proposing changes to the document. (See GX638 (Intuit); GX639 (Intuit)). Neither document stands for the proposition that “ [REDACTED]

Tellingly, Complaint Counsel did not present the exhibits cited in the Proposed Finding (GX638 (Intuit); GX639 (Intuit)) to any witness at trial (Complaint Counsel’s Exhibit Index at 26 (May 23, 2023)), nor did they elicit any testimony regarding Intuit’s strategy for products other than TurboTax. Therefore, the exhibits should be accorded little weight and Complaint Counsel should not be permitted to rely on inferences from them.

Even if the exhibits established that Intuit had [REDACTED], the exhibits do not support a cease-and-desist order covering free offers for all Intuit products. Prospective relief that extends to products beyond the one at issue is only appropriate when there is a “reasonable relation” between the relief sought and the alleged at-issue deceptive practices such that there is the “likelihood of the [respondent] committing the sort of unfair practices” with other products. (*American Home Prods. Corp. v. FTC*, 695 F.2d 681, 705-706 (3d Cir. 1982)). There is no relation whatsoever between the challenged TurboTax advertising and Intuit’s future marketing strategies for other products (which are offered by other business units at Intuit), as the fact that [REDACTED] does not lead to a “prediction” that Intuit will run ads with similar claims for other products in the future. (*Am. Home Prods.*, 695 F.2d at 706).

E. Intuit and the IRS Free File Program

31. “The Free File program provides free guided electronic tax preparation and filing services to taxpayers whose adjusted gross income is up to 70 percent of all U.S. taxpayers.” (RX78 (Intuit) (publicly available GAO report) at 4 (PDF pg. 8); *see also* GX86 (Complaint Counsel) (publicly available IRS publication) at CC-00000903).

Response to Finding No. 31:

The Proposed Finding is incomplete because it intentionally omits that the Free File Program is actually the *IRS* Free File Program.

The Proposed Finding is also misleading. No software program made available through the *IRS* Free File Program was available to 70 percent of taxpayers. Instead, the IRS rules for the Program stated that no software could be available to more than 50 percent of the eligible population. The result was a “patchwork” of confusing qualifications. (PFF ¶59). As the Court saw at trial (Rubin (Intuit) Tr. 1515-1519; RX1259-A (Intuit); PFF¶59), only consumers of certain ages and residents of certain states can use the *IRS* Free File Program—to say nothing of its other restrictions.

32. The IRS Free File Program is a public/private partnership. (Rubin (Intuit) Tr. 1506); *see also* GX8 (Intuit) at CC-00000116; GX86 (Complaint Counsel) (publicly available IRS publication) at CC-00000902).

Response to Finding No. 32:

The Proposed Finding is irrelevant. That the *IRS* Free File Program is a public/private partnership says nothing about whether the challenged ads (none of which had anything to do with the *IRS* Free File Program) were deceptive or any other relevant issue in the case.

33. Although the IRS Free File Program is designed to serve the majority of taxpayers, few taxpayers participate in the program. (RX78 (Intuit) (publicly available GAO report) at 9 (PDF pg. 13)).

Response to Finding No. 33:

The Proposed Finding is incorrect. First, the IRS Free File Program is not “designed to serve the majority of taxpayers.” (RX874 (Intuit) at 4; Rubin (Intuit) Tr. 1508). The Program is instead intended to encourage electronic tax filing. (RX874 (Intuit) at 4; Rubin (Intuit) Tr. 1509-1510). Second, it is not true that “few” taxpayers participate in the Program. During Intuit’s final year participating in the *IRS* Free File Program, [REDACTED] were filed for free

through software donated through the Program. (RX820 (Intuit); RX821 (Intuit)). This is not a “few” returns or a small number. Usage has declined from 4.7 million to 3.3 million participants since Intuit’s exit from the Program, which was necessitated by Complaint Counsel’s demands for disclosure that were at odds with the IRS’s rules for the Program. (Rubin (Intuit) Tr. 1510; RX333 (Intuit); RX84 (Intuit) at 2; *see also* IRS, 2022 *Internal Revenue Service Data Book* (last visited June 17, 2023), <https://www.irs.gov/pub/irs-pdf/p55b.pdf>²).

It is true, however, that in all years, the number of taxpayers who file their taxes for free using TurboTax software far exceeds by several multiples the number of taxpayers who file their taxes for free through the **IRS** Free File Program. (RX820 (Intuit); RX821 (Intuit); RX84 (Intuit) at 2; RX694 (Intuit) at 2). This fact reinforces the clear consumer benefits to the challenged ads.

34. For TY 2020, approximately 4.2 million or about 4 percent of eligible individual taxpayers used the IRS Free File Program to file their federal return; about 3 percent of all individual taxpayers. (RX78 (Intuit) (publicly available GAO report) at 9 (PDF pg. 13)).

Response to Finding No. 34:

Intuit has no specific response other than to note that in Tax Year 2020 [REDACTED] taxpayers filed their taxes for free using TurboTax software donated to the IRS Free File Program. (RX820 (Intuit); RX821 (Intuit)).

35. The IRS Free File Program is governed by a Memorandum of Understanding (MOU). (Rubin (Intuit) Tr. 1612); *see also* GX89 (Intuit) (discussing updated requirements under the MOU).

² Intuit requests that the Court take judicial notice of the 2022 IRS Data Book pursuant to Commission Rule 3.43(f). (*See* 16 C.F.R. § 3.43(f)). It is appropriate to take judicial notice of “records and reports of administrative bodies” (*see S.C. State Bd. of Dentistry*, 138 F.T.C. 229, 240 (2004), and content on the IRS website (*see California Naturel, Inc.*, 2016 WL 7228668, at *5 n.2 (F.T.C. Dec. 5, 2016) (“[W]e take official notice of the content of [respondent’s] website.”)).

Response to Finding No. 35:

Intuit has no specific response except to note that the Memorandum of Understanding (MOU) governing the IRS Free File Program did not permit participating tax providers to offer the software they donated to the Program on their commercial websites. (Rubin (Intuit) Tr. 1514). Instead, the Free File Program was “accessible only through IRS.gov” because the IRS wanted consumers to go to the IRS’s website and look at all available options under the Program. (Rubin (Intuit) Tr. 1521; GX86 (Intuit)). The MOU also prohibited participants from marketing their commercial products through the IRS or on their Free File landing page. (*See* RX874 (Intuit) at 35). Further, the MOU expressly permitted participants to “engage in any business activity outside of the IRS Free File Program, in the same manner as they could if they were not participating in the Free File Program, including without limitation all marketing, advertising or promotion of commercial tax preparation software or services offered at no cost or for a fee outside of Free File Program offerings to any taxpayers.” (RX301-A at 2; *see also* Rubin (Intuit) Tr. 1612). And the MOU provided that participants did not have “any marketing or other obligation with regard to the IRS Free File Program,” meaning that the responsibility for marketing the Program rested entirely with the IRS. (RX301-A (Intuit) at 2; *see also* RX301 (Intuit) at 23).

36. Part of the agreement between private companies and the IRS was that Government would not enter the market to provide tax preparation products and services to the public so long as the private sector tax software industry provided its products and services for free. (GX8 (Intuit) at CC-00000116; GX70 (Intuit) at CC-00000734).

Response to Finding No. 36:

The Proposed Finding is irrelevant because it says nothing about whether the challenged ads were deceptive or any other issue in the case.

The Proposed Finding is also inaccurate. The MOU that governed the IRS Free File Program beginning in Tax Year 2019 does not contain any limitation on the Government's ability to enter the market to provide tax-preparation products and services to the public. (See RX301-A at 1). The IRS has repeatedly (and independently) determined that creating its own tax-preparation software was impractical. (RX874 (Intuit) at 23; Rubin (Intuit) Tr. 1507-1509).

37. When Intuit participated in the IRS Free File Program (Intuit withdrew after TY 2020 (see RX333 (Intuit)), it also offered TurboTax Free Edition through its commercial website (Rubin (Intuit) Tr. 1514).

Response to Finding No. 37:

The Proposed Finding is incomplete and misleading. Complaint Counsel ignore the testimony from Mr. Rubin that immediately follows the snippet on which they rely, where he testified that Intuit was permitted to offer TurboTax Free Edition when it participated in the IRS Free File Program. (Rubin (Intuit) Tr. 1514). The Memorandum of Understanding governing the Program confirms that Intuit was allowed to “engage in any business activity outside of the IRS Free File Program, in the same manner as they could if they were not participating in the Free File Program, including without limitation all marketing, advertising or promotion of commercial tax preparation software or services offered at no cost or for a fee outside of Free File Program offerings to any taxpayers.” (RX301-A at 2; see also Rubin (Intuit) Tr. 1612). Thus, when Intuit donated a version of the TurboTax software to the *IRS* Free File Program, it was expressly permitted to offer free tax-preparation products like TurboTax Free Edition on the TurboTax website just as it could if it were not participating in the Program. This made sense: the IRS wished to encourage electronic filing of tax returns and consumer choice. (RX874 (Intuit) at 4; Rubin (Intuit) Tr. 1509-1510). And consumers having more free options is generally thought to be a good thing.

The Proposed Finding is also incorrect to the extent it insinuates that the TurboTax software donated to the IRS Free File Program was the same as commercial TurboTax SKUs. The TurboTax software donated to the Free File Program was kept “completely separate” from the company’s commercial TurboTax offerings, including by requiring Free File Program users to create a separate account to access the Free File software. (Rubin (Intuit) Tr. 1519-1520; *see also* Rubin (Intuit) Tr. 1513-1514). The software donated to the Free File Program was also accessible “only through IRS.gov,” and had a landing page (linked to from the IRS website) apart from commercial TurboTax SKUs. Rubin (Intuit) Tr. 1520-1521; GX86 (Intuit) at 1; (Ryan (Intuit) Tr. 709-710). In fact, the IRS did not permit Intuit to offer the software donated to the IRS Free File Program through its normal product lineup on the TurboTax website, instead preferring that taxpayers see all of the Free File options on the IRS website. (Rubin (Intuit) Tr. 1514-1516; RX1259-A). Though Intuit does not know *why* the IRS insisted on these rules (and Complaint Counsel refused in discovery to turn over their communications with the IRS that may have shed light on these questions (*see* Order Denying Respondent’s Mot. to Compel at 2 (Jan. 3, 2023); RX392 (Intuit) ¶12)), it seems obvious that they helped mitigate against any confusion that may have otherwise existed.

Moreover, the Proposed Finding is incomplete in that it references that Intuit left the Free File Program after Tax Year 2020 without providing context about that decision. That decision resulted in part from the FTC’s demand that Intuit promote its donated Free File software on its commercial website, which IRS rules prohibited. (RX333 (Intuit); Rubin (Intuit) Tr. 1510). Unable to comply with both the IRS’s requirements and the FTC’s demands, Intuit decided to leave the program. (RX333 (Intuit); Rubin (Intuit) Tr. 1510).

38. When Intuit participated in the IRS Free File Program, it linked to the irs.gov Free File Program website from various pages on the TurboTax website. (Rubin (Intuit) Tr. 1632–33).

Response to Finding No. 38:

The Proposed Finding is irrelevant. That the TurboTax website included links to the IRS Free File Program website when Intuit was participating in that Program says nothing about whether the challenged ads (which were not for the IRS Free File Program) were deceptive, nor does it speak to any other relevant issue in the case. The Proposed Finding therefore should not be considered. (*See* 16 C.F.R. §3.43(b) (providing that “[i]rrelevant, immaterial, and unreliable evidence shall be excluded,” and “[e]vidence, even if relevant, may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, or if the evidence would be misleading”); 16 C.F.R. §3.51(c) (“An initial decision shall be based on a consideration of the whole record relevant to the issues decided, and shall be supported by reliable and probative evidence.”)).

The Proposed Finding is also misleading because it ignores critical context about the links that were available to the IRS Free File Program. Intuit did not list the software it donated to the IRS Free File Program alongside commercial TurboTax SKUs, and the IRS Free File Program was not listed on the Products & Pricing page, TurboTax home page, or the Free Edition landing page. Instead, Intuit provided links to the IRS Free File Program website in specific blog posts and FAQs. (Rubin (Intuit) Tr. 1632-1633). These were webpages that were informational in nature, referenced the Program as a whole and not just the software Intuit donated to the Program, and were found in places where consumers would be conducting research about various tax preparation options. (GX151 (Ison (Intuit) IHT) at 171, 183; Rubin (Intuit) Tr. 1632).

39. Intuit documents indicate that participation in the IRS Free File Program was part of Intuit’s government strategy, and that Intuit sought to grow the use of its Free File Program offering without hurting its commercial business. (See GX6 (Intuit) at CC-00000108; GX11 (Intuit) at CC-00000152; GX15 (Intuit) at CC-00000251 [REDACTED]); GX16 (Intuit) at CC-00000263 [REDACTED]; GX23 (Intuit) at CC-00000283 (“Brad’s [then-Intuit CEO Brad Smith’s] basic direction has been we need to ‘win in Free File’ this year — which he explained to me means we need to take a point or two of share or explain why we don’t have proportionately the same share as we do in commercial Free.”); GX28 (Intuit) at CC-00000319).

Response to Finding No. 39:

The Proposed Finding—that a handful of documents “indicate” something—is not sufficiently specific to support an evidentiary finding of fact. Tellingly, Complaint Counsel failed to present any of the exhibits relied on in the Proposed Finding (GX6 (Intuit); GX11 (Intuit); GX15 (Intuit); GX16 (Intuit); GX23 (Intuit); GX28 (Intuit)) to any fact witness at the trial (Complaint Counsel’s Exhibit Index at 1 (May 23, 2023)). Because Complaint Counsel did not do so, their reliance on those exhibits should be accorded no weight and Complaint Counsel should not be permitted to rely on any inferences from them.

Moreover, the Proposed Finding is irrelevant. Intuit’s motivations for participating in the IRS Free File Program (when it did participate) have nothing to do with the challenged advertisements—none of which are for the IRS Free File Program—or any other relevant issue in the case.

The Proposed Finding therefore should not be considered. (See 16 C.F.R. §3.43(b) (providing that “[i]rrelevant, immaterial, and unreliable evidence shall be excluded,” and “[e]vidence, even if relevant, may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, or if the evidence would be misleading”);

16 C.F.R. §3.51(c) (“An initial decision shall be based on a consideration of the whole record relevant to the issues decided, and shall be supported by reliable and probative evidence.”)).

Even if the Proposed Finding were relevant—and it is not—the Proposed Finding would be incorrect. Intuit participated in the IRS Free File Program to create more opportunities for low-income consumers to file their taxes for free and optimize their refunds. (GX152 (Johnson (Intuit) IHT) at 47). Intuit believed that its participation in the Program, and the Program’s overall success, was important because the TurboTax software donated to the Program (along with the other software donated by other participants) could be used to help “low-income consumers” beyond what the government was capable of doing on its own. (GX154 (Muilenberg (Intuit) IHT) at 89; GX15 (Intuit) at -0245 to -0246).

40. Intuit referred to its participation in the IRS Free File Program as part of its strategy to prevent government “encroachment” in the tax return preparation space. (See GX15 (Intuit) at CC-00000246; GX17 (Intuit) at CC-00000265; GX18 (Intuit) at CC-00000271 to 72; GX21 (Intuit); GX24 (Intuit) [REDACTED]; GX28 (Intuit) at CC-00000319; GX38 (Intuit) at CC-00000375 [REDACTED]; GX70 (Intuit) at CC-00000734 (“The negotiated public policy agreement that created the Free File Alliance in 2002 specifies that as long as the tax industry donates online tax services and e-filing to eligible taxpayers, the Government will not encroach into tax preparation. This policy is the lynch pin for maintaining a competitive level playing field for taxpayers and the tax software industry.”); GX109 (Intuit) at CC-0000109t1 (“In terms of how to think about FFA vs. Commercial Free, my POV is we should do what we need to hit FFA volume that satisfies the goal of gov’t encroachment, but not beyond that.”); GX112 (Intuit) at CC-00001103 (“Outside of growing the software category, Free offerings have also played an important and integral role in our government encroachment strategies; specifically the Free File Alliance between IRS and Industry.”); see also GX20 (Intuit) at CC-00000277).

Response to Finding No. 40:

The Proposed Finding is irrelevant. Intuit’s motivations for participating in the IRS Free File Program (when it did participate) have nothing to do with the challenged advertisements—none of which are for the IRS Free File Program—or any other relevant issue in the case.

The Proposed Finding therefore should not be considered. (*See* 16 C.F.R. §3.43(b) (providing that “[i]rrelevant, immaterial, and unreliable evidence shall be excluded,” and “[e]vidence, even if relevant, may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, or if the evidence would be misleading”); 16 C.F.R. §3.51(c) (“An initial decision shall be based on a consideration of the whole record relevant to the issues decided, and shall be supported by reliable and probative evidence.”)).

Even if the Proposed Finding were relevant—and it is not—the Proposed Finding would be incorrect. Intuit participated in the IRS Free File Program to create more opportunities for low-income consumers to file their taxes for free and optimize their refunds. (GX152 (Johnson (Intuit) IHT) at 47). Intuit believed that its participation in the Program, and the Program’s overall success, was important because the TurboTax software donated to the Program (along with the other software donated by other participants) could be used to help “low-income consumers” beyond what the government was capable of doing on its own. (GX154 (Muilenberg (Intuit) IHT) at 89; GX15 (Intuit) at -0245 to -0246).

Tellingly, Complaint Counsel failed to present any of the exhibits relied on in the Proposed Finding (GX15 (Intuit); GX17 (Intuit); GX18 (Intuit); GX21 (Intuit); GX24 (Intuit); GX28 (Intuit); GX38 (Intuit); GX70 (Intuit); GX109 (Intuit); GX112 (Intuit)) to any fact witness at the trial (Complaint Counsel’s Exhibit Index at 1, 3, 5 (May 23, 2023)). Because Complaint Counsel did not do so, their reliance on those exhibits should be accorded little weight and Complaint Counsel should not be permitted to rely on any inferences from them.

41. Intuit documents have acknowledged competition between its IRS Free File Program offering and TurboTax Free Edition, including competition for customers and for higher results in online search rankings. (*See* GX35 (Intuit) at CC-00000356 [REDACTED]); GX67 (Intuit) at CC-00000719; GX68 (Intuit) at CC-00000721 & 724; GX69 (Intuit) at CC-00000727 & 728; GX70 (Intuit) at CC-00000729

& 730; GX284 (Intuit) at CC-00005981 (“We did a pull of the data that shows 58% of our non-FFA base is FFA-eligible (and worth \$827M in revenue), so highly material as far as max exposure!”); *see also* GX30 (Intuit) at CC-00000340; GX91 (Intuit) at CC-00000957 (in 2013, “50% of ALL TTO customers would qualify for FFA....and in a world of perfect information, this would be a risk to our business”); GX19 (Intuit) at CC-00000273; GX92 (Intuit) at CC-00000961; GX108 (Intuit) at CC-00001085).

Response to Finding No. 41:

The Proposed Finding is correct that Intuit documents have recognized that the IRS Free File Program is a competitor of Intuit’s for online tax-preparation software users. The Proposed finding omits, however, that TurboTax Free Edition generates many times more free filers than the IRS Free File Program *as a whole* (or any other free tax-prep option). (RX820 (Intuit); RX821 (Intuit); RX84 (Intuit) at 2; RX694 (Intuit) at 2).

While the underlying Proposed Finding is factually accurate, the Proposed Finding is misleading because of the snippets it quotes from the documents. Tellingly, Complaint Counsel failed to present any of the exhibits relied on in the Proposed Finding (GX19 (Intuit); GX30 (Intuit); GX35 (Intuit); GX67 (Intuit); GX68 (Intuit); GX69 (Intuit); GX70 (Intuit); GX91 (Intuit); GX92 (Intuit); GX108 (Intuit); GX284 (Intuit)) to any fact witness at the trial (Complaint Counsel’s Exhibit Index at 1-4, 11 (May 23, 2023)). Because Complaint Counsel did not do so, their reliance on those exhibits should be accorded little weight, and Complaint Counsel should not be permitted to rely on any inferences from them.

The competition referenced in the exhibits cited in the Proposed Finding was expressly encouraged by the Memorandum of Understanding governing the Free File Program, which allowed participating companies to offer both paid and free commercial products outside of the IRS Free File Program “in the same manner as they could if they were not participating in the Free File Program.” (RX301-A (Intuit) at 2; Rubin (Intuit) Tr. 1612). Moreover, the fact that TurboTax competed with the IRS Free File Program reinforces that commercial TurboTax SKUs

were distinct from the TurboTax software donated to the Free File Program. (*See* Ryan (Intuit) Tr. 709-710).

42. Intuit referred to potential loss of business to the IRS Free File Program as “cannibalization.” (*See* GX16 (Intuit) at CC-00000260; GX65 (Intuit) at CC-00000710 (“The FFA site is ranking in organic search and we need to make sure that FFA is not cannibalizing the our [sic] commercial products.”); *see also* GX29 (Intuit) at CC-00000334).

Response to Finding No. 42:

The Proposed Finding is inaccurate. “Intuit” did not refer to potential loss of business to the IRS Free File Program as “cannibalization.” A single document at the company used the verb “cannibalizing” to refer the potential loss of users from TurboTax’s commercial products to the IRS Free File Program. But as previous Proposed Findings accurately contended, Intuit understood the IRS Free File Program to be a competitor.

Tellingly, Complaint Counsel failed to present any of the exhibits relied on in the Proposed Finding (GX16 (Intuit); GX65 (Intuit); GX29 (Intuit)) to any fact witness at the trial (Complaint Counsel’s Exhibit Index at 1, 3 (May 23, 2023)). Because Complaint Counsel did not do so, their reliance on those exhibits should be accorded little weight and Complaint Counsel should not be permitted to rely on any inferences from them.

Moreover, the Proposed Finding is incorrect insofar as it suggests that references to “cannibalization” are somehow nefarious. Intuit used the term “cannibalization” to refer to customers moving from one place to another. (GX154 (Muilenberg (Intuit) IHT) at 114; GX16 (Intuit) at CC-00000260). The fact that consumers may have moved from commercial TurboTax SKUs to the IRS Free File Program, or that Intuit commented on that movement, is not improper, nor does it suggest that consumers were misled by the challenged advertising. Instead, as noted, competition between TurboTax and the IRS Free File Program was expressly permitted by the Memorandum of Understanding governing the Free File Program, which allowed participating

companies to offer both paid and free commercial products outside of the IRS Free File Program “in the same manner as they could if they were not participating in the Free File Program.”

(RX301-A (Intuit) at 2; Rubin (Intuit) Tr. 1612).

43. Intuit documents have acknowledged consumer confusion between its IRS Free File Program offering and TurboTax Free Edition. (*See* GX34 (Intuit) at CC-00000353; GX65 (Intuit) at CC-00000710 (“Need to make sure the Freedom Edition & Free Edition are clearly differentiated from each other – concern that they look to [sic] similar right now.”); GX70 (Intuit) at CC-00000735 (“Once we launched a free commercialized offering on TT.com, customers have often been confused between the two ‘free’ offerings and we have received complaints that we were not transparent and/or a bait and switch.”); GX71 (Intuit) at CC-00000745 & CC-00000771; GX74 (Intuit) at CC-00000792 (“This is a common issue for FFA customers: they often navigate to the TT.com website and believe the Free Edition product is the Free File Edition.”).

Response to Finding No. 43:

The Proposed Finding is inaccurate because Intuit did not have an “IRS Free File Program offering.” Instead, when Intuit participated in the IRS Free File Program, it donated *to the IRS* a version of the TurboTax software for the IRS to then use in its operation of and marketing for the IRS Free File Program. (Rubin (Intuit) Tr. 1514-1515).

The Proposed Finding is also inaccurate because it misstates the exhibits cited and fails to recognize Intuit’s substantial efforts to avoid consumer confusion related to the TurboTax software donated to the IRS Free File Program. Intuit strove to “provide customers more clarity between the FFA product and TurboTax Free Edition.” (GX108 (Intuit) at CC-00001085). The cited exhibits similarly reflect Intuit working to provide consumers with “[REDACTED]” about the software it donated to the IRS Free File Program (GX70 (Intuit) at -0729; *see also* GX70 (Intuit) at CC-0736), and “help[ing] to eliminate confusion to customers” related to the IRS Free File Program (GX71 (Intuit) at -0745, -0751).

Intuit further notes that to the extent any such confusion did exist, it actually weakens Complaint Counsel’s theory of deception. Intuit did not create the IRS Free File Program, nor

was it responsible for the marketing of the IRS Free File Program. If there was confusion and that confusion was responsible for some consumers who qualified to file for free with one product believing that they could file for free with another, the challenged advertisements would necessarily not be responsible for that confusion. In reality, Intuit strove to “provide customers more clarity between the FFA product and TurboTax Free Edition.” (GX108 (Intuit) at CC-00001085).

44. Intuit deindexed its Free File landing page for TY 2018, meaning it was blocked from appearing in internet search engine results. (GX83 (Intuit) at CC-00000897; *see also* GX71 (Intuit) at CC-00000782; GX73 (Intuit) at CC-00000790; GX74 (Intuit) at CC-00000792; GX75 (Intuit) at CC-00000796; GX76 (Intuit) at CC-00000799 (discussing unblocking the page); GX81 (Intuit) at CC-00000889 & 890; JX83 (Intuit) at CC-00000897; GX84 (Intuit) at CC-00000898; GX109 (Intuit) at CC-00001090 (“A change was made to this year’s product is the name in an attempt to minimize confusion between FFA and our commercial Free product ... [sic] TurboTax Free File Program vs. TurboTax Freedom Edition. Here’s last week’s dashboard... [sic] we’re mainly down due to traffic, mainly because we eliminated organic search to TTFPP [TurboTax Free File Program]. This was what we had aligned on with the name change.”); GX151 (Ison (Intuit) IHT) at 158-159).

Response to Finding No. 44:

The Proposed Finding is irrelevant because whether Intuit deindexed the landing page for the software that it donated to the IRS Free File Program has no bearing on whether the challenged ads—none of which are for the IRS Free File Program—are deceptive.

The Proposed Finding is also incomplete and misleading because it ignores the context surrounding Intuit’s decision to deindex the landing page for the software Intuit donated to the IRS Free File Program. Intuit was concerned that taxpayers who were searching for Intuit’s free commercial product, TurboTax Free Edition, would instead find the landing page for the TurboTax software donated to the IRS Free File Program, only to find that they did not qualify for the Free File Program. (GX150 (Goode (Intuit) IHT) at 64, 66; GX151 (Ison (Intuit) IHT) at 99). Because Intuit could not provide consumers with a link from the software it donated to the

Free File Program to the commercial TurboTax website (RX874 (Intuit) at 35), consumers would be unable to easily access the TurboTax offerings they were searching for, resulting in a negative customer experience (GX150 (Goode (Intuit) IHT) at 66). To avoid those negative consumer experiences, and consistent with the IRS’s intent that consumers access the Free File Program “only through IRS.gov” (Rubin (Intuit) Tr. 1521; GX86 (Intuit)), Intuit deindexed the landing page for the software it donated to the Free File Program. At the same time, however, Intuit made efforts to ensure that customers who were looking for the Free File Program would still be able to find it. (GX150 (Goode (Intuit) IHT) at 64-65; GX151 (Ison (Intuit) IHT) at 171-173, 180-183). These decisions reflect that Intuit strove to “provide customers more clarity between the FFA product and TurboTax Free Edition.” (GX108 (Intuit) at -1085). Moreover, Intuit succeeded in making sure that there was no impact to consumers’ ability to access the TurboTax software donated to the IRS Free File Program. (GX150 (Goode (Intuit) IHT) at 65; GX151 (Ison (Intuit) IHT) at 178-181). In fact, more consumers found and used the TurboTax software donated to the Free File Program through online search when the landing page for that software was deindexed compared to the prior year when it was not deindexed. (GX151 (Ison (Intuit) IHT) at 178-179).

45. Between 2017 and 2019, Intuit grossed more than \$1 billion from more than 17 million consumers who were eligible to file their taxes for free using the Free File version of TurboTax, as follows:

| Year | Consumers | Total Paid |
|---------------------------|-------------------|------------------------|
| 2017 | 4,863,237 | \$392,225,117 |
| 2018 | 5,222,241 | \$462,708,267 |
| 2019 (through July 19) | 7,381,851 | \$663,518,426 |
| Total | 17,467,329 | \$1,518,451,810 |

GX98 (Intuit) at CC-00001006 & 07.

Response to Finding No. 45:

The Proposed Finding is irrelevant. Every dollar Intuit “grossed” was from a consumer who could have used a competing form of tax preparation, from CPAs to people who could have done it themselves on paper, and to the IRS Free File Program. It is hardly surprising that many consumers chose TurboTax products and services over the “patchwork” of offers in the IRS Free File Program. (PFF ¶59). Intuit believes that its complexity-based lineup of offerings is easier for consumers to comprehend and more appealing than the Free File Program’s focus on adjusted gross income. (See Johnson (Intuit) Tr. 571; Rubin (Intuit) Tr. 1519; see also PFF ¶¶122-123). As the Court saw, many IRS Free File Program participants also apply additional criteria that are confusing for consumers, and some do not offer state filing for free. (Rubin (Intuit) Tr. 1516-1519; RX1259-A (Intuit)). Moreover, TurboTax is widely recognized as having the best software in the industry (RX505 (Intuit)), and its net promoter score exceeds that of its competitors (RX1018 (Golder Expert Report) ¶¶39-40 & fig. 1). It is not entirely clear what Complaint Counsel are suggesting through this Proposed Finding, but it is completely clear that whatever that may be, it does not speak to any pertinent issue in this case.

The Proposed Finding therefore should not be considered. (See 16 C.F.R. §3.43(b) (providing that “[i]rrelevant, immaterial, and unreliable evidence shall be excluded,” and “[e]vidence, even if relevant, may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, or if the evidence would be misleading”); 16 C.F.R. §3.51(c) (“An initial decision shall be based on a consideration of the whole record relevant to the issues decided, and shall be supported by reliable and probative evidence.”)).

Further underscoring this Proposed Finding’s lack of relevance is the fact that Complaint Counsel failed to present the exhibit relied on in the Proposed Finding ((GX98 (Intuit)) to any

fact witness at the trial (Complaint Counsel’s Exhibit Index at 4 (May 23, 2023)). Because Complaint Counsel did not do so, their reliance on that exhibit should be accorded little weight and Complaint Counsel should not be permitted to rely on any inferences from the exhibit.

If the Proposed Finding were relevant—and it obviously is not—it would be misleading. The Memorandum of Understanding governing the Free File Program expressly permitted companies to offer both paid and free commercial products outside of the IRS Free File Program “in the same manner as they could if they were not participating in the Free File Program.” (RX301-A (Intuit) at 2; Rubin (Intuit) Tr. 1612). Accordingly, there was nothing improper about Intuit marketing TurboTax products and services as it otherwise would if it were not participating in the Free File Program, including by selling its products to consumers who might qualify for the IRS Free File Program. (RX301-A at 2; Rubin (Intuit) Tr. 1612).

Moreover, the Proposed Finding is incomplete and misleading insofar as it suggests that consumers would choose to use software offered through the IRS Free File Program over commercial TurboTax SKUs absent some unspecified wrongful conduct by Intuit. The undisputed evidence shows that the IRS Free File Program was not popular with consumers. (See CCF ¶33; RX1016-A (Kirk Fair Expert Report) ¶¶20, 25-26, 36; RX1555 (Kirk Fair (Intuit) Trial Dep.) at 31, 39-41). And a reliable consumer survey conducted by Ms. Kirk Fair reflects that consumers would not choose to use software offered through the IRS Free File Program even when they are directly told about those offerings by Intuit. (RX1016-A (Kirk Fair Expert Report) ¶¶20, 25-26; RX1555 (Kirk Fair (Intuit) Trial Dep.) at 31, 39-41). That survey revealed that expressly informing consumers that they may be able to file for free with the IRS Free File Program instead of upgrading to a paid TurboTax SKU made it no more statistically likely that those consumers would choose the Free File Program instead of upgrading to a paid

SKU. (RX1016-A (Kirk Fair Expert Report) ¶¶20, 25-26; RX1555 (Kirk Fair (Intuit) Trial Dep.) at 31, 39-41). Those consumers explained that they preferred paid TurboTax offerings over the IRS Free File Program in part because they trust TurboTax and its offerings. (RX1016-A (Kirk Fair Expert Report) ¶36 & fig. 4). Thus, the fact that consumers chose to use TurboTax’s paid offerings over the Free File Program reflects only that consumers value the industry-leading services offered by TurboTax, not that consumers were somehow deceived into using those TurboTax products. (RX698 (Intuit) at 2-3; RX1016-A (Kirk Fair Expert Report) ¶36 & fig. 4).

46. Between 2017 and 2019, Intuit grossed more than \$28 million from more than half a million active-duty military service members who were eligible for the Free File version of TurboTax, as follows:

| Year | Military Consumers | Total Paid |
|---------------------------|--------------------|--------------|
| 2017 | 175,747 | \$10,209,900 |
| 2018 | 190,647 | \$13,209,331 |
| 2019 (through July 19) | 227,931 | \$18,052,583 |
| Total | 594,325 | \$41,471,814 |

GX98 (Intuit) at CC-00001006 & 07.

Response to Finding No. 46:

The Proposed Finding is inaccurate on its face because there was no such thing as a “free file version of TurboTax.” This Proposed Finding is not referring to TurboTax Free Edition; it is referring to software that Intuit donated to the *IRS* Free File Program.

So understood, the Proposed Finding is also irrelevant. Every dollar Intuit “grossed” was from a consumer who could have used a competing form of tax preparation, from CPAs to people who could have done it themselves on paper, and to the IRS Free File Program. It is hardly surprising that many consumers chose TurboTax products and services over the

“patchwork” of offers in the IRS Free File Program. (PFF ¶59). Intuit believes that its complexity-based lineup of offerings is easier for consumers to comprehend and more appealing than the Free File Program’s focus on adjusted gross income. (*See* Johnson (Intuit) Tr. 571; Rubin (Intuit) Tr. 1519; *see also* PFF ¶¶122-123). As the Court saw, many IRS Free File Program participants also apply additional criteria that is confusing for consumers, and some do not offer state filing for free. (Rubin (Intuit) Tr. 1516-1519; RX1259-A (Intuit)). Moreover, TurboTax is widely recognized as having the best software in the industry (RX505 (Intuit)), and its net promoter score exceeds that of its competitors (RX1018 (Golder Expert Report) ¶¶39-40 & fig. 1). It is not entirely clear what Complaint Counsel are suggesting through this Proposed Finding, but it is completely clear that whatever that may be, it does not speak to any pertinent issue in this case.

If the Proposed Finding were relevant—and it is not—it would be incomplete and misleading because it ignores Intuit’s long-standing history of helping military personnel file their taxes for free using TurboTax products and services. In recognition of their service to the country (PFF ¶151), Intuit has allowed all enlisted military members (E-1 to E-9) to use any TurboTax DIY SKU for free, regardless of their tax complexity. (PFF ¶152). Previously, Intuit allowed certain servicemembers to file for free using specific TurboTax SKUs and provided discounts for others. (*See* RX141 at -3831). Intuit applies its free offer automatically for servicemembers, even if they do not request it. (PFF ¶153). In Tax Year 2021 alone, 627,000 enlisted servicemembers filed their taxes for free using the TurboTax military discount. (PFF ¶154). That figure exceeds the number of servicemembers identified in the Proposed Finding across three tax years and amounts to over one-third of the estimated 1.7 million servicemembers who qualified to file for free using the TurboTax military discount. (PFF ¶154).

Moreover, the Proposed Finding is incomplete and misleading insofar as it suggests that consumers would choose to use software offered through the IRS Free File Program over commercial TurboTax SKUs. The undisputed evidence shows that the IRS Free File Program was not popular with consumers. (See CCFE ¶33; RX1016-A (Kirk Fair Expert Report) ¶¶20, 25-26, 36; RX1555 (Kirk Fair (Intuit) Trial Dep.) at 31, 39-41). And a reliable consumer survey conducted by Ms. Kirk Fair reflects that consumers would not choose to use software offered through the Free File Program even when they are directly told about those offerings. (RX1016-A (Kirk Fair Expert Report) ¶¶20, 25-26; RX1555 (Kirk Fair (Intuit) Trial Dep.) at 31, 39-41). That survey revealed that expressly informing consumers that they may be able to file for free with the IRS Free File Program instead of upgrading to a paid TurboTax SKU made it no more statistically likely that those consumers would choose the Free File Program instead of upgrading to a paid SKU. (RX1016-A (Kirk Fair Expert Report) ¶¶20, 25-26; RX1555 (Kirk Fair (Intuit) Trial Dep.) at 31, 39-41). Those consumers explained that they preferred paid TurboTax offerings over the IRS Free File Program in part because they trust TurboTax and its offerings. (RX1016-A (Kirk Fair Expert Report) ¶36 & fig. 4). Thus, the fact that consumers chose to use TurboTax's paid offerings over the Free File Program reflects only that consumers value the industry-leading services offered by TurboTax, not that consumers were somehow deceived into using those TurboTax products. (RX698 (Intuit) at 2-3; RX1016-A (Kirk Fair Expert Report) ¶36 & fig. 4).

II. Intuit's Advertising Practices

A. Overview

47. Intuit has promoted TurboTax through long running, extensive and ongoing multichannel advertising and marketing communications campaigns that represent that consumers can file for free using TurboTax. Ryan (Intuit) Tr. 691-92, 693, 695-96] (Shiller (Complaint Counsel) Tr. 156-203; Baburek (Complaint Counsel) Tr. 318-23; GX342 (Complaint Counsel) ¶¶ 11-208, at CC-00006908-7007; GX Summary 001 (Complaint Counsel)

(summarizing TV ad dissemination data produced by Intuit); GX Summary 002 (Complaint Counsel) (summarizing Online ad dissemination data produced by Intuit); GX431 (Intuit); GX432 (Intuit); GX433 (Intuit); GX434 (Intuit); GX435 (Intuit); GX436 (Intuit); GX437 (Intuit); GX631 (Intuit) at CC-000132884-85 (Intuit interrogatory responses specifying INTUIT-FTC-PART3-000490335 to INTUIT-FTCPART3-000490339; INTUIT-FTC-PART3-000490439 to INTUIT-FTC-PART3-000490440 (admitted as trial exhibits GX431-37) as the records from which the dates, times, and locations of advertisements, channels through which advertisements were disseminated, and number of times advertisements were circulated could be ascertained); *see, e.g.*, GX321 (Complaint Counsel) at 0:51–0:56 (“Okay, so maybe that’s not exactly how it went down, but you can file on TurboTax for absolutely nothing.”); RX1106 (Intuit) at 0:25 (“That’s right. TurboTax Free is free. Free, free free free.”); GX342 (Complaint Counsel) ¶ 117, at CC-00006955 (“What it feels like to file your taxes for free, aka the TurboTax #FreeFreeDance”); *see also* RX1018 (Golder Expert Report) ¶ 8 (“Intuit advertises its Turbo Tax products, including its free products, in a number of ways, including through TV ads, social media/display ads, paid search, and email campaigns to prior customers.”); Hauser (Intuit) Tr. 971 (“Intuit did use a multiyear, multimodal campaign.”)).

Response to Finding No. 47:

The Proposed Finding (really numerous findings combined in one) is incorrect and unsupported. The record shows that the challenged ads did not represent that consumers can file for free *using TurboTax*. Instead, the evidence makes clear that the challenged ads conveyed that *the specific TurboTax SKU being advertised* was free (which it was) for consumers who qualified, that those qualifications were tied to the complexity of a consumer’s tax return, and often that consumers can “see if they qualify” or “see details” on the TurboTax website. (*See* PFF ¶¶210-211, 242-244, 260-262, 273-275, 288-290, 297-299). Where the challenged ads did not direct consumers to the TurboTax website (typically those ads found in search or display advertising), they included links or were themselves links that would take consumers directly to the TurboTax website. (*See* PFF ¶¶253-254, 269-270, 284-285). Given that the challenged ads pointed or linked to the TurboTax website, it is undisputed that the information on that website was integrated into the challenged ads. (CCFF ¶455; *see also* PFF ¶¶328-330). That integrated information provided detailed information regarding the qualifications of free TurboTax SKUs

and all other TurboTax SKUs and supplied consumers with easy-to-use tools like the SKU selector to help consumers assess the right TurboTax product for them. (*See* PFF ¶¶364-441). Further, even with no disclosures, reasonable consumers understand that free tax-preparation offers are qualified, and that their ability to qualify for that offering depends on the complexity of their tax returns. (PFF ¶¶470-527).

None of the evidence cited in the Proposed Finding even suggests that the challenged ads conveyed that all TurboTax is free. Instead, that evidence all relates to the general proposition that Intuit advertised individual TurboTax SKUs and the fact that the ads were widely disseminated, which Intuit does not dispute. For example, Ms. Ryan's cited testimony discusses Intuit's general marketing strategies and how they related to the TurboTax product lineup. (Ryan (Intuit) Tr. 690-691). She did not testify in support of Complaint Counsel's theory; quite the contrary, she repeatedly testified that the challenged ads did not convey that all TurboTax is free, nor were they intended to convey that all TurboTax is free. (Ryan (Intuit) Tr. 712, 716, 718, 722, 726-727, 733-735, 741, 743-744, 748-749, 753, 758, 760, 768; *see also* GX146 (Ryan (Intuit) Dep.) at 110). And Ms. Shiller testified only that she viewed "a lot" of television ads, social media ads, and display ads (Shiller (Intuit) Tr. 156-162); she visited the TurboTax website "many times" (Shiller (Intuit) Tr. 156-162); she "knows" certain video ads aired on television (Shiller (Intuit) Tr. 165-179); and she saw a handful of TurboTax ads were on sites such as Facebook, Apple News, and Bing. (Shiller (Intuit) Tr. 188-203). That testimony says nothing about the claims the ads conveyed to reasonable consumers.

The Proposed Finding's contention that consumers were misled into believing that all TurboTax was free is actually contradicted by the ads' wide dissemination. If Intuit had run a "multiyear, multi-ad, multichannel, multimodal" deceptive advertising campaign as Complaint

Counsel assert, it would have received overwhelmingly negative reviews and voluminous complaints from consumers. (PFF ¶¶647-652). That was not the case. Indeed, even if every one of the 218 complaints identified by Complaint Counsel were found to be both relevant and reliable, these complaints represent less than 0.0003% of the 86.4 million TurboTax customers who completed at least one return during the Tax Year 2015 to 2021 period. (*Cf.* PFF ¶¶631-632). The 218 complaints are even more insignificant when compared to the number of views, impressions, and clicks that the challenged ads received during the relevant time period. (PFF ¶¶637). For example, in Tax Years 2020 and 2021, TurboTax Free Edition ads generated over 15 billion impressions and were clicked on over 130 million times. (Baburek (FTC) Tr. 338). Even considering only the advertisement clicks from those two years, and ignoring consumers who would have seen ads through other mediums in other years, the full set of 218 complaints amounts to just 0.000167% of those who clicked on a TurboTax ad. (*Cf.* PFF ¶¶637). 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 a survey of nine other FTC consumer-protection cases relied upon by Complaint Counsel rebuttal witness Erez Yoeli. (*Cf.* PFF ¶¶641-642; *see also* PFF ¶¶643-644, 646). And when calculated based on Mr. 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 likely to be deceived. (PFF ¶¶623, 631-632).

The Proposed Finding is also misleading in that it states that Intuit promoted “TurboTax.” Intuit does not typically advertise just the brand “TurboTax.” Intuit typically advertises for specific TurboTax products, known as SKUs. (GX156 (Ryan (Intuit) IHT) at 107-134

(discussing advertising for free TurboTax SKUs); Ryan (Intuit) Tr. 691 (testifying that Intuit “advertise[s] for all of [the products in the TurboTax online lineup]”); Johnson (Intuit) Tr. 573-574 (discussing advertising for free TurboTax SKUs); PFF ¶¶161, 171, 173, 178). In this case, Complaint Counsel have challenged a small percentage of the advertisements Intuit ran during the relevant period (PFF ¶¶205, 214, 247, 265, 280, 293); but the ads Complaint Counsel challenge were not for “TurboTax” but for TurboTax’s free SKUs, including TurboTax Free Edition and TurboTax Live Basic (PFF ¶¶205-301), both of which are completely free (PFF ¶¶69, 109-112). None of the challenged ads claim—expressly or impliedly—that all TurboTax SKUs are free. (PFF ¶¶210-211, 242-244, 260-262, 273-275, 288-290, 297-299).

48. Disclaimers related to Intuit’s “free” television and/or video advertising were small and appeared at the bottom of the screen. (Ryan (Intuit) Tr. 736-737, 821, 822-823 (in discussing the Spelling Bee, Young Love, Dance Class, and Auctioneer ads “Q. ...the line ‘simple tax returns only’ appeared in a small line of white print at the bottom center of the screen, while the much larger Intuit TurboTax logo appeared centered. Is that correct? A. Yes, that’s where the disclosure appeared.”)). Intuit has also made many of its “free” claims without any qualification whatsoever. (*See, e.g., infra* FF-445—FF-447; *see also* RX1018 (Golder Expert Report) ¶ 98, fig. 12).

Response to Finding No. 48:

The Proposed Finding is incorrect in multiple respects. *First*, it wrongly refers to language in the challenged ads as “disclaimers.” Complaint Counsel have not established that there was anything in the challenged ads that needed to be “disclaimed.” Intuit assumes Complaint Counsel are referring to text in the challenged ads that disclosed the qualifications to use the specific free product being advertised.

Second, the Proposed Finding is wrong that the disclosures in the ads were “small,” thereby implying that consumers would not have seen those disclosures. Complaint Counsel did not offer any evidence that the qualifications in the challenged could not be seen (or heard) by reasonable consumers. (*See* PFF ¶¶230-231, 255-256, 271, 286, 295). Complaint Counsel’s own

witnesses confirmed that the qualifications were legible (or audible) by repeatedly acknowledging that they saw (or heard) them. (PFF ¶¶223, 233, 306-307, 317). In fact, when Complaint Counsel failed to acknowledge the qualifications in several of the challenged ads shown during their opening statement, the Court interjected to point them out. (PFF ¶208). That the Court and Complaint Counsel’s witnesses noticed the qualifications in the challenged ads demonstrates that those qualifications were sufficiently prominent to be seen and read (or heard). Intuit also presented evidence that the challenged ads compare favorably to other ads consumers see on television, based both on the metrics Complaint Counsel single out as bases for criticism and on other metrics drawn from the FTC’s “.com Disclosures” guidelines (PFF ¶235). Professor Golder’s benchmarking analysis revealed that the qualifications in the challenged ads were at least comparable to the qualifications in benchmark companies’ ads. (PFF ¶¶234-236, 258). And for two metrics—height and duration, both of which Complaint Counsel highlight in their post-trial brief (at 59-60) as bases for criticizing Intuit’s ads—Intuit’s qualifications were statistically *superior*. (PFF ¶237).

Moreover, contrary to the Proposed Finding, Ms. Ryan did not testify that the disclosures were small; she said that some disclosures appeared at the bottom of the screen. (Ryan (Intuit) Tr. 736-737, 821, 822-823). Intuit places certain disclosures at the bottom of the screen in video advertisements where reasonable consumers expect to find such information. (PFF ¶¶515-518). In fact, placing disclosures at the bottom of the screen communicates to consumers that there are qualifications, even if they do not read the qualifications. (PFF ¶¶515-518). Intuit’s competitors similarly place disclosures at the bottom of the screen, in line with reasonable consumer expectations. (PFF ¶456). Of course, most of the challenged ads are not video ads at all, and in

those ads, the disclosures are not at the bottom of the screen and are easily legible. (PFF ¶¶248, 250, 266-267, 281).

Third, the Proposed Finding incorrectly states that “many” of the challenged ads made free claims without qualification. The record instead reflects that the challenged ads *all did* include qualifications. To begin, most of the challenged ads, including all of the brand video ads and radio ads, identified the specific TurboTax SKU being advertised as free. (PFF ¶¶215, 250-251, 266, 281, 294, 317-321). That includes nearly all of the challenged paid-search ads (PFF ¶266)—including the paid-search ads that Complaint Counsel cite for support. That alone was sufficient to prevent reasonable consumers from being misled into believing that all TurboTax SKUs were free because it made clear to reasonable consumers that there were multiple TurboTax SKUs and that only the one being advertised was free. (PFF ¶319).

All of the challenged video and radio ads also include language like “see if you *qualify*” or “see details at TurboTax.com.” (PFF ¶¶215-219, 294). Further, all of the challenged video, radio, and display ads, and most of the paid-search ads, stated in writing “simple tax returns only,” “simple U.S. returns only,” or “simple tax returns.” (PFF ¶¶215-219, 248, 266-267). And all of the challenged email ads included disclosure language such as “TurboTax Free Edition, for simple tax returns only. See if you qualify.” (PFF ¶281).

To support the expansive proposition that “many” ads had no qualifications, Complaint Counsel cite only *three* paid-search ads. That Complaint Counsel attempt to support that sweeping proposition by citing just 1% of the ads (and no video, display, email, or radio ads) challenged in this case is telling. But even setting that aside, it is inaccurate that the paid-search ads cited did not include any qualifications. Two of those advertisements stated that “Over 50 Million Americans Can File For Free With TurboTax Free Edition” (CCFF ¶¶445-446), telling

consumers both that the offer was for a specific TurboTax product and that not all consumers would qualify for that offer. And the third paid-search ad was not a TurboTax ad at all. As Ms. Ryan previously stated, Intuit did not bid on the search term reflected in that paid-search ad, meaning the ad never should have been shown. (GX439 (Intuit) ¶26). That the ad was mistakenly shown to consumers is also clear on its face; it did not even take consumers to the TurboTax website. (See CCF ¶447; GX177 (FTC)). Actual TurboTax paid-search ads, by contrast, linked directly to the Free Edition landing page. (See PFF ¶269). It is also telling that the paid-search ad looks nothing like any of the other paid-search ads at issue in this proceeding. (See PFF ¶¶266-269, 272-275; CCF ¶¶445-446, 448-454). That single ad is thus not representative of any other ads challenged in this proceeding, let alone evidence that “many” ads made free claims without any qualifications.

49. Intuit’s “free” TurboTax advertisements were widely disseminated. (Shiller (Complaint Counsel) Tr. 156-203; Baburek (Complaint Counsel) Tr. 318–23; GX342 (Complaint Counsel) ¶¶ 11-208, at CC-00006908-7007; GX Summary 001 (Complaint Counsel) (summarizing TV ad dissemination data produced by Intuit); GX Summary 002 (Complaint Counsel) (summarizing Online ad dissemination data produced by Intuit); GX431 (Intuit); GX432 (Intuit); GX433 (Intuit); GX434 (Intuit); GX435 (Intuit); GX436 (Intuit); GX437 (Intuit); GX631 (Intuit) at CC-000132884-85 (Intuit interrogatory responses specifying INTUIT-FTC-PART3-000490335 to INTUIT-FTC-PART3-000490339; INTUIT-FTC-PART3-000490439 to INTUIT-FTC-PART3-000490440 (admitted as trial exhibits GX431-37) as the records from which the dates, times, and locations of advertisements, channels through which advertisements were disseminated, and number of times advertisements were circulated could be ascertained)).

Response to Finding No. 49:

The Proposed Finding is misleading in part. First, by putting “free” in scare quotes, it appears Complaint Counsel have reverted to the implications in their complaint that TurboTax’s free products are somehow not truly free. The record says otherwise. (PFF ¶¶69, 492). Second, the challenged advertisements are not for the brand TurboTax. Intuit does not typically advertise just the brand “TurboTax.” Intuit typically advertises for specific TurboTax products, known as

SKUs. (GX156 (Ryan (Intuit) IHT) at 107-134 (discussing advertising for free TurboTax SKUs); Ryan (Intuit) Tr. 691 (testifying that Intuit “advertise[s] for all of [the products in the TurboTax online lineup]”); Johnson (Intuit) Tr. 573-574 (discussing advertising for free TurboTax SKUs); PFF ¶¶161, 171, 173, 178). In this case, Complaint Counsel have challenged a small percentage of the advertisements Intuit ran during the relevant period (PFF ¶¶205, 214, 247, 265, 280, 293); but the ads Complaint Counsel challenge were not for “TurboTax” but for TurboTax’s free SKUs, including TurboTax Free Edition and TurboTax Live Basic (PFF ¶¶205-301), both of which are completely free (PFF ¶¶69, 109-112). None of the challenged ads claim—expressly or impliedly—that all TurboTax SKUs are free. (PFF ¶¶210-211, 242-244, 260-262, 273-275, 288-290, 297-299).

It is correct, however, that the challenged ads (for specific TurboTax SKUs that were truly free) were widely disseminated. Intuit has no specific response to this portion of the Proposed Finding except to note that if it had run a “multiyear, multi-ad, multichannel, multimodal” deceptive advertising campaign as Complaint Counsel assert, it would have received overwhelmingly negative reviews and voluminous complaints from customers. (PFF ¶¶647-652). That was not the case. Indeed, even if every one of the 218 complaints identified by Complaint Counsel were found to be both relevant and reliable, these complaints represent less than 0.0003% of the 86.4 million TurboTax customers who completed at least one return during the Tax Year 2015 to 2021 period. (*Cf.* PFF ¶¶631-632). The 218 complaints are even more insignificant when compared to the number of views, impressions, and clicks that the challenged ads received during the relevant time period. (PFF ¶637). For example, in Tax Years 2020 and 2021, TurboTax Free Edition ads generated over 15 billion impressions and were clicked on over 130 million times. (Baburek (FTC) Tr. 338). Even considering only the

advertisement clicks from those two years, and ignoring consumers who would have seen ads through other mediums in other years, the full set of 218 complaints amounts to just 0.000167% of those who clicked on a TurboTax ad. (*Cf.* PFF ¶¶637). 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 a survey of nine other FTC consumer-protection cases relied upon by Complaint Counsel rebuttal witness Mr. Yoeli. (*Cf.* PFF ¶¶641-642; *see also* PFF ¶¶643-644, 646). And when calculated based on Mr. 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 likely to be deceived. (PFF ¶¶623, 631-632).

50. Since at least TY 2014 with TurboTax’s 2015 Super Bowl ad, “Boston Tea Party,” (GX321 (Complaint Counsel); GX342 (Complaint Counsel) ¶ 22, at CC-00006910), and through TY 2017, Intuit ran the Absolute Zero campaign. (*See e.g.*, GX323 (Complaint Counsel) (2016 TurboTax Super Bowl ad, “Never a Sellout”); GX325 (Intuit) (15-second TurboTax “Fish” ad); GX324 (Intuit) (30-second TurboTax “Fish” ad); GX344 (Intuit) (15-second “Guzman” TurboTax ad), GX345 (Intuit) (30-second “Cruise” TurboTax ad); GX346 (Intuit) (15-second “Baby” TurboTax ad); GX347 (Intuit) (45-second “Anthem Launch” TurboTax ad)). For the Absolute Zero campaign, Intuit’s goal was for consumers to believe the offering was truly free, and Intuit often included the word “Guaranteed” in its Absolute Zero marketing to bolster and emphasize the claim that the offer was truly free. (*See* GX290 (Intuit) at CC-00006225 (explaining that Intuit added the language “Guaranteed” to “address skepticism of free, build credibility of TT Free, and drive trial”); GX295 (Intuit) at CC-00006316 (“Convince consumers TurboTax Absolute Zero is truly free ... Guarantee”), CC-00006333 (“Drive believability of TT Free ... add ‘Guaranteed’ in lock-up”) & CC-00006351 (“Findings:... ‘A[bsolute]/Z[ero] Guarantee’ is the strongest concept to battle free skepticism”)).

Response to Finding No. 50:

The Proposed Finding and the underlying ads should not be considered in this proceeding because the cited challenged ads aired in Tax Years 2014 through 2017 and have not aired since. Those challenged ads are therefore outside the relevant statute of limitations (*see* COL ¶¶147-

156), and the Tax Year 2014 Boston Tea Party ad is outside the relevant period referenced in the complaint (*see* RX260 (FTC) ¶¶9-20, 21-22, 37-44, 47, 49, 53, 56, 61-62). The Commissioners never voted to challenge advertisements that ran before 2016 (*see* RX260 (FTC) ¶¶9-20, 21-22, 37-44, 47, 49, 53, 56, 61-62) and thus that advertisement is not properly before the Court.

The Proposed Finding is also misleading in part. The Proposed Finding incorrectly refers to Absolute Zero as a campaign, when it was instead the name of Intuit's free TurboTax offer from Tax Year 2014 to Tax Year 2017. (PFF ¶¶102-103). Accordingly, all of the ads identified in the Proposed Finding specify that they are for the "Absolute Zero" offer. (GX321 (Intuit); GX323 (Intuit); GX324 (Intuit); GX325 (Intuit); GX344 (Intuit); GX345 (Intuit); GX346 (Intuit); GX347 (Intuit)). Moreover, each of the cited ads included additional qualifications, stating either "TurboTax Federal Free Edition is for simple U.S. returns only," "For simple U.S. returns," as well as "See offer details at TurboTax.com." (GX321 (Intuit); GX323 (Intuit); GX324 (Intuit); GX325 (Intuit); GX344 (Intuit); GX345 (Intuit); GX346 (Intuit); GX347 (Intuit)). It is incorrect to suggest that the Absolute Zero ads conveyed that all TurboTax SKUs were free or that TurboTax would necessarily be free for consumers viewing the ads.

It is correct, however, that the purpose of the Absolute Zero ads to convey that the specific TurboTax offer being advertised, Absolute Zero, was truly free—because it was truly free for consumers a majority of consumers in the online tax-preparation market. (PFF ¶¶69, 102, 129). Intuit does not dispute that its messaging was intended to overcome consumer skepticism of free offers in order to drive awareness and believability with consumers who were likely to qualify for that free product that TurboTax did in fact have a truly free product. (GX295 (Intuit) at -6317, -6318). The exhibits cited in the Proposed Finding reinforce that Intuit

intended to convey only that its truly free product, Absolute Zero, was truly free in effort to get consumers who qualify to use that product.

Intuit otherwise has no specific response to this finding exception to note that if the ads for Absolute Zero were deceptive as Complaint Counsel assert, it would have received overwhelmingly negative reviews and voluminous complaints from customers. (PFF ¶¶647-652). That was not the case. Complaint Counsel have not identified any potentially relevant consumer complaints from Tax Year 2014, and only identified 175 potentially relevant consumer complaints from the five years spanning Tax Years 2015-2019. (See CCF ¶¶676-677). Even if every one of the 218 complaints identified by Complaint Counsel from Tax Years 2015-2021 were found to be both relevant and reliable, these complaints represent less than 0.0003% of the 86.4 million TurboTax customers who completed at least one return during the Tax Year 2015 to 2021 period. (Cf. 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 a survey of nine other FTC consumer-protection cases relied upon by Complaint Counsel rebuttal witness Mr. Yoeli. (Cf. PFF ¶¶641-642; *see also* PFF ¶¶643-644, 646). And when calculated based on Mr. 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 likely to be deceived. (PFF ¶¶623, 631-632).

51. From TY 2018 to TY 2021, Intuit ran a campaign called “Free, Free, Free, Free” or “The Power of Free” in which “free” is essentially the only word used or spoken in the commercials, until the voice over or disclaimer at the end of the advertisement. (Rubin (Intuit) Tr. 1555 (“We called it ‘The Power of Free.’”); GX441 (Intuit) at CC-00007890-92). From November 1, 2018 to April 18, 2022, Intuit aired ads in the “Free, Free, Free, Free” campaign at least **84,356 times** across at least **721 television networks**. This

included networks in every state in the country. (GX342 (Complaint Counsel) ¶¶ 41, 45, 50, 55, 61, 70, 75, 85, 87, 89, 91, 93, 107, 110, 113, 134, 140, 145, at CC-00006915-16, CC-00006918, CC-00006920, CC-00006922, CC-00006925, CC-00006927-28, CC-00006930, CC-00006937-42, CC-00006948-53, CC-00006966, CC-00006968-70, CC-00006972-73).

Response to Finding No. 51:

The Proposed Finding is incomplete and misleading. *First*, it wrongly refers to language in the challenged ads as “disclaimers.” Complaint Counsel have not established that there was anything in the challenged ads that needed to be “disclaimed.” Intuit assumes Complaint Counsel are referring to text in the challenged ads that disclosed the qualifications to use the specific free product being advertised.

Second, although the Proposed Finding notes that “free” was the only word spoken in the challenged ads until the voiceover was heard and disclosures were shown, it fails to recognize that the word “free” by itself is not a claim about TurboTax at all. (PFF ¶221). Indeed, the FTC’s designee testified that the word “free” in ads is not an express claim because its meaning “depends [on] whether there is any other context for the person that is hearing [it].” (GX161 (Maxson (FTC) Dep.) at 239). Complaint Counsel’s own witness, Ms. Shiller, similarly agreed that these video ads did not say anything about TurboTax until a voiceover that stated, “TurboTax *Free Edition* is free” and invited viewers to “see details at TurboTax.com.” (PFF ¶223; Schiller (FTC) Tr. 235). The “other context” provided by the challenged ads was that a specific TurboTax SKU was free; that the SKU was available for “simple tax returns only” (or similar language), and that consumers would “see if you qualify” or “see details” on the TurboTax website. (See PFF ¶¶215-218, 222-224). It is incorrect to suggest that the so-called “Free, Free, Free” ads conveyed that all TurboTax SKUs were free or that TurboTax would necessarily be free for consumers viewing the ads. Moreover, Intuit no longer runs TurboTax ads that repeat the term “free”—which comprise only a small portion of the challenged ads—and Intuit is bound by

the Consent Order not to air these are similar ads that repeat “free” in the future. (PFF ¶¶213, 824).

The Proposed Finding is correct, however, that the challenged ads (for specific TurboTax SKUs that were truly free) were disseminated tens of thousands of times across the country. Intuit has no specific response to this portion of the Proposed Finding except to note that if Intuit had run a “multiyear, multi-ad, multichannel, multimodal” deceptive advertising campaign as Complaint Counsel assert, it would have received overwhelmingly negative reviews and voluminous complaints from customers. (PFF ¶¶647-652). That was not the case. Indeed, although Complaint Counsel assert that the “Free, Free, Free” ads were aired on TV over 80,000 times during a four-year period, Complaint Counsel identified only 26 potentially relevant consumer complaints from Tax Year 2021, another 17 complaints from Tax Year 2020, and just 175 potentially relevant consumer complaints from the five years spanning Tax Years 2015-2019. (See CCF ¶¶676-677). Even if every one of the 218 complaints identified by Complaint Counsel from Tax Years 2015-2021 were found to be both relevant and reliable, these complaints represent less than 0.0003% of the 86.4 million TurboTax customers who completed at least one return during the Tax Year 2015 to 2021 period. (Cf. 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 a survey of nine other FTC consumer-protection cases relied upon by Complaint Counsel rebuttal witness Mr. Yoeli. (Cf. PFF ¶¶641-642; *see also* PFF ¶¶643-644, 646). And when calculated based on Mr. 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 likely to be deceived. (PFF ¶¶623, 631-632).

52. Between January and March of 2022, versions of “free free free” ads (“Dance Workout,” “Auctioneer,” and “Dog Show”) aired more than 11,000 times on national television. (GX Summary 001 (Complaint Counsel) at ‘Pivot – Ads w-Program Count’ B22, B26, B27 & B29; GX431 (Intuit); GX432 (Intuit); GX433 (Intuit)). “Free free free” ads were aired on national TV during the broadcast of the 2022 Olympics. (GX432 (Intuit)). Between February and May 2021, “free free free” ads (“Dance Workout,” “Auctioneer,” and “Dog Show”) aired more than 16,000 times on national television. (GX Summary 001 (Complaint Counsel) at ‘Pivot – Ads w-Program Count’ B9, B10, B12, B13, B15 & B16; GX436 (Intuit); GX437 (Intuit)).

Response to Finding No. 52:

Intuit has no specific response except to note that if Intuit had run a “multiyear, multi-ad, multichannel, multimodal” deceptive advertising campaign as Complaint Counsel assert, it would have received overwhelmingly negative reviews and voluminous complaints from customers. (PFF ¶¶647-652). That was not the case. Indeed, although Complaint Counsel assert that versions of the “Free, Free, Free” ads were aired on TV over 11,000 times during Tax Year 2021, including during a national broadcast of the 2022 Olympics, and more than 16,000 times in Tax Year 2020, Complaint Counsel identified only 26 even potentially relevant consumer complaints from Tax Year 2021 and just 17 potentially relevant complaints from Tax Year 2020. (See CCF ¶¶676-677). That so few consumers complained is strong evidence that reasonable consumers were not deceived by the “Free, Free, Free” ads that ran in Tax Years 2020 and 2021. (See PFF ¶¶632, 637, 639, 641-647).

53. Between September 30, 2020, and March 11, 2022, Intuit aired at least 35,194 TurboTax free-themed television advertisements nationwide, reaching an estimated 7.5 billion views. (GX750 (Novemsky Rebuttal Report Errata) ¶ 42 (correcting GX749 (Novemsky Rebuttal Report) ¶ 42); GX768 (Complaint Counsel) at ‘Workpaper_x’ A1:B2 (summarizing iSpot.tv television advertising dissemination data) & ‘Data’ A1:AW60).

Response to Finding No. 53:

The Proposed Finding is inaccurate and misleading. Intuit does not run “free-themed” advertisements for the TurboTax brand or all TurboTax products. Intuit typically advertises that specific TurboTax products, known as SKUs, are free, and those SKUs are free. GX156 (Ryan (Intuit) IHT) at 107-134; Ryan (Intuit) Tr. 691; Johnson (Intuit) Tr. 573-574; PFF ¶¶161, 171, 173, 178). The challenged video ads only advertise truly free SKUs, and not the TurboTax brand or *all* TurboTax products. (*See* Responses to CCFE ¶¶50-53). Every one of the challenged video ads stated that the free offer being advertised applied to a truly free SKU. (PFF ¶215). Every challenged video ad further stated in writing that the free offer was available to taxpayers with “simple returns only” or similar qualifying language, in addition to language that invited consumers to visit the TurboTax website to learn more about the offer and whether they qualified for it. (PFF ¶215). It is misleading and incorrect to suggest that the challenged video ads conveyed that all TurboTax SKUs were free or that TurboTax would necessarily be free for consumers viewing the ads. Moreover, Intuit no longer runs TurboTax ads that repeat the term “free” (assuming that is what is meant by “free-themed”)—which comprise only a small portion of the challenged ads—and Intuit is bound by the Consent Order not to air these or similar ads that repeat “free” in the future. (PFF ¶¶213, 824).

The Proposed Finding is correct, however, that the challenged ads (for specific TurboTax SKUs that were truly free) were aired tens of thousands of times across the country and received billions of views.

54. When Intuit committed to cease running the “free, free, free” advertising on March 24, 2022 (after meeting with FTC Chair Lina Khan), removing the ads required “Intuit to coordinate with over 100 advertising partners.” (GX438 (Intuit) ¶¶ 16, 23, at CC-00007862-64).

Response to Finding No. 54:

Intuit has no specific response except to note that it was under no obligation to discontinue the “free, free, free” ads but rather did so voluntarily even though doing so “was extremely disruptive” to its business and required it to “work[] across multiple agencies and across hundreds of contacts across [its] media partners.” (PFF ¶¶7-8; GX438 (Intuit) ¶¶16-23). Intuit has not run any “free, free, free” ads—or any ads “substantially similar in their repetition of the word free”—since March 2022, and has expressly disclaimed any intent to run such ads in the future. (PFF ¶¶213, 225, 824). And Intuit is prohibited from running any “free, free, free” ads (or substantially similar ads) under its Consent Order with the state attorneys general. (PFF ¶810).

Intuit further notes that if the challenged “free, free, free,” ads had been part of a “multiyear, multi-ad, multichannel, multimodal” deceptive advertising campaign as Complaint Counsel assert, Intuit would have received overwhelmingly negative reviews and voluminous complaints from customers. (PFF ¶¶647-652). That was not the case. Indeed, although Complaint Counsel assert that the “Free, Free, Free” ads that aired through March 24, 2022, during Tax Year 2021 were deceptive, Complaint Counsel identified only 26 even potentially relevant consumer complaints from Tax Year 2021. (*See* CCF ¶¶676-677). That so few consumers complained is strong evidence that reasonable consumers were not deceived by the “Free, Free, Free” ads that ran in Tax Years 2020 and 2021. (*See* PFF ¶¶632, 637, 639, 641-647).

Even if every one of the 218 complaints identified by Complaint Counsel were found to be both relevant and reliable, these complaints represent less than 0.0003% of the 86.4 million TurboTax customers who completed at least one return during the Tax Year 2015 to 2021 period. (*Cf.* PFF ¶¶631-632). The 218 complaints are even more insignificant when compared to the number of views, impressions, and clicks that the challenged ads received during the relevant

time period. (PFF ¶637). For example, in Tax Years 2020 and 2021, TurboTax Free Edition ads generated over 15 billion impressions and were clicked on over 130 million times. (Baburek (FTC) Tr. 338). Even considering only the advertisement clicks from those two years, and ignoring consumers who would have seen ads through other mediums in other years, the full set of 218 complaints amounts to just 0.000167% of those who clicked on a TurboTax ad. (Cf. PFF ¶637). 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 a survey of nine other FTC consumer-protection cases relied upon by Complaint Counsel rebuttal witness Mr. Yoeli. (Cf. PFF ¶¶641-642; *see also* PFF ¶¶643-644, 646). And when calculated based on Mr. 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 likely to be deceived. (PFF ¶¶623, 631-632).

55. Intuit uses different advertising channels to advertise TurboTax, including direct response, holistic search marketing, display/social/mobile marketing, and brand advertising. (GX156 (Ryan (Intuit) IHT) at 25-26, 29 & 39); *see also* Ryan (Intuit) Tr. 691).

Response to Finding No. 55:

The Proposed Finding is misleading. As is discussed in the cited source and throughout the case, Intuit does not typically advertise just the brand “TurboTax.” Intuit typically advertises for specific TurboTax products, known as SKUs. (GX156 (Ryan (Intuit) IHT) at 107-134 (discussing advertising for free TurboTax SKUs); Ryan (Intuit) Tr. 691 (testifying that Intuit “advertise[s] for all of [the products in the TurboTax online lineup]”); Johnson (Intuit) Tr. 573-574 (discussing advertising for free TurboTax SKUs); PFF ¶¶161, 171, 173, 178). In this case, Complaint Counsel have challenged a small percentage of the advertisements Intuit ran during

the relevant period (PFF ¶¶205, 214, 247, 265, 280, 293); the ads Complaint Counsel challenge were not for “TurboTax” but for TurboTax’s free SKUs, including TurboTax Free Edition and TurboTax Live Basic (PFF ¶¶205-301), both of which are completely free (PFF ¶¶69, 109-112). None of the challenged ads claim—expressly or impliedly—that all TurboTax SKUs are free. (PFF ¶¶210-211, 242-244, 260-262, 273-275, 288-290, 297-299).

56. Intuit’s marketing efforts follow a marketing funnel approach across the different channels through which it advertises TurboTax. (*See* RX582 (Intuit) at INTUIT-FTC-PART3-000601293).

Response to Finding No. 56:

The Proposed Finding is misleading. Intuit does not typically advertise just the brand “TurboTax.” Intuit typically advertises for specific TurboTax products, known as SKUs. (GX156 (Ryan (Intuit) IHT) at 107-134 (discussing advertising for free TurboTax SKUs); Ryan (Intuit) Tr. 691 (testifying that Intuit “advertise[s] for all of [the products in the TurboTax online lineup]”); Johnson (Intuit) Tr. 573-574 (discussing advertising for free TurboTax SKUs); PFF ¶¶161, 171, 173, 178). In this case, Complaint Counsel have challenged a small percentage of the advertisements Intuit ran during the relevant period (PFF ¶¶205, 214, 247, 265, 280, 293); the ads Complaint Counsel challenge were not for “TurboTax” but for TurboTax’s free SKUs, including TurboTax Free Edition and TurboTax Live Basic (PFF ¶¶205-301), both of which are completely free (PFF ¶¶69, 109-112). None of the challenged ads claim—expressly or impliedly—that all TurboTax SKUs are free. (PFF ¶¶210-211, 242-244, 260-262, 273-275, 288-290, 297-299).

The Proposed Finding is also incomplete. The marketing funnel approach is a widely recognized and well-known concept wherein companies use different advertising strategies and channels to reach consumers at different points in the buying process. (PFF ¶¶156-158). Intuit employs its own marketing funnel to provide TurboTax consumers the appropriate level of

information depending on the stage of the buying process they are in. (RX582 (Intuit) at -1293; PFF ¶¶156-160). Intuit tailors its marketing strategies to the TurboTax online marketing funnel by targeting specific audiences at different points in the tax-preparation purchase process through specific marketing channels, providing increasingly detailed information to consumers as they near their purchase decision and move through the marketing funnel. (See PFF ¶¶73, 138, 156-160, 834). Intuit’s use of the widely recognized marketing funnel approach to provide consumers with the appropriate amount of information at the right time is evidence that the challenged ads did not deceive reasonable consumers. (See PFF ¶¶62, 180-190, 510-513).

57. A screenshot depicting Intuit’s marketing funnel and prior year return on investment related to different types of marketing (RX582 (Intuit) at INTUIT-FTC-PART3-000601293) appears below:

| TURBOTAX ONLINE MARKETING FUNNEL | | | | |
|----------------------------------|---|---|--|-------------|
| | Target/Audience | Tactics | Key Metrics | PY ROI |
| BRAND ADVERTISING | PY Assisted Simple Filers | TV, Audio, Video | Breakthrough, Consideration | \$2.5-\$4.3 |
| PERFORMANCE MEDIA | Net New Customers, Targeted Audiences (eg SE) | Display, Social, Mobile, Affiliate | Conversion Rates (Traffic & Installs via view, click; Auths) | \$3.0-\$4.3 |
| SEARCH MARKETING | In-market consumers | PPC, SEO, Content | Conversion Rates (Traffic via view, click, Auth rates) | \$4.1-\$5.4 |
| EMAIL | Existing customers, Win-backs | Segmentation, Marketing and Reminder Emails | Conversion Rates (open, click, Auth rates) | n/a |
| TRAFFIC | All visitors | Personalization, Content | Conversion Rates (V2L, T2N, bounce) | n/a |
| TTO LOGINS | New/Existing | Conversion Optimization | Conversion Rates (Login, Create Account % new) | n/a |

Response to Finding No. 57:

Intuit has no specific response to the Proposed Finding other than to note that the return on investment discussed in the screenshot is not discussing free advertisements specifically. (RX582 (Intuit)).

58. Intuit uses the brand advertising channel to promote TurboTax, for example through TV, radio, audio, and video ads, advertising in traditional broadcast and cable-type

environments. (GX156 (Ryan (Intuit) IHT) at 41-42; *see* GX145 (Berger (Intuit) Dep.) at 142-143 (“We have television, display advertising, email, paid search, organic search, social, affiliate. I know I’m probably missing one or two. But it’s a combination, you know, of digital and sort of traditional.”); Ryan (Intuit) Tr. 691-692). Superbowl advertising is considered brand advertising (Ryan (Intuit) Tr. 692).

Response to Finding No. 58:

This duplicative Proposed Finding is misleading. Even in the so-called brand advertising channel, Intuit does not typically advertise just the brand “TurboTax.” Instead, Intuit advertises specific TurboTax products, known as SKUs. (GX156 (Ryan (Intuit) IHT) at 107-134 (discussing the advertising strategy for specific TurboTax SKUs, including Free Edition and Premier Edition); Ryan (Intuit) Tr. 691 (testifying that Intuit advertises each specific SKU in the complexity based lineup—Free Edition, Deluxe Edition, Self-Employed Edition, and Premier Edition); Johnson (Intuit) Tr. 573-574 (discussing Intuit’s distinct, targeted advertisements for free TurboTax SKUs); PFF ¶¶161, 171, 173, 178). In this case, Complaint Counsel have challenged a small percentage of the advertisements Intuit ran during the relevant period (PFF ¶¶205, 214, 247, 265, 280, 293); the ads Complaint Counsel challenge were not for “TurboTax” but for TurboTax’s free SKUs, including TurboTax Free Edition and TurboTax Live Basic (PFF ¶¶205-301), both of which are completely free (PFF ¶¶69, 109-112). None of the challenged ads claim—expressly or impliedly—that all TurboTax SKUs are free. (PFF ¶¶210-211, 242-244, 260-262, 273-275, 288-290, 297-299).

The Proposed Finding is also misleading because it implies that certain kinds of advertising (e.g., search) are part of the brand advertising channel—they are not. (*See* PFF ¶¶157, 178-187).

The Proposed Finding is also incomplete because it ignores relevant context concerning what Intuit calls the brand advertising channel. Even in this channel, Intuit targets its ads to reach consumers likely to qualify for the product advertised. (*See* PFF ¶¶190-194, 197).

Advertising for free TurboTax SKUs, for example, uses creative concepts likely to resonate with the targeted audience of consumers with simple tax returns. (See PFF ¶¶192-195). Intuit also airs television brand advertisements when more consumers with simple tax returns are likely to be watching, such as earlier in the tax season. (See PFF ¶196). Super Bowl ads are part of that strategy to target consumers who likely have simple tax returns, because the Super Bowl happens early in the tax season “when the majority of Simple Filers prepare and file their taxes.” (PFF ¶196). And as Mr. Johnson explained, “[REDACTED] [REDACTED]. (Johnson (Intuit) Tr. 654-655).

59. Television advertising is one of the best ways to drive awareness and interest. (GX145 (Berger (Intuit) Dep.) at 146-148).

Response to Finding No. 59:

The Proposed Finding is unsupported. Complaint Counsel misrepresent Ms. Berger’s deposition testimony. She never testified that television is “one of the best ways to drive awareness and interest.” Instead, Ms. Berger testified that television and display advertising are “examples of the [advertising] channels that are more awareness driving,” meaning that Intuit’s purpose in advertising in those channels was to drive awareness about the free TurboTax offer. (GX145 (Berger (Intuit) Dep.) at 147-148).

The Proposed Finding is also unclear because there is no context provided about what television advertising is being referenced as “one of the best ways to drive awareness and interest.”

60. Display marketing includes traditional web media, mobile app advertising, video advertising (for example, on YouTube), and “over-the-top” video advertising, which is video advertising not delivered through traditional broadcast or cable. Over-the-top advertising is distributed, for example, on Hulu, Roku, or Amazon video. (GX156 (Ryan (Intuit) IHT) at 26-27; see Ryan (Intuit) Tr. 693).

Response to Finding No. 60:

The Proposed Finding is incorrect. Display advertising includes traditional online ads, such as banners displayed on websites, and social media advertisements like TikTok, Facebook, or Snapchat. (PFF ¶181). It does not include video advertising such as YouTube or “over-the-top” video advertising such as Hulu, Roku, or Amazon Video. That advertising is a component of the brand advertising channel. (See Ryan (Intuit) Tr. 691-692; GX146 (Ryan (Intuit) Dep.) at 39-41; PFF ¶179). Ms. Ryan’s cited investigational hearing testimony was focused on how Intuit marketing teams were organized, and who was in charge of those teams, not on the types of advertisements that fit into each marketing channel. (See GX156 (Ryan (Intuit) IHT) at 26-27).

61. Intuit also advertises TurboTax on social media platforms like Facebook, Instagram, Twitter, SnapChat, and TikTok. (GX156 (Ryan (Intuit) IHT) at 28-29; see also Ryan (Intuit) Tr. 693)

Response to Finding No. 61:

The Proposed Finding is misleading in part. Intuit does not typically advertise just the brand “TurboTax.” Intuit typically advertises for specific TurboTax products, known as SKUs. (GX156 (Ryan (Intuit) IHT) at 107-134 (discussing advertising for free TurboTax SKUs); Ryan (Intuit) Tr. 691 (testifying that Intuit “advertise[s] for all of [the products in the TurboTax online lineup]”); Johnson (Intuit) Tr. 573-574 (discussing advertising for free TurboTax SKUs); PFF ¶¶161, 171, 173, 178). In this case, Complaint Counsel have challenged a small percentage of the advertisements Intuit ran during the relevant period (PFF ¶¶205, 214, 247, 265, 280, 293); the ads Complaint Counsel challenge were not for “TurboTax” but for TurboTax’s free SKUs, including TurboTax Free Edition and TurboTax Live Basic (PFF ¶¶205-301), both of which are completely free (PFF ¶¶69, 109-112). None of the challenged ads claim—expressly or impliedly—that all TurboTax SKUs are free. (PFF ¶¶210-211, 242-244, 260-262, 273-275, 288-290, 297-299).

The Proposed Finding is correct, however, that Intuit advertises on social media platforms. Social media ads are part of Intuit’s display advertising channel. (PFF ¶181). As with all ads for TurboTax SKUs, Intuit’s social media advertising targets ads for individual TurboTax SKUs toward the audiences most likely to qualify to use those products. (PFF ¶190). For advertisements for free TurboTax SKUs, Intuit targets 18-to-35-year-olds because they are likely to have simple returns (PFF ¶193), and it uses social media advertising such as Snapchat and TikTok specifically because they skew heavily towards this population of eligible consumers (PFF ¶194). Intuit also uses advertising concepts that will resonate with that younger audience, including partnering with influencers in its social media advertising. (PFF ¶195). Intuit also uses “exclusionary targeting” to avoid showing ads to consumers for SKUs that are not relevant to their tax situation. (PFF ¶197). All of the challenged social media ads (and all other challenged display ads) state in writing that the offer is for “simple tax returns only” (or includes similar language). (PFF ¶248). Most of these ads also specify that the advertisement is for a specific TurboTax SKU. (PFF ¶250). And many others communicate that there are multiple SKUs available for free, but that not all TurboTax SKUs are free. (PFF ¶251). And nearly all of the challenged video ads displayed on social media with audible free claims also include a voiceover stating that the free offer is for “simple tax returns only.” (PFF ¶252). In fact, as heard during the trial, many of those ads begin with the voiceover stating “[s]imple tax returns only” before any reference to the free offer. (Baburek (FTC) Tr. 334-336; GXD2 (FTC) at 8-17). No evidence suggests that consumers could not see or hear those qualifications. (PFF ¶¶255-256).

62. Intuit uses holistic search marketing to advertise TurboTax. Holistic search marketing refers to a combination of paid search advertising, also called pay-per-click or PPC advertising, and search engine optimization, also called SEO. (RX582 (Intuit) at INTUIT-FTC-PART3-000601290; Ryan (Intuit) Tr. 696; GX156 (Ryan (Intuit) IHT) at 30-31).

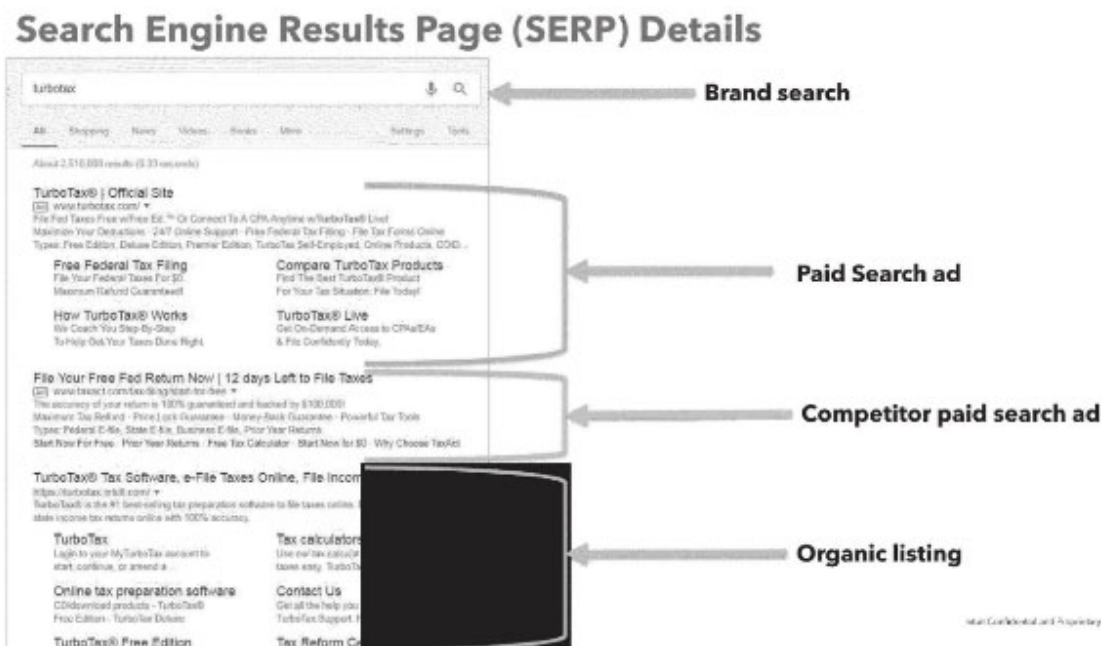
Response to Finding No. 62:

The Proposed Finding is misleading in that it states that Intuit advertised “TurboTax.” Intuit does not typically advertise just the brand “TurboTax.” Instead, Intuit typically advertises for specific TurboTax products, known as SKUs. (GX156 (Ryan (Intuit) IHT) at 107-134; Ryan (Intuit) Tr. 691; Johnson (Intuit) Tr. 573-574; PFF ¶¶161, 171, 173, 178). In this case, Complaint Counsel have challenged a small percentage of the advertisements Intuit ran during the relevant period (PFF ¶¶205, 214, 247, 265, 280, 293), but the ads Complaint Counsel challenge were not for “TurboTax” but for TurboTax’s free SKUs, including TurboTax Free Edition and TurboTax Live Basic (PFF ¶¶205-301), both of which are completely free (PFF ¶¶69, 109-112). And none of the challenged ads claim—expressly or impliedly—that all TurboTax SKUs are free. (PFF ¶¶210-211, 242-244, 260-262, 273-275, 288-290, 297-299).

The Proposed Finding is correct, however, that Intuit advertises free TurboTax SKUs through holistic search marketing. Intuit uses holistic search marketing to increase conversion among consumers who are already in the market for online tax-preparation products generally, or who may be searching for information about TurboTax specifically. (PFF ¶183). With respect to search engine optimization (SEO), Intuit uses different techniques, such as modifying the content on webpages, to get the TurboTax website to rank highly in organic search results and help consumers find the TurboTax SKU that best fits their tax needs. (PFF ¶185). As with all ads for TurboTax SKUs, Intuit’s holistic search advertising targets ads for individual TurboTax SKUs toward the audiences most likely to qualify to use those products. (PFF ¶190). Through SEO, Intuit attempts to direct its marketing for specific TurboTax SKUs to consumers who have indicated that the promoted SKU would be right for their tax situation. (PFF ¶199). For instance, if a consumer searches “TurboTax Free” on the internet, Intuit’s SEO strategy will result in her being served with more prominent results related to TurboTax Free Edition. (PFF

200). If a consumer searches phrases such as “TurboTax sold new investments” or “TurboTax rental property” on the internet, Intuit’s SEO strategy will result in a consumer “see[ing] content for TurboTax Premier appearing in those search results,” because that product covers investments and rental properties. (PFF ¶201). It is incorrect to suggest that Intuit’s use of holistic search advertising is misleading or deceptive. Tellingly, Complaint Counsel have not identified any holistic search advertising that they contend is deceptive.

63. A screenshot of a 2019 marketing function review presentation (RX582 (Intuit) at INTUIT-FTC-PART3-000601312) appears below:



Response to Finding No. 63:

Intuit has no specific response except to note that Intuit targets its ads for free TurboTax SKUs, including holistic search marketing, to consumers most likely to have simple returns and thus qualify for the free SKU. (PFF ¶¶190-193). Intuit further notes that the cited exhibit reflects that consumers shown a paid-search ad are also shown paid-search ads by TurboTax competitors, as well organic search results, which often include additional TurboTax results that provide further qualifications for its free SKUs. (See RX1438 (Intuit); PFF ¶398).

64. Intuit uses pay-per-click advertising to promote TurboTax by placing advertising on search engine result pages for queries that customers use to find products. (GX156 (Ryan (Intuit) IHT) at 31; *see also* Ryan (Intuit) Tr. 696, 697; *see, e.g.*, RX1440).

Response to Finding No. 64:

The Proposed Finding is inaccurate in that it states that Intuit promotes “TurboTax.” Intuit does not typically advertise just the brand “TurboTax.” Instead, Intuit typically advertises for specific TurboTax products, known as SKUs. (GX156 (Ryan (Intuit) IHT) at 107-134; Ryan (Intuit) Tr. 691; Johnson (Intuit) Tr. 573-574; PFF ¶¶161, 171, 173, 178). In this case, Complaint Counsel have challenged a small percentage of the advertisements Intuit ran during the relevant period (PFF ¶¶205, 214, 247, 265, 280, 293); but the ads Complaint Counsel challenge were not for “TurboTax” but for TurboTax’s free SKUs, including TurboTax Free Edition and TurboTax Live Basic (PFF ¶¶205-301), both of which are completely free (PFF ¶¶69, 109-112). And none of the challenged ads claim—expressly or impliedly—that all TurboTax SKUs are free. (PFF ¶¶210-211, 242-244, 260-262, 273-275, 288-290, 297-299).

The Proposed Finding is also misleading in that it states that Intuit places ads on search engine results pages. Intuit does not control when or how those ads appear on the search engine’s results page. (PFF ¶184; Ryan (Intuit) Tr. 697; GX439 (Ryan (Intuit) Decl.) ¶23). Instead, Intuit bids on a variety of keywords in an auction marketplace, and if Intuit is the highest bidder, a TurboTax advertisement would appear at the top of the search results page when consumers search for those keywords. (PFF ¶184; Ryan (Intuit) Tr. 696-697; GX151 (Ison (Intuit) IHT) at 61-63; GX156 (Ryan (Intuit) IHT) at 31; Hauser (Intuit) Tr. 973-974). Intuit submits components of the advertising copy that should appear when a paid-search ad is shown, but ultimately the search engine (e.g., Google or Bing) compiles and presents the advertisement based on the search performed and the information the search engine has about the particular consumer who performed the search. (PFF ¶184; Ryan (Intuit) Tr. 697).

The Proposed Finding is correct, however, that Intuit advertised free TurboTax SKUs with paid-search advertisements. As with all ads for TurboTax SKUs, Intuit's paid-search advertising is targeted toward the audiences most likely to qualify to use those products. (PFF ¶190). For ads for free TurboTax SKUs, Intuit targets consumers with simple tax returns who are likely to qualify for the free product. (PFF ¶¶191-193). Nearly all of the challenged paid-search ads in this case stated in writing that the free offering being advertised was for "TurboTax Free Edition." (PFF ¶266). Most of the challenged ads further conveyed that the offer was available only to consumers who qualify, stating in writing that it was for "simple tax returns only" or that "[o]ver 50 million Americans can file with TurboTax Free Edition." (PFF ¶¶266, 267). Next to or above this qualifying language, there was a hyperlink to the Free Edition landing page where consumers would see detailed information about Free Edition's qualifications. (PFF ¶¶266, 269). Given that the challenged ads linked to the TurboTax website, it is undisputed that the information on that website was integrated into the challenged ads. (CCFF ¶455; *see also* PFF ¶¶328-330).

65. Intuit also uses marketing directly to consumers to promote TurboTax through push notifications, SMS, and emails. (Ryan (Intuit) Tr. 689-690, 695-696; GX156 (Ryan (Intuit) IHT) at 40).

Response to Finding No. 65:

The Proposed Finding is inaccurate. Intuit does not typically promote "TurboTax." Intuit typically advertises for specific TurboTax products, known as SKUs. (GX156 (Ryan (Intuit) IHT) at 107-134; Ryan (Intuit) Tr. 691; Johnson (Intuit) Tr. 573-574; PFF ¶¶161, 171, 173, 178). In this case, Complaint Counsel have challenged a small percentage of the advertisements Intuit ran during the relevant period (PFF ¶¶205, 214, 247, 265, 280, 293); the ads Complaint Counsel challenge were not for "TurboTax" but for TurboTax's free SKUs, including TurboTax Free Edition and TurboTax Live Basic (PFF ¶¶205-301), both of which are completely free (PFF

¶¶69, 109-112). None of the challenged ads claim—expressly or impliedly—that all TurboTax SKUs are free. (PFF ¶¶210-211, 242-244, 260-262, 273-275, 288-290, 297-299).

The Proposed Finding is also irrelevant in part because none of the challenged advertisements are push notifications or SMS advertising.

The Proposed Finding is correct, however, that Intuit advertised TurboTax SKUs through direct marketing, including emails. As with all ads for TurboTax SKUs, Intuit’s paid-search advertising is targeted toward the audiences most likely to qualify to use those products. (PFF ¶190). Through direct marketing, Intuit is able to leverage customer data and predictive models to target advertisements that are personalized to the individual consumer and their tax situation. (PFF ¶187). Intuit uses this information to advertise free TurboTax SKUs directly to consumers likely to have simple tax returns, such as consumers who filed with TurboTax Free Edition the previous year or those who have entered information into TurboTax Free Edition in the current Year. (PFF ¶198; *see also* PFF ¶¶191-197). Notably, Intuit typically only sends email advertisements to consumers with some prior experience using TurboTax, such as consumers who had previously used Free Edition or who had started but not yet finished a return using Free Edition. (PFF ¶283). The challenged email ads in this case included qualifications indicating that the free TurboTax offer was only available to consumers who qualified. (PFF ¶281). These qualifications were often written in different ways and in multiple locations in a single email. (PFF ¶281). Most of the challenged email ads also expressly identified the TurboTax SKU being advertised. (PFF ¶281). These email ads also contain hyperlinks, which take the consumer directly to a TurboTax landing page that details the TurboTax Free Edition qualifications. (PFF ¶284). Given that the challenged ads linked to the TurboTax website, it is undisputed that the

information on that website was integrated into the challenged ads. (CCFF ¶455; *see also* PFF ¶¶328-330).

B. Television Commercials & Video Ads

1. 2015 Super Bowl Ad

66. GX321 is a video recording of the 2015 TurboTax Super Bowl ad, “Boston Tea Party.” (GX321 (Complaint Counsel); GX342 (Complaint Counsel) ¶ 22, at CC-00006910). The TurboTax “Boston Tea Party” ad aired during the 2015 Super Bowl game. (GX320 (Complaint Counsel) at CC-00006790-91; GX342 (Complaint Counsel) ¶¶ 20-22, at CC-00006910).

Response to Finding No. 66:

The Proposed Finding and the underlying ad should not be considered in this proceeding because the challenged ad aired in Tax Year 2014 and has not aired since. The challenged ad is therefore both outside the relevant statute of limitations (*see* COL ¶¶147-156), and also outside the relevant period referenced in the complaint (*see* RX260 (FTC) ¶¶9-20, 21-22, 37-44, 47, 49, 53, 56, 61-62). The Commissioners never voted to challenge advertisements that ran before 2016 (*see* RX260 (FTC) ¶¶9-20, 21-22, 37-44, 47, 49, 53, 56, 61-62) and thus this advertisement is not properly before the Court.

67. The following is a transcription of the words spoken in the 2015 TurboTax Super Bowl ad, “Boston Tea Party,” ad:

[commotion, music, and shouting]

FIRST REVOLUTIONARY: No taxation without represent . . .

FIRST BRITISH SOLDIER: Yes, yes, we hear you on the tax thing.

SECOND BRITISH SOLDIER: But what if it were free to file your taxes?

SECOND REVOLUTIONARY: Like, free free?

SECOND BRITISH SOLDIER: Yes, yes. You’d pay nothing. Not a thing. No thing.

THIRD REVOLUTIONARY: Well alright then!

[music]

FOURTH REVOLUTIONARY: Alright then!

THIRD BRITISH SOLDIER: Cheers!

WOMAN: Alright then.

FOURTH BRITISH SOLDIER: Alright then.

GEORGE WASHINGTON: Alright then. Back it up!

VOICEOVER: Okay, so maybe that's not exactly how it went down, but you can file on TurboTax for absolutely nothing. Intuit TurboTax. It's amazing what you're capable of.

(GX321 (Complaint Counsel); GX342 (Complaint Counsel) ¶ 24, at CC-00006911).

Response to Finding No. 67:

The Proposed Finding is incomplete and misleading because it is just a snippet of the full ad that actually ran and Complaint Counsel have omitted critical information for evaluating the advertisement, including that the ad also contained disclosures about qualifications. (*See* CCF ¶68; Response to CCF ¶68). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

Moreover, the Proposed Finding does not support an inference that the ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The ad informed consumers in writing that the free offer was for a specific TurboTax SKU, “TurboTax Federal Free Edition” (or “Absolute Zero”); that the free offer had qualifications based on the complexity of a consumer’s tax return, by stating “simple U.S. returns only”; and that consumers could learn more about qualifications by “See[ing] offer details at TurboTax.com.” (GX321 (FTC); PFF ¶244). Intuit used the “Absolute Zero” name in the ad because it was the name of the free TurboTax offer at the time and Absolute Zero was truly free. (PFF ¶103). Complaint Counsel offered no evidence that the written

disclosures were not visible to consumers, (PFF ¶230), nor could they given the prominence of those disclosures and the benchmarking analysis showing that the disclosures were consistent with those in comparable ads (PFF ¶¶232-241).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel allege. Instead, the undisputed testimony from Intuit's executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (See PFF ¶¶167-177, 190, 192-202, 405, 852, 857, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel offered no evidence that the ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the disclosures in the ad ensured that reasonable consumers understood that there were qualifications for the free TurboTax SKU being advertised, the nature and character of those qualifications, and where additional detail was available. (PFF ¶¶241-246, 302-330, 334). Even without those disclosures, reasonable consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for the free SKU is likely to be available on the TurboTax website. (PFF ¶¶470-527).

68. A screen shown at 0:55 near the end of the 2015 TurboTax Super Bowl ad, "Boston Tea Party," states: "Intuit TurboTax Federal Free Edition Absolutezero \$0 Fed \$0 State \$0 To File." (GX321 (Complaint Counsel) at 0:55). Also at 0:55, a disclaimer appears in smaller print near the bottom of the screen which reads, "TurboTax Federal Free Edition is for simple U.S. returns only. Offer may end without notice. See offer details at TurboTax.com. Screen image simulated." (GX321 (Complaint Counsel) at 0:55).

Response to Finding No. 68:

The Proposed Finding is incorrect, incomplete, and misleading because it wrongly refers to language in the ad as a “disclaimer.” Further, the Proposed Finding is just a snippet of the full ad that actually ran and Complaint Counsel have omitted critical information for evaluating the advertisement. For instance, the referenced language appears on screen at 0:54 and stays on screen for several seconds. (GX321 (FTC)). The Proposed Finding also fails to recognize that by inviting consumers to “[s]ee offer details at turbotax.com,” all content on the TurboTax website—including detailed information about qualifications—was “integrated” into the ad and should be considered when assessing the ad’s disclosures. (PFF ¶¶328; CCFF ¶455). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

Moreover, the Proposed Finding does not support an inference that the ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The ad informed consumers in writing that the free offer was for a specific TurboTax SKU, “TurboTax Federal Free Edition” (or “Absolute Zero”); that the free offer had qualifications based on the complexity of a consumer’s tax return, by stating “for simple U.S. returns only”; and that consumers could learn more about qualifications by “See[ing] offer details at TurboTax.com.” (GX321 (FTC); PFF ¶244). Intuit used the “Absolute Zero” name in the ad because it was the name of the free TurboTax offer at the time and Absolute Zero was truly free. (PFF ¶103). Complaint Counsel offered no evidence that the written disclosures were not visible to consumers (PFF ¶230), nor could they given the prominence of those disclosures and the benchmarking analysis showing that the disclosures were consistent with disclosures in comparable ads (PFF ¶¶232-241).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel allege. Instead, the undisputed testimony from Intuit's executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (See PFF ¶¶167-177, 190, 192-202, 405, 852, 857, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel offered no evidence that the ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that reasonable consumers would understand the language highlighted in the Proposed Finding and described above as setting forth qualifications to use the free product, details of which were available if desired on the TurboTax website. (PFF ¶¶241-246, 302-330, 334). Even without those disclosures, consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for the free SKU is likely to be available on the TurboTax website. (PFF ¶¶470-527).

69. Before running the TurboTax “Boston Tea Party” ad during the 2015 Super Bowl, Intuit conducted consumer research that was shared with Intuit's then-CEO, Brad Smith, as well as its present CEO, Sasan Goodarzi. (GX341 (Intuit) at CC-00006897). Intuit's research found that: “Consumers played back a clear and single-minded message: *File/do your taxes for free; TurboTax is free*[.] There was no confusion or ambiguity in the message[.]” (GX341 (Intuit) at CC-00006900). The research also found that: “While free came through clearly, there was little playback of the offer specifics (Absolute Zero, free State) that were mentioned at the end of the ad. However, consumers voiced very few questions or confusion about the details[.]” (GX341 (Intuit) at CC-00006901).

Response to Finding No. 69:

The Proposed Finding—as well as the cited exhibit and ad itself—should not be considered in this proceeding because the challenged ad aired in Tax Year 2014 and has not aired

since. The challenged ad is therefore both outside the relevant statute of limitations (*see* COL ¶¶147-156), and also outside the relevant period referenced in the complaint (*see* RX260 (FTC) ¶¶9-20, 21-22, 37-44, 47, 49, 53, 56, 61-62). The Commissioners never voted to challenge advertisements that ran before 2016 (*see* RX260 (FTC) ¶¶9-20, 21-22, 37-44, 47, 49, 53, 56, 61-62) and thus this advertisement is not properly before the Court.

Moreover, the Proposed Finding is incomplete and misleading because the cited survey does not reflect that the Boston Tea Party ad conveyed to consumers that “TurboTax is free” or that reasonable consumers were misled by the ad. In fact, the survey says nothing about what the Boston Tea Party ad that aired in Tax Year 2015 conveyed to consumers, because the survey did not test the ad that actually aired. (*See* GX159 (Ryan (Intuit) Dep.) at 53). Most significantly, the draft version of the ad shown to survey participants likely did not include any disclosures; at a minimum, the survey occurred before the ad’s disclosures were finalized. (Ryan (Intuit) Tr. 713-714; GX159 (Ryan (Intuit) Dep.) at 12-13). The draft ad also underwent substantive revisions after the test before it was aired. (Ryan (Intuit) Tr. 713-715; GX159 (Ryan (Intuit) Dep.) at 12-13). The final version, for example, contained different shots of the actors and potentially different audio. (Ryan (Intuit) Tr. 715).

Beyond not testing the version of the Boston Tea Party ad that consumers actually viewed, the survey’s methodology does not offer reliable insights into the message the ad conveyed to reasonable consumers. As Ms. Ryan explained, the survey was not meant to yield quantitative results about consumers’ takeaway from the ad. (GX159 (Ryan (Intuit) Dep.) at 11). Intuit instead conducted the survey at the “last minute,” interviewing a mere 26 consumers “pulled off the street” in San Francisco’s Union Station. (Ryan (Intuit) Tr. 713; GX341 (FTC) at -6899). These consumers were not a representative sample of the target population for the ad, or

even the general population, and because they were quite literally interviewed “on the street,” they did not view the ad where it would typically be seen. (Ryan (Intuit) Tr. 714; GX159 (Ryan (Intuit) Dep.) at 54).

The survey’s purpose further underscores that Complaint Counsel’s reliance on it is misplaced. As noted, the survey was not designed to test whether the ad effectively conveyed Absolute Zero’s qualifications. (Ryan (Intuit) Tr. 713-714; GX159 (Ryan (Intuit) Dep.) at 11-12). Intuit instead conducted this limited, qualitative research to determine whether the ad’s parody of the Boston Tea Party event would alienate audiences, either because of the political subject matter or physical violence. (Ryan (Intuit) Tr. 713; GX159 (Ryan (Intuit) Dep.) at 11; *see also* GX341 (FTC) at -6897 (“[The ad] should cause no social, political or governmental offense to US, British or Canadian audiences.). Because assessing the message the ad conveyed, including the offer’s qualifications, was “not the intent of this research that purpose, the quote referenced in the Proposed Finding discussing the message that consumers’ purportedly took away from the ad should be “characterize[d] as shorthand” for the takeaway that TurboTax Absolute Zero is free (which it was). (GX159 (Ryan (Intuit) Dep.) at 53).

In fact, the research should not be relied upon to reflect consumer understanding of the Boston Tea Party Ad. (Ryan (Intuit) Tr. 715; GX159 (Ryan (Intuit) Dep.) at 53). The draft ad shown to survey participants underwent substantive revisions, including to its disclosures, before it was aired. (Ryan (Intuit) Tr. 713-715; GX159 (Ryan (Intuit) Dep.) at 12-13). The final Boston Tea Party contained different shots of the actors and potentially different audio. (Ryan (Intuit) Tr. 715). The research was conducted before the ad’s disclosure screen was finalized. (Ryan (Intuit) Tr. 713-714; GX159 (Ryan (Intuit) Dep.) at 12-13). And the version of the ad shown to survey participants likely did not include any disclosures at all. (Ryan (Intuit) Tr. 714). The

survey was also not meant to yield quantitative results. (GX159 (Ryan (Intuit) Dep.) at 11). Intuit conducted this survey at the “last minute,” interviewing a mere 26 consumers “pulled off the street” in San Francisco’s Union Station. (Ryan (Intuit) Tr. 713; GX341 (FTC) at -6899). These consumers were not a scientific sample of the population, and because they were quite literally interviewed “on the street,” they did not view the ad where it would be typically consumed. (Ryan (Intuit) Tr. 714; GX159 (Ryan (Intuit) Dep.) at 54).

In any event, the Proposed Finding is irrelevant because Complaint Counsel have not even established that the draft ad misled any of the survey participants. The 26 survey participants “[s]kewed younger” and included members of the military. (GX341 (FTC) at -6899). These groups are more likely to be eligible to file for free with TurboTax than the general population: Younger taxpayers are more likely to have simple tax returns and qualify for Free Edition (PFF ¶¶85, 193), and Intuit has long allowed certain military personnel to file for free using any TurboTax DIY SKU (PFF ¶¶151-152). It is possible that all 26 participants could “File/do [their] taxes for free” with TurboTax, and Complaint Counsel offered no evidence to the contrary. (*See* CCF ¶69).

2. 2016 Super Bowl Ad

70. GX323 is a video recording of the 2016 TurboTax Super Bowl ad, “Never a Sellout.” (GX323 (Complaint Counsel); GX342 (Complaint Counsel) ¶ 26, at CC-00006912); *see also* Johnson (Intuit) Tr. 657-658).

Response to Finding No. 70:

The Proposed Finding and the underlying ad should not be considered in this proceeding because the challenged ad aired in Tax Year 2015 and has not aired since. The challenged ad is therefore both outside the relevant statute of limitations (*see* COL ¶¶147-156), and also outside the relevant period referenced in the complaint (*see* RX260 (FTC) ¶¶9-20, 21-22, 37-44, 47, 49, 53, 56, 61-62). The Commissioners never voted to challenge advertisements that ran before

2016 (*see* RX260 (FTC) ¶¶9-20, 21-22, 37-44, 47, 49, 53, 56, 61-62) and thus this advertisement is not properly before the Court.

71. The following is a transcription of the words spoken in the 2016 TurboTax Super Bowl “Never a Sellout” ad:

INTERVIEWER: Sir Anthony Hopkins, every actor at some point considers selling out.

SIR ANTHONY HOPKINS: I would never tarnish my name by selling you something.

Now, if I were to tell you to go to turbotax.com, it’s because TurboTax Absolute Zero lets you file your taxes for free.

INTERVIEWER: You’re . . . you’re not selling anything.

HOPKINS: It’s free. There’s nothing to sell. Come here, TurboTax.com. [dog jumps on his lap]. Such a good girl, TurboTax.com.

(GX323 (Complaint Counsel); GX342 (Complaint Counsel) ¶ 28, at CC-00006912); *see also* Johnson (Intuit) Tr. 660).

Response to Finding No. 71:

The Proposed Finding is incomplete and misleading because it is just a snippet of the full ad that actually ran and Complaint Counsel have omitted critical information for evaluating the advertisement, including that the ad also contained disclosures about qualifications. (*See* CCFF ¶72; Response to CCFF ¶72). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

Moreover, the Proposed Finding does not support an inference that the ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The ad informed consumers through a spoken narrative that the free offer was for a specific TurboTax SKU, “TurboTax Absolute Zero,” and that consumers could learn more at “TurboTax.com.” (GX323 (Intuit)). Complaint Counsel offered

no evidence that these words were not audible. (PFF ¶231). The ad also informed consumers in writing that the free offer was for a specific TurboTax SKU, “TurboTax Federal Free Edition” or “Absolute Zero”; that the free offer had qualifications based on the complexity of a consumer’s tax return, by stating “for simple US returns only”; and that consumers could learn more about the qualifications by “See[ing] offer details at TurboTax.com.” (GX323 (Intuit); PFF ¶244). Complaint Counsel offered no evidence that the written disclosures were not visible to consumers, (PFF ¶230), nor could they given the prominence of those disclosures and the benchmarking analysis showing that the disclosures were consistent with those in comparable ads (PFF ¶¶232-241).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel allege. Instead, the undisputed testimony from Intuit’s executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (See PFF ¶¶167-177, 190, 192-202, 405, 852, 857, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel offered no evidence that the ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the disclosures in the ad ensured that reasonable consumers understood that there were qualifications for the free TurboTax SKU being advertised, the nature and character of those qualifications, and where additional detail was available. (PFF ¶¶241-246, 302-330, 334). Even without those disclosures, reasonable consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax

returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

72. The disclaimer shown at 0:18 in the 2016 TurboTax Super Bowl “Never a Sellout” ad states, “Screen simulated. TurboTax Federal Free Edition is for simple US returns only. Offer may end without notice. See offer details at TurboTax.com.” (GX 323 (Complaint Counsel) at 0:18).

Response to Finding No. 72:

The Proposed Finding is incorrect, incomplete, and misleading because it wrongly refers to language in the ad as a “disclaimer” and ignores other written disclosures in the ad. The referenced language also appears on screen at 0:17 and stays on screen for several seconds. (GX323 (Intuit)). Not mentioned in the Proposed Finding, the ad displays the “Absolute Zero” product name on a teacup at 0:08, on a phone at 0:11, on slippers at 0:15, on a phone at 0:18, on a dog at 0:26, and on a painting at 0:28. (GX323 (Intuit)). Intuit used the “Absolute Zero” name in the ad because it was the name of the free TurboTax offer at the time and Absolute Zero was truly free. (PFF ¶103). Further, by inviting consumers to “See offer details at TurboTax.com,” all content on the TurboTax website—including detailed information about qualifications—was “integrated” into the ad, and therefore all disclosures on the website are incorporated into the ad. (PFF ¶328; CCF ¶455). The Proposed Finding also fails to account for the audio disclosures in the ad, as described in the preceding finding and response thereto. (CCFF ¶71; Response to CCF ¶71). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the ad must be considered as a whole, including any qualifications included in the ad. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

Moreover, the Proposed Finding does not support an inference that the ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The ad informed consumers in writing that the free offer

was for a specific TurboTax SKU, “TurboTax Federal Free Edition” or “Absolute Zero”; that the free offer had qualifications based on the complexity of a consumer’s tax return, by stating “for simple US returns only”; and that consumers could learn more about the qualifications by “See[ing] offer details at TurboTax.com.” (GX323 (Intuit); PFF ¶244). Complaint Counsel offered no evidence that the written disclosures were not visible to consumers (PFF ¶230), nor could they given the prominence of those disclosures and the benchmarking analysis showing that the disclosures were consistent with disclosures in comparable ads (PFF ¶¶232-241). The ad also informed consumers in spoken narrative that the free offer was for a specific SKU by stating “*TurboTax Absolute Zero* lets you file your taxes for free,” and the spoken narrative also referenced the TurboTax website, TurboTax.com. (GX323 (Intuit) (emphasis added)). Complaint Counsel offered no evidence that these words could not be heard by consumers. (PFF ¶231).



Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel allege. Instead, the undisputed testimony from Intuit’s executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (See PFF ¶¶167-177, 190, 192-202, 405, 852, 857, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel also offered no evidence that the ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that reasonable consumers would understand the language highlighted in the Proposed Finding and described above as setting forth qualifications to use the free product,

details of which were available if desired on the TurboTax website. (PFF ¶¶241-246, 302-330, 334). Even without those disclosures, consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

73. The TurboTax “Never a Sellout” ad aired during the 2016 Super Bowl game. (GX322 (Complaint Counsel) at CC-00006795-96; GX342 (Complaint Counsel) ¶ 25, at CC-00006911; *see also* Johnson (Intuit) Tr. 657-658).

Response to Finding No. 73:

The Proposed Finding is incomplete and misleading because it fails to explain why Intuit aired the ad during the 2016 Super Bowl. Intuit did so to target consumers likely to have simple tax returns and who would therefore qualify for the free offer with the message that TurboTax Free Edition is available for free to consumers with simple tax returns. (Johnson (Intuit) Tr. 662; PFF ¶¶191-192, 196). Consumers with simple tax returns are “ ”, and the Super Bowl occurs during the “First Peak” of tax season, “when the majority of Simple Filers prepare and file their taxes.” (PFF ¶196; Johnson (Intuit) Tr. 654-655). Thus, airing the ad during the Super Bowl allowed Intuit to inform taxpayers with simple tax returns that they could file for free using TurboTax Free Edition. (PFF ¶191). While it is undoubtedly true that some taxpayers without simple returns watch the Super Bowl, the ad stated clearly and unequivocally that only a specific TurboTax SKU would be free (and that TurboTax SKU was, in fact, free), that TurboTax Free Edition was for simple tax returns *only*, and that details about those qualifications were available at the TurboTax website.

3. TurboTax Television and Video Ads TY 2017

a. Fish

74. GX325 is a true and correct copy of the 15-second TurboTax “Fish” ad. (GX325 (Intuit); GX342 (Complaint Counsel) ¶ 31, at CC-00006913).

Response to Finding No. 74:

The Proposed Finding and the underlying ad should not be considered in this proceeding because the challenged ad aired in Tax Year 2017 and has not aired since. The challenged ad is therefore outside the relevant statute of limitations. (*See* COL ¶¶147-156).

75. The following is a transcription of the words spoken in the 15-second TurboTax “Fish” ad:

[swordfish screaming]

MAN: At least your taxes are free.

[all three men laugh]

VOICE OVER: Intuit TurboTax.

(GX325 (Intuit); GX342 (Complaint Counsel) ¶ 32, at CC-00006913-14).

Response to Finding No. 75:

The Proposed Finding is incomplete and misleading because it is just a snippet of the full ad that actually ran and Complaint Counsel have omitted critical information for evaluating the advertisement, including that the ad also contained disclosures about qualifications. (*See* CCF ¶76; Response to CCF ¶76). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

Moreover, the Proposed Finding does not support an inference that the ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The ad informed consumers in writing that the free offer

was for a specific TurboTax SKU, “Absolute Zero”; that the free offer had qualifications based on the complexity of a consumer’s tax return, by stating “for simple US returns”; and that consumers could learn more about the qualifications by “See[ing] offer details at TurboTax.com.” (GX325 (Intuit); PFF ¶244). Complaint Counsel offered no evidence that the written disclosures were not visible to consumers, (PFF ¶230), nor could they given the prominence of those disclosures and the benchmarking analysis showing that the disclosures were consistent with those in comparable ads (PFF ¶¶232-241).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel allege. Instead, the undisputed testimony from Intuit’s executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (See PFF ¶¶167-177, 190, 192-202, 405, 852, 857, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel offered no evidence that the ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the disclosures in the ad ensured that reasonable consumers understood that there were qualifications for the free TurboTax SKU being advertised, the nature and character of those qualifications, and where additional detail was available. (PFF ¶¶241-246, 302-330, 334). Even without those disclosures, reasonable consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

76. A disclaimer shown at 0:03 in the 15-second TurboTax “Fish” ad reads, “Dramatization. AbsoluteZero product only. For simple U.S. returns. Offer may end without notice, customer must file taxes before offer ends to file for free. See offer details at TurboTax.com.” (GX325 (Intuit) at 0:03).

Response to Finding No. 76:

The Proposed Finding is incorrect, incomplete, and misleading because it wrongly refers to language in the ad as a “disclaimer” and ignores other disclosures in the ad. The referenced language also appears on screen at 0:02 and stays on screen for several seconds. (GX325 (Intuit)). Not mentioned in the Proposed Finding, the ad displays the “AbsoluteZero” product name at 0:14 and it remains on screen for several seconds. (GX325 (Intuit)). Intuit used the “AbsoluteZero” name in the ad because it was the name of the free TurboTax offer at the time and Absolute Zero was truly free. (PFF ¶103). Further, the Proposed Finding fails to recognize that by inviting consumers to “[s]ee offer details at TurboTax.com,” all content on the TurboTax website—including detailed information about qualifications—was “integrated” into the ad, and therefore all disclosures on the website are incorporated into the ad. (PFF ¶328; CCFF ¶455). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

Moreover, the Proposed Finding does not support an inference that the ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The ad informed consumers in writing that the free offer was for a specific TurboTax SKU, “AbsoluteZero”; that the free offer had qualifications based on the complexity of a consumer’s tax return, by stating “[f]or simple U.S. returns”; and that consumers could learn more about the qualifications by “See[ing] offer details at TurbotTax.com.” (GX325 (Intuit); PFF ¶244). Complaint Counsel offered no evidence that the

written disclosures were not visible to consumers (PFF ¶230), nor could they given the prominence of those disclosures and the benchmarking analysis showing that the disclosures were consistent with those in comparable ads (PFF ¶¶232-241).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel allege. Instead, the undisputed testimony from Intuit's executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (See PFF ¶¶167-177, 190, 192-202, 405, 852, 857, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel offered no evidence that the ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. The evidence establishes that the disclosures in the ad ensured that reasonable consumers understood that there were qualifications for the free TurboTax SKU being advertised, the nature and character of those qualifications, and where additional detail was available. (PFF ¶¶241-246, 302-330, 334). Even without those disclosures, reasonable consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

77. A true and correct copy of the 30-second TurboTax "Fish" ad is at GX324. (Shiller (Complaint Counsel) Tr. 186-87; GX324 (Intuit); GX342 (Complaint Counsel) ¶ 29, at CC-00006913).

Response to Finding No. 77:

The Proposed Finding and the underlying ad should not be considered in this proceeding because the challenged ad aired in Tax Year 2017 and has not aired since. The challenged ad is therefore outside the relevant statute of limitations. (*See* COL ¶¶147-156).

78. The following is a true and correct transcription of the words spoken in the 30-second “Fish” TurboTax ad:

[grunting]

MAN IMPALED BY SWORDFISH: [swordfish screaming] Aww, man. My lucky shirt.

MAN WITH FISHING POLE: At least your taxes are free.

MAN CARRYING BEVERAGES: [seeing man impaled by swordfish] What happened?

MAN WITH FISHING POLE: It’s his lucky shirt

MAN CARRYING BEVERAGES: Well, with TurboTax AbsoluteZero, at least your taxes are free.

MAN WITH FISHING POLE: That’s what I said!

[all three men laugh]

VOICEOVER: Intuit TurboTax.

(GX324 (Intuit); GX342 (Complaint Counsel) ¶ 30, at CC-00006913; *see also* Shiller (Complaint Counsel) Tr. 187).

Response to Finding No. 78:

The Proposed Finding is incomplete and misleading because it is just a snippet of the full ad that actually ran and Complaint Counsel have omitted critical information for evaluating the advertisement, including that the ad contained disclosures about qualifications. (*See* CCF ¶79; Response to CCF ¶79). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

Moreover, the Proposed Finding does not support an inference that the ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The ad informed consumers through a spoken narrative that the free offer was for a specific TurboTax SKU, “TurboTax Absolute Zero.” (GX324 (Intuit)). Complaint Counsel offered no evidence that these words were not audible. (PFF ¶231). The ad also informed consumers in writing that the free offer was for a specific TurboTax SKU, “AbsoluteZero”; that the free offer had qualifications based on the complexity of a consumer’s tax return, by stating “for simple US returns only”; and that consumers could learn more about the qualifications by “See[ing] offer details at TurboTax.com.” (GX324 (Intuit); PFF ¶244). Complaint Counsel offered no evidence that the written disclosures were not visible to consumers, (PFF ¶230), nor could they given the prominence of those disclosures and the benchmarking analysis showing that the disclosures were consistent with those in comparable ads (PFF ¶¶232-241).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel allege. Instead, the undisputed testimony from Intuit’s executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (See PFF ¶¶167-177, 190, 192-202, 405, 852, 857, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel offered no evidence that the ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the disclosures in the ad ensured that reasonable consumers understood that there were

qualifications for the free TurboTax SKU being advertised, the nature and character of those qualifications, and where additional detail was available. (PFF ¶¶241-246, 302-330, 334). Even without those disclosures, reasonable consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

79. A disclaimer shown at 0:04 in the 30-second TurboTax “Fish” ad reads, “Dramatization. For simple U.S. returns. Offer may end without notice, customer must file taxes before offer ends to file for free. See offer details at TurboTax.com.” (GX324 (Intuit) at 0:04).

Response to Finding No. 79:

The Proposed Finding is incorrect, incomplete, and misleading because it wrongly refers to language in the ad as a “disclaimer” and ignores other disclosures in the ad. Not mentioned in the Proposed Finding is that the ad includes a verbal disclosure stating “With TurboTax Absolute Zero, at least your taxes are free,” and also displayed the TurboTax Absolute Zero logo. (GX324 (Intuit)). Intuit used the “Absolute Zero” name in the ad because it was the name of the free TurboTax offer at the time and Absolute Zero was truly free. (PFF ¶103). Further, the Proposed Finding fails to recognize that by inviting consumers to “[s]ee offer details at TurboTax.com,” all content on the TurboTax website—including detailed information about qualifications—was “integrated” into the ad, and therefore all disclosures on the website are incorporated into the ad. (PFF ¶328; CCF ¶455). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

Moreover, the Proposed Finding does not support an inference that the ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The ad informed consumers through a spoken narrative

that the free offer was for a specific TurboTax SKU, “TurboTax Absolute Zero.” (GX324 (Intuit)). Complaint Counsel offered no evidence that these words were not audible. (PFF ¶231). The ad also informed consumers in writing that the free offer was for a specific TurboTax SKU, “AbsoluteZero”; that the free offer had qualifications based on the complexity of a consumer’s tax return, by stating “[f]or simple U.S. returns”; and that consumers could learn more about the qualifications by “[s]ee[ing] offer details at TurboTax.com.” (GX324 (Intuit); PFF ¶244). Complaint Counsel offered no evidence that the written disclosures were not visible to consumers (PFF ¶230), nor could they given the prominence of those disclosures and the benchmarking analysis showing that the disclosures were consistent with those in comparable ads (PFF ¶¶232-241).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel allege. Instead, the undisputed testimony from Intuit’s executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (See PFF ¶¶167-177, 190, 192-202, 405, 852, 857, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel offered no evidence that the ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. The evidence establishes that the disclosures in the ad ensured that reasonable consumers understood that there were qualifications for the free TurboTax SKU being advertised, the nature and character of those qualifications, and where additional detail was available. (PFF ¶¶241-246, 302-330, 334). Even without those disclosures, reasonable consumers understand that free tax-preparation offers are qualified, that their ability

to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

80. The TurboTax “Fish” ads aired on television between January 17, 2018, and February 5, 2018. (GX60 (Intuit) at CC-00000669).

Response to Finding No. 80:

The Proposed Finding and the underlying ad should not be considered in this proceeding because the challenged ad aired in Tax Year 2017 and has not aired since. The challenged ad is therefore outside the relevant statute of limitations. (See COL ¶¶147-156).

b. Guzman

81. A true and correct copy of the 15-second “Guzman” TurboTax ad is at GX344. (GX344 (Intuit); GX342 (Complaint Counsel) ¶ 34, at CC-00006914).

Response to Finding No. 81:

The Proposed Finding and the underlying ad should not be considered in this proceeding because the challenged ad aired in Tax Year 2017 and has not aired since. The challenged ad is therefore outside the relevant statute of limitations. (See COL ¶¶147-156).

82. The 15-second “Guzman” TurboTax ad includes the following claim: “But hey, at least my taxes are free.” (GX344 (Intuit) at 0:08).

Response to Finding No. 82:

The Proposed Finding is incomplete and misleading because it is just a snippet of the full ad that actually ran and Complaint Counsel have omitted critical information for evaluating the advertisement, including that the ad contained disclosures about qualifications. (See CCF ¶83; Response to CCF ¶83). Not mentioned in the Proposed Finding is that the referenced quote—“But hey, at least my taxes are free”—is spoken while the actor holds up a cellphone with a blue screen clearly displaying the TurboTax Absolute Zero logo, indicating that the free offer is for

Absolute Zero. (GX344 (Intuit)). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

Moreover, the Proposed Finding does not support an inference that the ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The ad informed consumers in writing that the free offer was for a specific TurboTax SKU, “AbsoluteZero”; that the free offer had qualifications based on the complexity of a consumer’s tax return, by stating “[f]or simple U.S. returns”; and that consumers could learn more about the qualifications by “See[ing] offer details at TurboTax.com.” (GX344 (Intuit); PFF ¶244). Complaint Counsel offered no evidence that the written disclosures were not visible (PFF ¶230), nor could they given the prominence of those disclosures and the benchmarking analysis showing that the disclosures were consistent with those in comparable ads (PFF ¶¶232-241).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel allege. Instead, the undisputed testimony from Intuit’s executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (See PFF ¶¶167-177, 190, 192-202, 405, 852, 857, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel offered no evidence that the ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the disclosures in the ad ensured that reasonable consumers understood that there were

qualifications for the free TurboTax SKU being advertised, the nature and character of those qualifications, and where additional detail was available. (PFF ¶¶241-246, 302-330, 334). Even without those disclosures, reasonable consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

83. A disclaimer shown at 0:05 in the “Guzman” TurboTax ad reads, “Screen simulated. AbsoluteZero product only. For simple U.S. returns. Offer may end without notice, customer must file taxes before offer ends to file for free. See offer details at TurboTax.com.” (GX344 (Intuit) at 0:05).

Response to Finding No. 83:

The Proposed Finding is incorrect, incomplete, and misleading because it wrongly refers to language in the ad as a “disclaimer” and ignores other disclosures in the ad. GX344 includes a written disclosure informing consumers that the free offer was for the “AbsoluteZero product only,” which appears on screen for several seconds. (GX344 (Intuit)). Intuit used the “Absolute Zero” name in the ad because it was the name of the free TurboTax offer at the time and Absolute Zero was truly free. (PFF ¶103). Further, the Proposed Finding fails to recognize that by inviting consumers to “[s]ee offer details at TurboTax.com,” all content on the TurboTax website—including detailed information about qualifications—was “integrated” into the ad, and therefore all disclosures on the website are incorporated into the ad. (PFF ¶328; CCFF ¶455). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

Moreover, the Proposed Finding does not support an inference that the ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be

free for the consumer when it was not. The ad informed consumers in writing that the free offer was for a specific TurboTax SKU, “AbsoluteZero”; that the free offer had qualifications based on the complexity of a consumer’s tax return, by stating “[f]or simple U.S. returns”; and that consumers could learn more about the qualifications by “[s]ee[ing] offer details at TurboTax.com.” (GX344 (Intuit); PFF ¶244). Complaint Counsel offered no evidence that the written disclosures were not visible to consumers (PFF ¶230), nor could they given the prominence of those disclosures and the benchmarking analysis showing that the disclosures were consistent with those in comparable ads (PFF ¶¶232-241).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel allege. Instead, the undisputed testimony from Intuit’s executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (See PFF ¶¶167-177, 190, 192-202, 405, 852, 857, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel offered no evidence that the ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. The evidence establishes that the disclosures in the ad ensured that reasonable consumers understood that there were qualifications for the free TurboTax SKU being advertised, the nature and character of those qualifications, and where additional detail was available. (PFF ¶¶241-246, 302-330, 334). Even without those disclosures, reasonable consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional

information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

84. The “Guzman” TurboTax ad aired on television between January 31, 2018, and February 20, 2018. (GX60 (Intuit) at CC-00000669).

Response to Finding No. 84:

The Proposed Finding and the underlying ad should not be considered in this proceeding because the challenged ad aired in Tax Year 2017 and has not aired since. The challenged ad is therefore outside the relevant statute of limitations. (See COL ¶¶147-156).

c. Cruise

85. A true and correct copy of the 30-second “Cruise” TurboTax ad is at GX345. (GX345 (Intuit); GX342 (Complaint Counsel) ¶ 35, at CC-00006914).

Response to Finding No. 85:

The Proposed Finding and the underlying ad should not be considered in this proceeding because the challenged ad aired in Tax Year 2017 and has not aired since. The challenged ad is therefore outside the relevant statute of limitations. (See COL ¶¶147-156).

86. The 30-second “Cruise” TurboTax ad includes the following claim: “Hey, at least your taxes are free....With TurboTax AbsoluteZero, at least your taxes are free.” (GX345 (Intuit) at 0:08).

Response to Finding No. 86:

The Proposed Finding is incomplete and misleading because it is just a snippet of the full ad that actually ran and Complaint Counsel have omitted critical information for evaluating the advertisement, including that the ad contained disclosures about qualifications. Not mentioned in the Proposed Finding is that the ad included a written disclosure that appeared for several seconds stating “For simple U.S. returns” and “See offer details at TurboTax.com.” (GX345 (Intuit)). Also not mentioned is that the ad displayed the TurboTax Absolute Zero logo. (GX345 (Intuit)). In addition, the Proposed Finding fails to recognize that by inviting consumers to

“[s]ee offer details at TurboTax.com,” all content on the TurboTax website—including detailed information about qualifications—was “integrated” into the ad and should be considered when assessing the ad’s disclosures. (PFF ¶¶328; CCF ¶455). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

Moreover, the Proposed Finding does not support an inference that the ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The ad verbally informed consumers that the free offer was for “AbsoluteZero.” (GX345 (Intuit)). Complaint Counsel offered no evidence that these words were not audible. (PFF ¶231). The ad also informed consumers in writing that the free offer was for a specific TurboTax SKU, “AbsoluteZero”; that the free offer had qualifications based on the complexity of a consumer’s tax return, by stating “[f]or simple U.S. returns”; and that consumers could learn more about the qualifications by “[s]ee[ing] offer details at TurboTax.com.” (GX345 (Intuit); PFF ¶244). Complaint Counsel offered no evidence that the written disclosures were not visible (PFF ¶230), nor could they given the prominence of those disclosures and the benchmarking analysis showing that the disclosures were consistent with those in comparable ads (PFF ¶¶232-241).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel allege. Instead, the undisputed testimony from Intuit’s executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (See PFF ¶¶167-177, 190, 192-202, 405, 852, 857, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel offered no evidence that the ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the disclosures in the ad ensured that reasonable consumers understood that there were qualifications for the free TurboTax SKU being advertised, the nature and character of those qualifications, and where additional detail was available. (PFF ¶¶241-246, 302-330, 334). Even without those disclosures, reasonable consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

87. The “Cruise” TurboTax ad aired on television between January 7, 2018, and January 26, 2018. (GX60 (Intuit) at CC-00000669).

Response to Finding No. 87:

The Proposed Finding and the underlying ad should not be considered in this proceeding because the challenged ad aired in Tax Year 2017 and has not aired since. The challenged ad is therefore outside the relevant statute of limitations. (See COL ¶¶147-156).

d. Baby

88. A true and correct copy of the 15-second “Baby” TurboTax ad is at GX346. (GX346 (Intuit); GX342 (Complaint Counsel) ¶ 36, at CC-00006914).

Response to Finding No. 88:

The Proposed Finding and the underlying ad should not be considered in this proceeding because the challenged ad aired in Tax Year 2017 and has not aired since. The challenged ad is therefore outside the relevant statute of limitations. (See COL ¶¶147-156).

89. The 15-second “Baby” TurboTax ad includes the following claim: “At least your taxes are free.” (GX346 (Intuit) at 0:11).

Response to Finding No. 89:

The Proposed Finding is incomplete and misleading because it is just a snippet of the full ad that actually ran and Complaint Counsel have omitted critical information for evaluating the advertisement, including that the ad contained disclosures about qualifications. Not mentioned in the Proposed Finding is that the ad included a written disclosure that appeared for several seconds stating “AbsoluteZero product only. For simple U.S. returns” and “See offer details at TurboTax.com.” (GX346 (Intuit)). Also not mentioned is that the ad displays the TurboTax Absolute Zero logo. (GX346 (Intuit)). In addition, the Proposed Finding fails to recognize that by inviting consumers to “[s]ee offer details at TurboTax.com,” all content on the TurboTax website—including detailed information about qualifications—was “integrated” into the ad and should be considered when assessing the ad’s disclosures. (PFF ¶¶328; CCFF ¶455). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

Moreover, the Proposed Finding does not support an inference that the ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The ad informed consumers in writing that the free offer was for a specific TurboTax SKU, “AbsoluteZero”; that the free offer had qualifications based on the complexity of a consumer’s tax return, by stating “[f]or simple U.S. returns”; and that consumers could learn more about the qualifications by “[s]ee[ing] offer details at TurboTax.com.” (GX346 (Intuit); PFF ¶244). Complaint Counsel offered no evidence that the written disclosures were not visible (PFF ¶230), nor could they given the prominence of those

disclosures and the benchmarking analysis showing that the disclosures were consistent with those in comparable ads (PFF ¶¶232-241).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel allege. Instead, the undisputed testimony from Intuit's executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (See PFF ¶¶167-177, 190, 192-202, 405, 852, 857, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel offered no evidence that the ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the disclosures in the ad ensured that reasonable consumers understood that there were qualifications for the free TurboTax SKU being advertised, the nature and character of those qualifications, and where additional detail was available. (PFF ¶¶241-246, 302-330, 334). Even without those disclosures, reasonable consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

90. The "Baby" TurboTax ad aired on television for TY 2017. (GX61 (Intuit) at CC-00000683).

Response to Finding No. 90:

The Proposed Finding and the underlying ad should not be considered in this proceeding because the challenged ad aired in Tax Year 2017 and has not aired since. The challenged ad is therefore outside the relevant statute of limitations. (See COL ¶¶147-156).

e. Anthem Launch

91. A true and correct copy of the 45-second “Anthem Launch” TurboTax ad is at GX347. (GX347 (Intuit); GX342 (Complaint Counsel) ¶ 37, at CC-00006914).

Response to Finding No. 91:

The Proposed Finding and the underlying ad should not be considered in this proceeding because the challenged ad aired in Tax Year 2017 and has not aired since. The challenged ad is therefore outside the relevant statute of limitations. (See COL ¶¶147-156).

92. The 45-second “Anthem Launch” TurboTax ad includes the following claim: “With TurboTax AbsoluteZero, at least your taxes are free.” (GX347 (Intuit) at 0:06).

Response to Finding No. 92:

The Proposed Finding is incomplete and misleading because it is just a snippet of the full ad that actually ran and Complaint Counsel have omitted critical information for evaluating the advertisement, including that the ad contained disclosures about qualifications. Not mentioned in the Proposed Finding is that the ad included a written disclosure that appeared for several seconds stating “For simple U.S. returns” and “See offer details at TurboTax.com.” (GX347 (Intuit)). Also not mentioned is that the ad displays the TurboTax Absolute Zero logo. (GX347 (Intuit)). In addition, the Proposed Finding fails to recognize that by inviting consumers to “[s]ee offer details at TurboTax.com,” all content on the TurboTax website—including detailed information about qualifications—was “integrated” into the ad and should be considered when assessing the ad’s disclosures. (PFF ¶328; CCF ¶455). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

Moreover, the Proposed Finding does not support an inference that the ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The ad verbally informed consumers that the free offer

was for “AbsoluteZero.” (GX347 (Intuit)). Complaint Counsel offered no evidence that these words were not audible. (PFF ¶231). The ad also informed consumers in writing that the free offer was for a specific TurboTax SKU, “AbsoluteZero”; that the free offer had qualifications based on the complexity of a consumer’s tax return, by stating “[f]or simple U.S. returns”; and that consumers could learn more about the qualifications by “[s]ee[ing] offer details at TurboTax.com.” (GX347 (Intuit); PFF ¶244). Complaint Counsel offered no evidence that the written disclosures were not visible (PFF ¶230), nor could they given the prominence of those disclosures and the benchmarking analysis showing that the disclosures were consistent with those in comparable ads (PFF ¶¶232-241).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel allege. Instead, the undisputed testimony from Intuit’s executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (See PFF ¶¶167-177, 190, 192-202, 405, 852, 857, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel offered no evidence that the ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the disclosures in the ad ensured that reasonable consumers understood that there were qualifications for the free TurboTax SKU being advertised, the nature and character of those qualifications, and where additional detail was available. (PFF ¶¶241-246, 302-330, 334). Even without those disclosures, reasonable consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax

returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

93. The “Anthem Launch” TurboTax ad aired on television for TY 2017. (GX61 (Intuit) at CC-00000683).

Response to Finding No. 93:

The Proposed Finding and the underlying ad should not be considered in this proceeding because the challenged ad aired in Tax Year 2017 and has not aired since. The challenged ad is therefore outside the relevant statute of limitations. (See COL ¶¶147-156).

4. TurboTax Television and Video Ads TY 2018 and TY 2019

94.

[REDACTED]; see also Ryan (Intuit) Tr. 698)

Response to Finding No. 94:

The Proposed Finding is inaccurate and misleading because it fails to mention that only a portion of Intuit’s TurboTax marketing budget for television is spent on ads for free TurboTax SKUs. (Ryan (Intuit) Tr. 698). Depending on the year, Intuit spends “as little as zero [percent], and as much as maybe 30 percent” of its “TV and radio advertising” budget on TurboTax Free Edition. (Ryan (Intuit) Tr. 698).

Moreover, the Proposed Finding does not support an inference that the challenged television ads expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The fact that Intuit spent money on television advertising is not evidence that such advertising conveyed any claim asserted by Complaint Counsel or that reasonable consumers were likely to be deceived by the ads. To the contrary, the lack of consumer complaints is strong evidence that consumers were

not deceived by the challenged television advertisements that ran in Tax Year 2018. (See PFF ¶¶632, 637, 639, 641-647).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel allege in the challenged television ads. Instead, the undisputed testimony from Intuit’s executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (See PFF ¶¶167-177, 190, 192-202, 405, 852, 857, 860, 870). Intuit’s mission and values—including its focus on customers and its commitment to integrity without compromise—are integral to the company and drive its business and marketing strategies, including the advertising for free TurboTax SKUs. (See PFF ¶34). Intuit’s TurboTax advertisements consequently go through a months-long iterative process during which ads are carefully reviewed—by Intuit’s marketing team, outside ad agencies, and legal team—to ensure they are not deceptive or misleading. (See PFF ¶162-163).

95.

[REDACTED]; see also Ryan (Intuit) Tr. 698).

Response to Finding No. 95:

The Proposed Finding is inaccurate and misleading because it fails to mention that only a portion of Intuit’s TurboTax marketing budget for television is spent on ads for free TurboTax SKUs. (Ryan (Intuit) Tr. 698). Depending on the year, Intuit spends “as little as zero [percent], and as much as maybe 30 percent” of its “TV and radio advertising” budget on TurboTax Free Edition. (Ryan (Intuit) Tr. 698).

Moreover, the Proposed Finding does not support an inference that the challenged television ads expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The fact that Intuit spent

money on television advertising is not evidence that such advertising conveyed any claim asserted by Complaint Counsel or that reasonable consumers were likely to be deceived by the ads. To the contrary, the lack of consumer complaints is strong evidence that consumers were not deceived by the challenged television advertisements that ran in Tax Year 2018. (*See* PFF ¶¶632, 637, 639, 641-647).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel allege in the challenged television ads. Instead, the undisputed testimony from Intuit’s executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (*See* PFF ¶¶167-177, 190, 192-202, 405, 852, 857, 860, 870). Intuit’s mission and values—including its focus on customers and its commitment to integrity without compromise—are integral to the company and drive its business and marketing strategies, including the advertising for free TurboTax SKUs. (*See* PFF ¶34). Intuit’s TurboTax advertisements consequently go through a months-long iterative process during which ads are carefully reviewed—by Intuit’s marketing team, outside ad agencies, and legal team—to ensure they are not deceptive or misleading. (*See* PFF ¶162-163).

b. Lawyer

96. A true and correct copy of the 60-second “Lawyer” TurboTax ad is at GX328. (GX328 (Intuit); GX342 (Complaint Counsel) ¶ 56, at CC-00006923).

Response to Finding No. 96:

Intuit has no specific response except to note that the challenged ad aired in Tax Year 2018 and has not aired in the last four years. Moreover, the binding Consent Order with the attorneys general of all 50 states and the District of Columbia already prohibits Intuit from

running this ad or substantially similar ads in the future, and Intuit has disclaimed any intention of running such ads again in the future. (See PFF ¶¶225, 810, 824).

97. The following is a true and correct transcription of the words spoken in the 60-second “Lawyer” TurboTax ad:

LAWYER: Free free free free free free free free free free. Free free.
Free free free free. Free free free. Free free free free free. Free free
free free free free free free.

SECOND LAWYER: Free! Free!

JUDGE: Free free. Free.

LAWYER: Free free free. Free free free free free free free free free.
Free free free free free free free! Free free free free free. Free free
free free. Free free free free free free!

JUROR: (applauding) Free.

OTHER JURORS: Free. Free. Free. Free. Free. [gavel]

UNIDENTIFIED VOICES: Free free free.

VOICEOVER: That’s right. TurboTax Free is free. Free, free free
free.

(GX328 (Intuit); GX342 (Complaint Counsel) ¶ 57, at CC-00006923).

Response to Finding No. 97:

The Proposed Finding is incomplete and misleading because it is just a snippet of the full ad that actually ran and Complaint Counsel have omitted critical information for evaluating the advertisement, including that the ad contained disclosures about qualifications. (See CCF ¶98; Response to CCF ¶98). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

The Proposed Finding fails to mention that the ad verbally informed consumers that the free offer was for “TurboTax Free.” (GX328 (Intuit) (“That’s right. TurboTax Free is Free.”)). As Mr. Rubin explained, “TurboTax Free” was how Intuit referred to TurboTax Free Edition

during that year, consistent with how it referred to the other TurboTax SKUs. (PFF ¶227). The reference to “TurboTax Free” in the audio disclosure was thus meant to convey the specific free SKU being advertised—namely, TurboTax Free Edition. (PFF ¶227). And after just a single year of using “TurboTax Free” in certain Tax Year 2018 advertisements, Intuit voluntarily updated the video advertisements in Tax Year 2019 to have the logo say “TurboTax Free *Edition*” to make the ads even clearer. (PFF ¶357). Further, the Proposed Finding also fails to mention that the ad included a written disclosure stating “Free Edition product only. For simple U.S. returns” and “See details at turbotax.com.” (GX328 (Intuit)).

Moreover, the Proposed Finding does not support an inference that the ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. To start, the repetition of the word “free” by itself is not a claim about TurboTax at all. (PFF ¶¶221-222). The ad does not state anything about TurboTax until the end of the ad, when it informed viewers that the free offer applied to a specific TurboTax SKU that had qualifications. (PFF ¶223; *see also* PFF ¶224). The ad informed consumers in writing that the free offer was for a specific TurboTax SKU, stating “Free Edition product only”; that the free offer had qualifications based on the complexity of a consumer’s tax return, by stating “[f]or simple U.S. returns”; and that consumers could learn more about the qualifications by “[s]ee[ing] details at turbotax.com.” (GX328 (Intuit); PFF ¶244). Complaint Counsel offered no evidence that the written disclosures were not visible (PFF ¶230), nor could they given the prominence of those disclosures and the benchmarking analysis showing that the disclosures were consistent with those in comparable ads (PFF ¶¶232-241). The ad also informed consumers through a spoken narrative that the free offer was for a specific TurboTax

SKU, “TurboTax Free.” (GX328 (Intuit)). Complaint Counsel offered no evidence that these words were not audible. (PFF ¶231).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel allege. Instead, the undisputed testimony from Intuit’s executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (See PFF ¶¶167-177, 190, 192-202, 405, 852, 857, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel offered no evidence that the ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the disclosures in the ad ensured that reasonable consumers understood that there were qualifications for the free TurboTax SKU being advertised, the nature and character of those qualifications, and where additional detail was available. (PFF ¶¶241-246, 302-330, 334). Even without those disclosures, reasonable consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

98. The disclaimer shown at 0:57 in the 60-second “Lawyer” TurboTax ad says, “Free Edition product only. For simple U.S. returns. Offer subject to change. See details at turbotax.com.” (GX328 (Intuit) at 0:57).

Response to Finding No. 98:

The Proposed Finding is incomplete and misleading because it wrongly refers to language in the ad as a “disclaimer.” Further, the Proposed Finding is just a snippet of the full ad that actually ran and Complaint Counsel have omitted critical information for evaluating the

advertisement, including that the ad contained other disclosures about qualifications, including an audio disclosure that free offer was for a specific SKU, TurboTax Free Edition. (See CCF ¶97; Response to CCF ¶97). The Proposed Finding also fails to recognize that by inviting consumers to “[s]ee offer details at turbotax.com,” all content on the TurboTax website—including detailed information about qualifications—was “integrated” into the ad and should be considered when assessing the ad’s disclosures. (PFF ¶328; CCF ¶455). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

Moreover, the Proposed Finding does not support an inference that the ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The ad informed consumers in writing that the free offer was for a specific TurboTax SKU, “Free Edition”; that the free offer had qualifications based on the complexity of a consumer’s tax return, by stating “[f]or simple U.S. returns”; and that consumers could learn more about the qualifications by “See[ing] details at turbotax.com.” (GX328 (Intuit); PFF ¶244). Complaint Counsel offered no evidence that the written disclosures were not visible to consumers (PFF ¶230), nor could they given the prominence of those disclosures and the benchmarking analysis showing that the disclosures were consistent with those in comparable ads (PFF ¶¶232-241). The ad also informed consumers through a spoken narrative that the free offer was for a specific TurboTax SKU, “TurboTax Free.” (GX328 (Intuit)). Complaint Counsel offered no evidence that these words were not audible. (PFF ¶231).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make the claims that Complaint Counsel allege. Instead, the undisputed testimony from Intuit's executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (See PFF ¶¶167-177, 190, 192-202, 405, 852, 857, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel offered no evidence that the ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the disclosures in the ad ensured that reasonable consumers understood that there were qualifications for the free TurboTax SKU being advertised, the nature and character of those qualifications, and where additional detail was available. (PFF ¶¶241-246, 302-330, 334). Even without those disclosures, reasonable consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

99. A true and correct copy of the 30-second "Lawyer" TurboTax ad is at GX329. (Shiller (Complaint Counsel) Tr. 182; GX329 (Intuit)).

Response to Finding No. 99:

Intuit has no specific response except to note that the challenged ad aired in Tax Year 2018 and has not aired in the last four years. Moreover, the binding Consent Order with the attorneys general of all 50 states and the District of Columbia already prohibits Intuit from running this ad or substantially similar ads in the future, and Intuit has disclaimed any intention of running such ads again in the future. (See PFF ¶¶225, 810, 824).

100. The following is a true and correct transcription of the words spoken in the 30-second “Lawyer” TurboTax ad:

LAWYER: Free free free free free free free free free. Free free free. Free free free. Free free free free free. Free free free free free free free free. Free free free free free free!

JUROR: (applauding) Free!

OTHER JURORS: Free. Free. [gavel] Free.

UNIDENTIFIED VOICES: Free free free.

VOICEOVER: That’s right. TurboTax Free is free. Free, free free free.

(GX329 (Intuit); GX342 (Complaint Counsel) ¶ 59; *see also* Shiller (Complaint Counsel) Tr. 182-83).

Response to Finding No. 100:

The Proposed Finding is incomplete and misleading because it is just a snippet of the full ad that actually ran and Complaint Counsel have omitted critical information for evaluating the advertisement. (*See* CCF ¶101; Response to CCF ¶101). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

The Proposed Finding fails to mention that the ad verbally informed consumers that the free offer was for “TurboTax Free.” (GX329 (Intuit) (“That’s right. TurboTax Free is free.”)). As Mr. Rubin explained, “TurboTax Free” was how Intuit referred to TurboTax Free Edition during that year, consistent with how it referred to the other TurboTax SKUs. (PFF ¶227). The reference to “TurboTax Free” was thus meant to convey the specific SKU being advertised—namely TurboTax Free Edition. (PFF ¶227). Complaint Counsel offered no evidence that these words were not audible. (PFF ¶231). And after just a single year of using “TurboTax Free” in certain Tax Year 2018 advertisements, Intuit voluntarily updated the video advertisements in Tax Year 2019 to have the logo say “TurboTax Free *Edition*” to make the ads even clearer. (PFF

¶357). Further, the Proposed Finding also fails to mention that the ad included a written disclosure stating “Free Edition product only. For simple U.S. returns” and “See details at turbotax.com.” (GX329 (Intuit)).

Moreover, the Proposed Finding does not support an inference that the ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. To start, the repetition of the word “free” by itself is not a claim about TurboTax at all. (PFF ¶¶221-222). The ad does not state anything about TurboTax until the end of the ad, when it informed viewers that the free offer applied to a specific TurboTax SKU that had qualifications. (PFF ¶223; *see also* PFF ¶224). The ad informed consumers in writing that the free offer was for a specific TurboTax SKU, stating “Free Edition product only”; that the free offer had qualifications based on the complexity of a consumer’s tax return, by stating “[f]or simple U.S. returns”; and that consumers could learn more about the qualifications by “[s]ee[ing] details at turbotax.com.” (GX329 (Intuit); PFF ¶244). Complaint Counsel offered no evidence that the written disclosures were not visible (PFF ¶230), nor could they given the prominence of those disclosures and the benchmarking analysis showing that the disclosures were consistent with those in comparable ads (PFF ¶¶232-241). The ad also informed consumers through a spoken narrative that the free offer was for a specific TurboTax SKU, “TurboTax Free.” (GX329 (Intuit)). Complaint Counsel offered no evidence that these words were not audible. (PFF ¶231).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make the claims that Complaint Counsel allege. Instead, the undisputed testimony from Intuit’s executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax

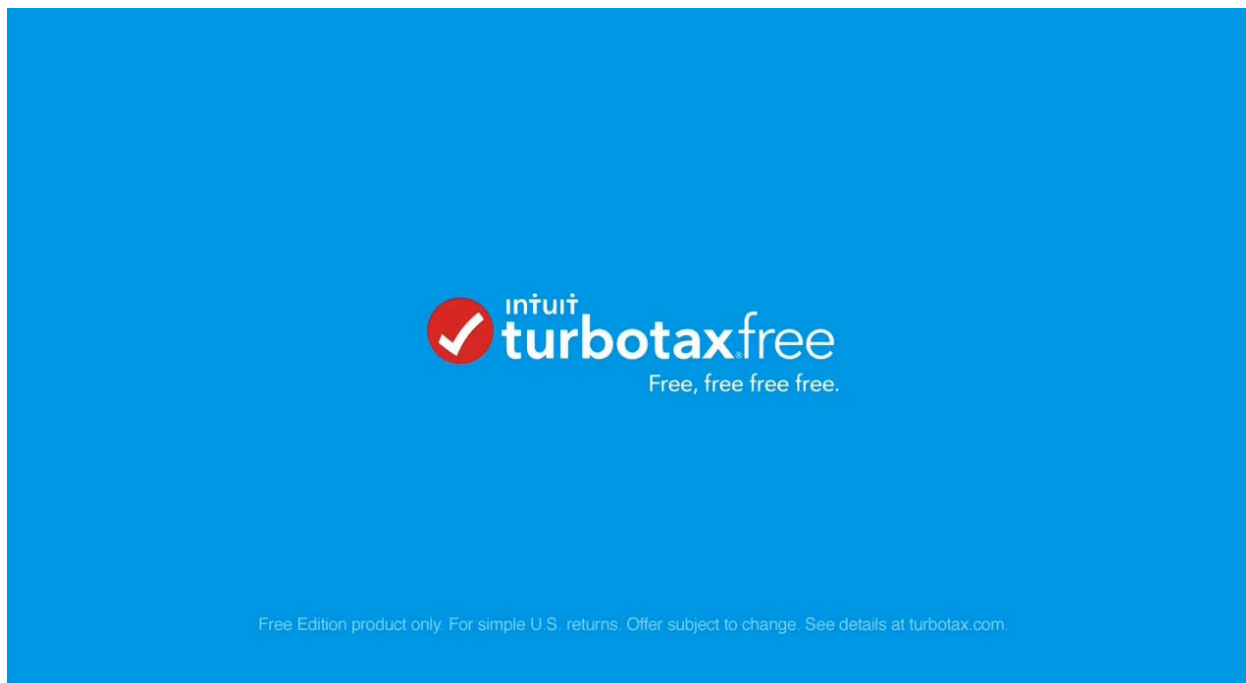
products are free or that TurboTax would be free for a consumer when that was not the case.

(See PFF ¶¶167-177, 190, 192-202, 405, 852, 857, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel offered no evidence that the ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. The evidence establishes that the disclosures in the ad ensured that reasonable consumers understood that there were qualifications for the free TurboTax SKU being advertised, the nature and character of those qualifications, and where additional detail was available. (PFF ¶¶241-246, 302-330, 334). Even without those disclosures, reasonable consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

101. A written disclaimer shown at 0:26 in the 30-second “Lawyer” TurboTax ad says, “Free Edition product only. For simple U.S. returns. Offer subject to change. See details at

turbotax.com.” (GX329 (Intuit) at 0:26. *See also*, GX342 (Complaint Counsel) ¶ 156, at CC-00006978) (screenshot of disclaimer) (depicted below)).



No audio disclaimer accompanies the short, written disclaimer pictured above. (GX329 (Intuit) at 0:26). The same disclaimer was used in GX326 (Complaint Counsel) (TY 2018 Crossword TurboTax Ad), GX327 (Complaint Counsel) (TY 2018 Big Kick TurboTax Ad), and GX332 (Complaint Counsel) (TY 2018 Spelling Bee TurboTax Ad) and other TurboTax “Free, Free, Free, Free” television ads in TY 2018.

Response to Finding No. 101:

The Proposed Finding is incomplete and misleading because it wrongly refers to language in the ad as a “disclaimer” and ignores the disclosures that ran in the ad. The Proposed Finding also incorrectly states that there is “[n]o audio disclaimer.” In fact, GX329 includes a verbal disclosure informing consumers that the free offer was for the “TurboTax Free” SKU. (GX329 (Intuit); *see* CCFE ¶100, Response to CCFE ¶100). Further, the Proposed Finding fails to recognize that by inviting consumers to “See offer details at TurboTax.com,” all content on the TurboTax website—including detailed information about qualifications—was “integrated” into the ad, and therefore all disclosures on the website are incorporated into the ad. (PFF ¶328; CCFE ¶455). In determining the claims conveyed by an advertisement and whether it was likely

to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

Moreover, the Proposed Finding does not support an inference that the ad, or the ads shown in GX326 (FTC) (TY 2018 Crossword TurboTax Ad), GX327 (FTC) (TY 2018 Big Kick TurboTax Ad), GX332 (FTC) (TY 2018 Spelling Bee TurboTax Ad), or any other TurboTax “Free, Free, Free, Free” campaign television ads from TY 2018 expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The ads informed consumers in writing that the free offer was for a specific TurboTax SKU, “Free Edition”; that the free offer had qualifications based on the complexity of a consumer’s tax return, by stating “[f]or simple U.S. returns”; and that consumers could learn more about the qualifications by “[s]ee[ing] details at turbotax.com.” (GX329 (Intuit); PFF ¶244). Complaint Counsel offered no evidence that the written disclosures were not visible to consumers (PFF ¶230), nor could they given the prominence of those disclosures and the benchmarking analysis showing that the disclosures were consistent with those in comparable ads (PFF ¶¶232-241). The ad also informed consumers through a spoken narrative that the free offer was for a specific TurboTax SKU, “TurboTax Free.” (GX329 (Intuit)). Complaint Counsel offered no evidence that these words were not audible. (PFF ¶231).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make the claims that Complaint Counsel allege. Instead, the undisputed testimony from Intuit’s executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (See PFF ¶¶167-177, 190, 192-202, 405, 852, 857, 860, 870). The ad also informed consumers in spoken narrative that the free offer was for a specific TurboTax product, referencing

“TurboTax Free.” (GX329 (Intuit)). Complaint Counsel offered no evidence these words could not be heard by consumers. (PFF ¶231).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel offered no evidence that the ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. The evidence establishes that the disclosures in the ad ensured that reasonable consumers understood that there were qualifications for the free TurboTax SKU being advertised, the nature and character of those qualifications, and where additional detail was available. (PFF ¶¶241-246, 302-330, 334). Even without those disclosures, reasonable consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

102. The “Lawyer” TurboTax ads aired on television in connection with TY 2018. (Shiller (Complaint Counsel) Tr. 183; GX60 (Intuit) at CC-00000668-69; GX61 (Intuit) at CC-00000682-83).

Response to Finding No. 102:

Intuit has no specific response except to note that the challenged ad aired in Tax Year 2018 and has not aired in the last four years. Moreover, the binding Consent Order with the attorneys general of all 50 states and the District of Columbia already prohibits Intuit from running this ad or substantially similar ads in the future, and Intuit has disclaimed any intention of running such ads again in the future. (See PFF ¶¶225, 810, 824).

103. The “Lawyer” TurboTax ads aired on television in connection with TY 2019. (Shiller (Complaint Counsel) Tr. 183).

Response to Finding No. 103:

The Proposed Finding is incomplete and misleading because it implies that Intuit ran the same TurboTax television ads in Tax Year 2018 and Tax Year 2019. That is not correct. Intuit voluntarily updated the written disclosures used in its television advertisements for TurboTax Free Edition in Tax Year 2019, including those used in the “Lawyer” ads. (*Compare* RX1112 (Intuit), *with* GX328 (Intuit); *see also* Shiller (FTC) Tr. 244-245). For example, the title card displayed at the end of Tax Year 2019 television advertisements was updated to refer to “TurboTax Free Edition,” instead of “TurboTax Free” as used in Tax Year 2018. (*Compare* RX1112 (Intuit), *with* GX328 (Intuit)). The disclosures in Tax Year 2019 video ads were also made larger, with higher contrast, and updated to read “TurboTax Free Edition is for simple U.S. returns only. See if you qualify at turbotax.com.” (*Compare* RX1112 (Intuit), *with* GX328 (Intuit)). Intuit’s executives explained that those changes were made as part of Intuit’s continuing efforts to be clear with consumers and to improve clarity in its advertising. (Ryan (Intuit) Tr. 726-727; Rubin (Intuit) Tr. 1560-1563).

104. The “Lawyer” TurboTax ads appeared on television throughout the United States at least 2,115 times on at least 124 television networks between November 1, 2018, and April 18, 2019. (GX342 (Complaint Counsel) ¶¶ 60-61, at CC-00006924-25; *see also* Shiller (Complaint Counsel) Tr. 183).

Response to Finding No. 104:

The Proposed Finding is incomplete and misleading because it is unclear which version of the “Lawyer” ad it is referring to. As described in response to the preceding finding (*See* Response to CCF ¶103), different versions of the Lawyer ad aired in Tax Years 2018 and 2019, and the version aired in Tax Year 2019 had larger font and higher contrast, with updated disclosures that stated in the middle of the title card, “TurboTax Free Edition,” and below that, “TurboTax Free Edition is for simple U.S. returns only. See if you qualify at turbotax.com.”

(Compare RX1112 (Intuit), with GX328 (Intuit); see Ryan (Intuit) Tr. 726-727; Rubin (Intuit) Tr. 1560-1563). Intuit’s executives explained that those changes were made as part of Intuit’s continuing efforts to be clear with consumers and to improve clarity in the advertising. (Ryan (Intuit) Tr. 726-727; Rubin (Intuit) Tr. 1560-1563).

Moreover, the Proposed Finding does not support an inference that the challenged ads were deceptive. The fact that ads aired is not evidence that the ads conveyed the claim asserted by Complaint Counsel or that reasonable consumers were likely to be deceived by the ads. To the contrary, the fact that Complaint Counsel have identified only 175 even potentially relevant consumer complaints from the five years spanning Tax Years 2015-2019 (see CCF ¶¶676-677), even though the Lawyer ad on its own was aired at least 2,115 times on at least 124 television networks during Tax Year 2018 alone, is strong evidence that reasonable consumers were not deceived by the Lawyer ad or any of the other challenged advertisements that ran in Tax Year 2018 (see PFF ¶¶632, 637, 639, 641-647).

c. Movie Credits

105. A true and correct copy of a 30-second “Movie Credits” TurboTax ad is at GX299. (Shiller (Complaint Counsel) Tr. 183-84; GX299 (Intuit); GX342 (Complaint Counsel) ¶ 63, at CC-00006926).

Response to Finding No. 105:

Intuit has no specific response except to note that the challenged ad aired in Tax Year 2018 and has not aired in the last four years. Moreover, the binding Consent Order with the attorneys general of all 50 states and the District of Columbia already prohibits Intuit from running this ad or substantially similar ads in the future, and Intuit has disclaimed any intention of running such ads again in the future. (See PFF ¶¶225, 810, 824).

106. The following is a true and correct transcription of the words spoken in the 30-second “Movie Credits” TurboTax ad:

[music plays]

MAN: Free. Free free free.

[explosion]

[music plays]

VOICEOVER: That's right. TurboTax Free is free. Free, free free free.

(GX299 (Intuit); GX342 (Complaint Counsel) ¶ 64, at CC-00006926; *see also* Shiller (Complaint Counsel) Tr. 184).

Response to Finding No. 106:

The Proposed Finding is incomplete and misleading because it is just a snippet of the full ad that actually ran and Complaint Counsel have omitted critical information for evaluating the advertisement, including that the ad contained disclosures about qualifications. (*See* CCF ¶107; Response to CCF ¶107). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

The Proposed Finding fails to mention that the ad verbally informed consumers that the free offer was for “TurboTax Free.” (GX299 (Intuit)). As Mr. Rubin explained, “TurboTax Free” was how Intuit referred to TurboTax Free Edition during that year, consistent with how it referred to the other TurboTax SKUs. (PFF ¶227). The reference to “TurboTax Free” was thus meant to convey the specific SKU being advertised, as reflected in the written disclosure appearing on the same title card at the end of the advertisement. (PFF ¶227). And after just a single year of using “TurboTax Free” in certain Tax Year 2018 advertisements, Intuit voluntarily updated the video advertisements in Tax Year 2019 to have the logo say “TurboTax Free *Edition*” to make the ads even clearer. (PFF ¶357). The Proposed Finding also fails to mention that the

included a written disclosure stating “Free Edition product only. For simple U.S. returns” and “See details at turbotax.com.” (GX299 (Intuit)).

Moreover, the Proposed Finding does not support an inference that the ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. To start, the repetition of the word “free” by itself is not a claim about TurboTax at all. (PFF ¶¶221-222). The ad does not state anything about TurboTax until the end of the ad, when it informed viewers that the free offer applied to a specific TurboTax SKU that had qualifications. (PFF ¶223; *see also* PFF ¶224). The ad informed consumers in writing that the free offer was for a specific TurboTax SKU, stating “Free Edition product only”; that the free offer had qualifications based on the complexity of a consumer’s tax return, by stating “[f]or simple U.S. returns”; and that consumers could learn more about the qualifications by “[s]ee[ing] details at turbotax.com.” (GX299 (Intuit); PFF ¶244). Complaint Counsel offered no evidence that the written disclosures were not visible (PFF ¶230), nor could they given the prominence of those disclosures and the benchmarking analysis showing that the disclosures were consistent with those in comparable ads (PFF ¶¶232-241). The ad also informed consumers through a spoken narrative that the free offer was for a specific TurboTax SKU, “TurboTax Free.” (GX299 (Intuit)). Complaint Counsel offered no evidence that these words were not audible. (PFF ¶231).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make the claims that Complaint Counsel allege. Instead, the undisputed testimony from Intuit’s executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (*See* PFF ¶¶167-177, 190, 192-202, 405, 852, 857, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel offered no evidence that the ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the disclosures in the ad ensured that reasonable consumers understood that there were qualifications for the free TurboTax SKU being advertised, the nature and character of those qualifications, and where additional detail was available. (PFF ¶¶241-246, 302-330, 334). Even without those disclosures, reasonable consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

107. The disclaimer shown at 0:28 in the 30-second “Movie Credits” TurboTax ad says, “Start now at turbotax.com[.] Free Edition product only. For simple U.S. returns. Offer subject to change. See details at turbotax.com.” (GX299 (Intuit) at 0:28).

Response to Finding No. 107:

The Proposed Finding is incorrect, incomplete, and misleading because it wrongly refers to language in the ad as a “disclaimer” and ignores other disclosures in the ad. GX299 includes a verbal disclosure informing consumers that the free offer was for the “TurboTax Free” SKU. (GX299 (Intuit); *see* CCF ¶¶105-106; Responses to CCF ¶¶105-106). Further, the Proposed Finding fails to recognize that by inviting consumers to “[s]ee details at TurboTax.com,” all content on the TurboTax website—including detailed information about qualifications—was “integrated” into the ad, and therefore all disclosures on the website are incorporated into the ad. (PFF ¶328; CCF ¶455). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

Moreover, the Proposed Finding does not support an inference that the ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The ad informed consumers in writing that the free offer was for a specific TurboTax SKU, “Free Edition”; that the free offer had qualifications based on the complexity of a consumer’s tax return, by stating “[f]or simple U.S. returns”; and that consumers could learn more about the qualifications by “[s]ee[ing] details at turbotax.com.” (GX299 (Intuit); PFF ¶244). Complaint Counsel offered no evidence that the written disclosures were not visible to consumers (PFF ¶230), nor could they given the prominence of those disclosures and the benchmarking analysis showing that the disclosures were consistent with those in comparable ads (PFF ¶¶232-241). The ad also informed consumers through a spoken narrative that the free offer was for a specific TurboTax SKU, “TurboTax Free.” (GX299 (Intuit)). Complaint Counsel offered no evidence that these words were not audible. (PFF ¶231).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make the claims that Complaint Counsel allege. Instead, the undisputed testimony from Intuit’s executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (See PFF ¶¶167-177, 190, 192-202, 405, 852, 857, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel offered no evidence that the ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. The evidence establishes that the disclosures in the ad ensured that reasonable consumers understood that there were qualifications for the free

TurboTax SKU being advertised, the nature and character of those qualifications, and where additional detail was available. (PFF ¶¶241-246, 302-330, 334). Even without those disclosures, reasonable consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

108. A true and correct copy of a version of the 30-second “Movie Credits” TurboTax ad containing a different disclaimer is at GX330 (“Movie Credit Ad Version 2”). (GX330 (Intuit)).

Response to Finding No. 108:

Intuit has no specific response except to note that the challenged ad aired in Tax Year 2018 and has not aired in the last four years. Moreover, the binding Consent Order with the attorneys general of all 50 states and the District of Columbia already prohibits Intuit from running this ad or substantially similar ads in the future, and Intuit has disclaimed any intention of running such ads again in the future. (See PFF ¶¶225, 810, 824). Further, the Proposed Finding incorrectly refers to the language in the ad as a “disclaimer,” when it is a disclosure.

109. The following is a true and correct transcription of the words spoken in the Movie Credit Ad Version 2:

[music plays]

MAN: Free. Free free free.

[explosion]

[music plays]

VOICEOVER: That’s right. TurboTax Free is free. Free, free free free.

(GX330 (Intuit); GX342 (Complaint Counsel) ¶ 66, CC-00006926).

Response to Finding No. 109:

The Proposed Finding is incomplete and misleading because it is just a snippet of the full ad that actually ran and Complaint Counsel have omitted critical information for evaluating the advertisement. (CCFF ¶110; Response to CCFF ¶110). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

The Proposed Finding fails to mention that the ad verbally informed consumers that the free offer was for “TurboTax Free.” (GX330 (Intuit)). As Mr. Rubin explained, “TurboTax Free” was how Intuit referred to TurboTax Free Edition during that year, consistent with how it referred to the other TurboTax SKUs. (PFF ¶227). The reference to “TurboTax Free” was thus meant to convey the specific SKU being advertised, as reflected in the written disclosure appearing on the same title card at the end of the advertisement. (PFF ¶227). And after just a single year of using “TurboTax Free” in certain Tax Year 2018 advertisements, Intuit voluntarily updated the video advertisements in Tax Year 2019 to have the logo say “TurboTax Free *Edition*” to make the ads even clearer. (PFF ¶357). The Proposed Finding also fails to mention that the ad included a written disclosure stating “Free Edition product only. For simple U.S. returns” and “See details at turbotax.com.” (GX330 (Intuit)).

Moreover, the Proposed Finding does not support an inference that the ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. To start, the repetition of the word “free” by itself is not a claim about TurboTax at all. (PFF ¶¶221-222). The ad does not state anything about TurboTax until the end of the ad, when it informed viewers that the free offer applied to a specific TurboTax SKU that had qualifications. (PFF ¶223; *see also* PFF ¶224). The ad informed consumers in writing that the free offer was for a specific TurboTax SKU, stating “Free Edition

product only”; that the free offer had qualifications based on the complexity of a consumer’s tax return, by stating “[f]or simple U.S. returns”; and that consumers could learn more about the qualifications by “[s]ee[ing] details at turbotax.com.” (GX330 (Intuit); PFF ¶244). Complaint Counsel offered no evidence that the written disclosures were not visible (PFF ¶230), nor could they given the prominence of those disclosures and the benchmarking analysis showing that the disclosures were consistent with those in comparable ads (PFF ¶¶232-241). The ad also informed consumers through a spoken narrative that the free offer was for a specific TurboTax SKU, “TurboTax Free.” (GX330 (Intuit)). Complaint Counsel offered no evidence that these words were not audible. (PFF ¶231).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make the claims that Complaint Counsel allege. Instead, the undisputed testimony from Intuit’s executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (See PFF ¶¶167-177, 190, 192-202, 405, 852, 857, 860, 870).

The proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel offered no evidence that the ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the disclosures in the ad ensured that reasonable consumers understood that there were qualifications for the free TurboTax SKU being advertised, the nature and character of those qualifications, and where additional detail was available. (PFF ¶¶241-246, 302-330, 334). Even without those disclosures, reasonable consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax

returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

110. The disclaimer shown at 0:28 in the Movie Credit Ad Version 2 says, “Free Edition product only. For simple U.S. returns. Offer subject to change. See details at turbotax.com.” (GX330 (Intuit) at 0:28).

Response to Finding No. 110:

The Proposed Finding is incorrect, incomplete, and misleading. It is wrong because the language telling consumers “Free Edition product only. For simple U.S. returns. Offer subject to change. See details at turbotax.com” appears at 0:27, not 0:28, and stays visible for several seconds. (GX330 (Intuit)). It is incomplete and misleading because it wrongly refers to language in the ad as a “disclaimer” and ignores other disclosures in the ad. GX330 includes a verbal disclosure informing consumers that the free offer was for the “TurboTax Free” SKU. (GX330 (Intuit); *see* CCFE ¶109; Response to CCFE ¶109). Further, the Proposed Finding fails to recognize that by inviting consumers to “[s]ee details at TurboTax.com,” all content on the TurboTax website—including detailed information about qualifications—was “integrated” into the ad, and therefore all disclosures on the website are incorporated into the ad. (PFF ¶328; CCFE ¶455). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

Moreover, the Proposed Finding does not support an inference that the ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The ad informed consumers in writing that the free offer was for a specific TurboTax SKU, “Free Edition”; that the free offer had qualifications based on the complexity of a consumer’s tax return, by stating “[f]or simple U.S. returns”; and that consumers could learn more about the qualifications by “[s]ee[ing] details at turbotax.com.”

(GX330 (Intuit); PFF ¶244). Complaint Counsel offered no evidence that the written disclosures were not visible to consumers (PFF ¶230), nor could they given the prominence of those disclosures and the benchmarking analysis showing that the disclosures were consistent with those in comparable ads (PFF ¶¶232-241). The ad also informed consumers in spoken narrative that the free offer was for a specific TurboTax product, referencing “TurboTax Free.” (GX330 (Intuit)). Complaint Counsel offered no evidence these words could not be heard by consumers. (PFF ¶231).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make the claims that Complaint Counsel allege. Instead, the undisputed testimony from Intuit’s executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (See PFF ¶¶167-177, 190, 192-202, 405, 852, 857, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel offered no evidence that the ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. The evidence establishes that the disclosures in the ad ensured that reasonable consumers understood that there were qualifications for the free TurboTax SKU being advertised, the nature and character of those qualifications, and where additional detail was available. (PFF ¶¶241-246, 302-330, 334). Even without those disclosures, reasonable consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

111. A true and correct copy of the 15-second “Movie Credits” TurboTax ad is at GX331. (GX331 (Intuit)).

Response to Finding No. 111:

Intuit has no specific response except to note that the challenged ad aired in Tax Year 2018 and has not aired in the last four years. Moreover, the binding Consent Order with the attorneys general of all 50 states and the District of Columbia already prohibits Intuit from running this ad or substantially similar ads in the future, and Intuit has disclaimed any intention of running such ads again in the future. (See PFF ¶¶225, 810, 824).

112. The following is a true and correct transcription of the words spoken in the 15-second “Movie Credits” TurboTax ad:

[music plays]

MAN: Free. Free free free.

[explosion, music plays]

VOICEOVER: That’s right. TurboTax Free is free. Free, free free free.

(GX331 (Intuit); GX342 (Complaint Counsel) ¶ 68, at CC-00006927).

Response to Finding No. 112:

The Proposed Finding is incomplete and misleading because it is just a snippet of the full ad that actually ran and Complaint Counsel have omitted critical information for evaluating the advertisement. (See CCFF ¶113; Response to CCFF ¶113). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

The Proposed Finding fails to mention that the ad verbally informed consumers that the free offer was for “TurboTax Free.” (GX331 (Intuit)). As Mr. Rubin explained, “TurboTax Free” was how Intuit referred to TurboTax Free Edition during that year, consistent with how it referred to the other TurboTax SKUs. (PFF ¶227). The reference to “TurboTax Free” was thus

meant to convey the specific SKU being advertised, as reflected in the written disclosure appearing on the same title card at the end of the advertisement. (PFF ¶227). And after just a single year of using “TurboTax Free” in certain Tax Year 2018 advertisements, Intuit voluntarily updated the video advertisements in Tax Year 2019 to have the logo say “TurboTax Free *Edition*” to make the ads even clearer. (PFF ¶357). The Proposed Finding also fails to mention that the ad included a written disclosure stating “Free Edition product only. For simple U.S. returns” and “See details at turbotax.com.” (GX331 (Intuit)).

Moreover, the Proposed Finding does not support an inference that the ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. To start, the repetition of the word “free” by itself is not a claim about TurboTax at all. (PFF ¶¶221-222). The ad does not state anything about TurboTax until the end of the ad, when it informed viewers that the free offer applied to a specific TurboTax SKU that had qualifications. (PFF ¶223; *see also* PFF ¶224). The ad informed consumers in writing that the free offer was for a specific TurboTax SKU, stating “Free Edition product only”; that the free offer had qualifications based on the complexity of a consumer’s tax return, by stating “[f]or simple U.S. returns”; and that consumers could learn more about the qualifications by “[s]ee[ing] details at turbotax.com.” (GX331 (Intuit); PFF ¶244). Complaint Counsel offered no evidence that the written disclosures were not visible (PFF ¶230), nor could they given the prominence of those disclosures and the benchmarking analysis showing that the disclosures were consistent with those in comparable ads (PFF ¶¶232-241). The ad also informed consumers in spoken narrative that the free offer was for a specific TurboTax product, referencing “TurboTax Free.” (GX331 (Intuit)). Complaint Counsel offered no evidence these words could not be heard by consumers. (PFF ¶231).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make the claims that Complaint Counsel allege. Instead, the undisputed testimony from Intuit's executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (See PFF ¶¶167-177, 190, 192-202, 405, 852, 857, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel offered no evidence that the ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the disclosures in the ad ensured that reasonable consumers understood that there were qualifications for the free TurboTax SKU being advertised, the nature and character of those qualifications, and where additional detail was available. (PFF ¶¶241-246, 302-330, 334). Even without those disclosures, reasonable consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

113. The disclaimer shown at 0:12 in the 15-second "Movie Credits" TurboTax ad says, "Free Edition product only. For simple U.S. returns. Offer subject to change. See details at turbotax.com." (GX331 (Intuit) at 0:12).

Response to Finding No. 113:

The Proposed Finding is incomplete and misleading because it wrongly refers to language in the ad as a "disclaimer" and ignores other disclosures in the ad. GX331 also includes a verbal disclosure informing consumers that the free offer was for the "TurboTax Free" SKU. (GX331 (Intuit); see CCF ¶112; Response to CCF ¶112). Further, the Proposed Finding fails to recognize that by inviting consumers to "[s]ee details at TurboTax.com," all

content on the TurboTax website—including detailed information about qualifications—was “integrated” into the ad, and therefore all disclosures on the website are incorporated into the ad. (PFF ¶328; CCF ¶455). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

Moreover, the Proposed Finding does not support an inference that the ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The ad informed consumers in writing that the free offer was for a specific TurboTax SKU, “Free Edition”; that the free offer had qualifications based on the complexity of a consumer’s tax return, by stating “[f]or simple U.S. returns”; and that consumers could learn more about the qualifications by “[s]ee[ing] details at turbotax.com.” (GX331 (Intuit); PFF ¶244). Complaint Counsel offered no evidence that the written disclosures were not visible to consumers (PFF ¶230), nor could they given the prominence of those disclosures and the benchmarking analysis showing that the disclosures were consistent with those in comparable ads (PFF ¶¶232-241). The ad also informed consumers in spoken narrative that the free offer was for a specific TurboTax product, referencing “TurboTax Free.” (GX331 (Intuit)). Complaint Counsel offered no evidence these words could not be heard by consumers. (PFF ¶231).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make the claims that Complaint Counsel allege. Instead, the undisputed testimony from Intuit’s executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (See PFF ¶¶167-177, 190, 192-202, 405, 852, 857, 860, 870). The ad also informed consumers

in spoken narrative that the free offer was for a specific TurboTax product, referencing “TurboTax Free.” (GX331 (Intuit)). Complaint Counsel offered no evidence these words could not be heard by consumers. (PFF ¶231).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel offered no evidence that the ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. The evidence establishes that the disclosures in the ad ensured that reasonable consumers understood that there were qualifications for the free TurboTax SKU being advertised, the nature and character of those qualifications, and where additional detail was available. (PFF ¶¶241-246, 302-330, 334). Even without those disclosures, reasonable consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

114. The “Movie Credits” TurboTax ads aired on television in connection with TY 2018. (Shiller (Complaint Counsel) Tr. 184; GX60 (Intuit) at CC-00000668-69; GX61 (Intuit) at CC-00000682-83).

Response to Finding No. 114:

Intuit has no specific response except to note that the challenged ad aired in Tax Year 2018 and has not aired in the last four years. Moreover, the binding Consent Order with the attorneys general of all 50 states and the District of Columbia already prohibits Intuit from running this ad or substantially similar ads in the future, and Intuit has disclaimed any intention of running such ads again in the future. (See PFF ¶¶225, 810, 824).

115. The “Movie Credits” TurboTax ads aired on television in connection with TY 2019. (Shiller (Complaint Counsel) Tr. 184).

Response to Finding No. 115:

The Proposed Finding is incomplete and misleading because it is unclear which version or versions of the “Movie Credits” ad it is referring to. Complaint Counsel have cited no “Movie Credits” advertisement from Tax Year 2019. GX299, GX330, and GX331 are from Tax Year 2018. (See CCF ¶¶105-106, 108; Responses to CCF ¶¶105-106, 108). Moreover, the Proposed Finding misleadingly implies that Intuit ran the same TurboTax television ads in Tax Year 2018 and Tax Year 2019. That is not correct. Intuit voluntarily updated the written disclosures used in its television advertisements for TurboTax Free Edition in Tax Year 2019, including those used in the “Movie Credits” ads. (Compare, e.g., RX1400 (Intuit), with GX299 (Intuit); see also Shiller (FTC) Tr. 244-245). For example, the title card displayed at the end of Tax Year 2019 television advertisements was updated to refer to “TurboTax Free Edition,” instead of “TurboTax Free” as used in Tax Year 2018. (Compare, e.g., RX1400 (Intuit), with GX299 (Intuit)). The disclosures in Tax Year 2019 video ads were also made larger, with higher contrast, and updated to read “TurboTax Free Edition is for simple U.S. returns only. See if you qualify at turbotax.com.” (Compare, e.g., RX1400 (Intuit), with GX299 (Intuit)). Intuit’s executives explained that those changes were made as part of Intuit’s continuing efforts to be clear with consumers and to improve clarity in its advertising. (Ryan (Intuit) Tr. 726-727; Rubin (Intuit) Tr. 1560-1563).

116. The “Movie Credits” TurboTax ads appeared on television throughout the United States at least 4,651 times on at least 195 television networks between November 1, 2018, and April 18, 2019. (GX342 (Complaint Counsel) ¶¶ 69-70, at CC-00006927-28; see also Shiller (Complaint Counsel) Tr. 184).

Response to Finding No. 116:

The Proposed Finding is incomplete and misleading because it is unclear which version of the “Movie Credits” ad it is referring to. As described in response to the preceding finding

(see Response to CCFE ¶115), different versions of the “Movie Credits” ad aired in Tax Years 2018 and 2019, and the version aired in Tax Year 2019 had larger font and higher contrast, with updated disclosures that stated in the middle of the title card, “TurboTax Free Edition,” and below that, “TurboTax Free Edition is for simple U.S. returns only. See if you qualify at turbotax.com.” (Compare, e.g., RX1400 (Intuit), with GX299 (Intuit); see Ryan (Intuit) Tr. 726-727; Rubin (Intuit) Tr. 1560-1563). Intuit’s executives explained that those changes were made as part of Intuit’s continuing efforts to be clear with consumers and to improve clarity in the advertising. (Ryan (Intuit) Tr. 726-727; Rubin (Intuit) Tr. 1560-1563).

Moreover, the Proposed Finding does not support an inference that the challenged ads were deceptive. The fact that ads aired is not evidence that the ads conveyed the claim asserted by Complaint Counsel or that reasonable consumers were likely to be deceived by the ads. To the contrary, the fact that Complaint Counsel have identified only 175 even potentially relevant consumer complaints from the five years spanning Tax Years 2015-2019 (see CCFE ¶¶676-677), even though the Movie Credits ad on its own was aired at least 4,651 times on at least 195 television networks during Tax Year 2018 alone, is strong evidence that reasonable consumers were not deceived by the “Movie Credits” ad or any of the other challenged advertisements that ran in Tax Year 2018 (see PFF ¶¶632, 637, 639, 641-647).

117. The “Movie Credits” TurboTax ads appeared throughout the United States at least 6,216 times on 721 at least television networks between November 1, 2019, and July 15, 2020. (GX342 (Complaint Counsel) ¶¶ 90-91, CC-00006940-41; see also Shiller (Complaint Counsel) Tr. 184).

Response to Finding No. 117:

The Proposed Finding is incomplete and misleading because it is unclear which version of the “Movie Credits” ad it is referring to. As described in response to the preceding findings (see Responses to CCFE ¶¶115-116), different versions of the “Movie Credits” ad aired in Tax

Years 2018 and 2019, and the version aired in Tax Year 2019 had larger font and higher contrast, with updated disclosures that stated in the middle of the title card, “TurboTax Free Edition,” and below that, “TurboTax Free Edition is for simple U.S. returns only. See if you qualify at turbotax.com.” (*Compare, e.g.,* RX1400 (Intuit), *with* GX299 (Intuit); *see* Ryan (Intuit) Tr. 726-727; Rubin (Intuit) Tr. 1560-1563). Intuit’s executives explained that those changes were made as part of Intuit’s continuing efforts to be clear with consumers and to improve clarity in the advertising. (Ryan (Intuit) Tr. 726-727; Rubin (Intuit) Tr. 1560-1563).

Moreover, the Proposed Finding does not support an inference that the challenged ads were deceptive. The fact that ads aired is not evidence that the ads conveyed the claim asserted by Complaint Counsel or that reasonable consumers were likely to be deceived by the ads. To the contrary, the fact that Complaint Counsel have identified only 175 even potentially relevant consumer complaints from the five years spanning Tax Years 2015-2019 (*see* CCF ¶¶676-677), even though the “Movie Credits” ad on its own was aired at least 6,216 times on at least 721 television networks during Tax Year 2019 alone, is strong evidence that reasonable consumers were not deceived by the “Movie Credits” ad or any of the other challenged advertisements that ran in Tax Year 2019 (*see* PFF ¶¶632, 637, 639, 641-647).

d. Game Show

118. A true and correct copy of the 30-second “Game Show” TurboTax ad is at GX59. (Shiller (Complaint Counsel) Tr. 180-81; GX59 (Complaint Counsel); GX342 (Complaint Counsel) ¶ 51, at CC-00006920).

Response to Finding No. 118:

The Proposed Finding is misleading because the cited exhibit (GX59 (FTC)) is not a copy of the ad, but rather a low-quality screen recording taken from a third-party website. (*See* GX59 (FTC)). Intuit has no other specific response except to note that the challenged ad aired in Tax Year 2018 and has not aired in the last four years. Moreover, the binding Consent Order with the

attorneys general of all 50 states and the District of Columbia already prohibits Intuit from running this ad or substantially similar ads in the future, and Intuit has disclaimed any intention of running such ads again in the future. (*See* PFF ¶¶225, 810, 824).

119. In the 30-second “Game Show” TurboTax ad, the word “free” is repeated dozens of times. (GX59 (Complaint Counsel; Shiller (Complaint Counsel) Tr. 181)).

Response to Finding No. 119:

The Proposed Finding is incomplete and misleading because Complaint Counsel have omitted critical information for evaluating the advertisement, including that the ad contained disclosures about qualifications. (*See* CCFF ¶¶120-124; Responses to CCFF ¶¶120-124). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

The Proposed Finding fails to mention that the ad verbally informed consumers that the free offer was for “TurboTax Free.” (GX59 (FTC)). As Mr. Rubin explained, “TurboTax Free” was how Intuit referred to TurboTax Free Edition during that year, consistent with how it referred to the other TurboTax SKUs. (PFF ¶227). The reference to “TurboTax Free” was thus meant to convey the specific SKU being advertised, as reflected in the written disclosure appearing on the same title card at the end of the advertisement. (PFF ¶227). And after just a single year of using “TurboTax Free” in certain Tax Year 2018 advertisements, Intuit voluntarily updated the video advertisements in Tax Year 2019 to have the logo say “TurboTax Free *Edition*” to make the ads even clearer. (PFF ¶357). The Proposed Finding also fails to mention that the ad included a written disclosure stating “Free Edition product only. For simple U.S. returns” and “see details at turbotax.com.” (GX59 (FTC)).

Moreover, the Proposed Finding does not support an inference that the ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. To start, the repetition of the word “free” by itself is not a claim about TurboTax at all. (PFF ¶221). The ad does not state anything about TurboTax until the end of the ad, when it informed viewers that the free offer applied to a specific TurboTax SKU that had qualifications. (GX59 (FTC); *see also* PFF ¶294). The ad informed consumers in writing that the free offer was for a specific TurboTax SKU, stating “Free Edition product only”; that the free offer had qualifications based on the complexity of a consumer’s tax return, by stating “[f]or simple U.S. returns”; and that consumers could learn more about the qualifications by “[s]ee[ing] details at turbotax.com.” (GX59 (FTC); PFF ¶244). Complaint Counsel offered no evidence that the written disclosures were not visible (PFF ¶230), nor could they given the prominence of those disclosures and the benchmarking analysis showing that the disclosures were consistent with those in comparable ads (PFF ¶¶232-241). The ad also informed consumers in spoken narrative that the free offer was for a specific TurboTax product, referencing “TurboTax Free.” (GX59 (FTC)). Complaint Counsel offered no evidence these words could not be heard by consumers. (PFF ¶231).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make the claims that Complaint Counsel allege. Instead, the undisputed testimony from Intuit’s executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (*See* PFF ¶¶167-177, 190, 192-202, 405, 852, 857, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel offered no evidence that the ad was likely to mislead

reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the disclosures in the ad ensured that reasonable consumers understood that there were qualifications for the free TurboTax SKU being advertised, the nature and character of those qualifications, and where additional detail was available. (PFF ¶¶241-246, 302-330, 334). Even without those disclosures, reasonable consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

120. A true and correct copy of the 15-second “Game Show” TurboTax ad is at GX356. (GX356 (Intuit); GX342 (Complaint Counsel) ¶ 51, at CC-00006921).

Response to Finding No. 120:

Intuit has no specific response except to note that the challenged ad aired in Tax Year 2018 and has not aired in the last four years. Moreover, the binding Consent Order with the attorneys general of all 50 states and the District of Columbia already prohibits Intuit from running this ad or substantially similar ads in the future, and Intuit has disclaimed any intention of running such ads again in the future. (See PFF ¶¶225, 810, 824).

121. In the 15-second “Game Show” TurboTax ad, the word “free” is repeated multiple times. (GX356 (Intuit)).

Response to Finding No. 121:

The Proposed Finding is incomplete and misleading because Complaint Counsel have omitted critical information for evaluating the advertisement, including that the ad contained disclosures about qualifications. (See CCFF ¶¶119-124; Responses to CCFF ¶¶119-124). In determining the claims conveyed by an advertisement and whether it was likely to mislead

reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

The Proposed Finding fails to mention that the ad verbally informed consumers that the free offer was for “TurboTax Free.” (GX356 (Intuit)). As Mr. Rubin explained, “TurboTax Free” was how Intuit referred to TurboTax Free Edition during that year, consistent with how it referred to the other TurboTax SKUs. (PFF ¶227). The reference to “TurboTax Free” was thus meant to convey the specific SKU being advertised, as reflected in the written disclosure appearing on the same title card at the end of the advertisement. (PFF ¶227). And after just a single year of using “TurboTax Free” in certain Tax Year 2018 advertisements, Intuit voluntarily updated the video advertisements in Tax Year 2019 to have the logo say “TurboTax Free *Edition*” to make the ads even clearer. (PFF ¶357). The Proposed Finding also fails to mention that the ad included a written disclosure stating “Free Edition product only. For simple U.S. returns” and “See details at turbotax.com.” (GX356 (Intuit)).

Moreover, the Proposed Finding does not support an inference that the ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. To start, the repetition of the word “free” by itself is not a claim about TurboTax at all. (PFF ¶221). The ad does not state anything about TurboTax until the end of the ad, when it informed viewers that the free offer applied to a specific TurboTax SKU that had qualifications. (GX356 (Intuit); *see also* PFF ¶294). The ad informed consumers in writing that the free offer was for a specific TurboTax SKU, stating “Free Edition product only”; that the free offer had qualifications based on the complexity of a consumer’s tax return, by stating “[f]or simple U.S. returns”; and that consumers could learn more about the qualifications by “[s]ee[ing] details at turbotax.com.” (GX356 (Intuit); PFF ¶244). Complaint

Counsel offered no evidence that the written disclosures were not visible (PFF ¶230), nor could they given the prominence of those disclosures and the benchmarking analysis showing that the disclosures were consistent with those in comparable ads (PFF ¶¶232-241). The ad also informed consumers in spoken narrative that the free offer was for a specific TurboTax product, referencing “TurboTax Free.” (GX356 (Intuit)). Complaint Counsel offered no evidence these words could not be heard by consumers. (PFF ¶231).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make the claims that Complaint Counsel allege. Instead, the undisputed testimony from Intuit’s executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (See PFF ¶¶167-177, 190, 192-202, 405, 852, 857, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel offered no evidence that the ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the disclosures in the ad ensured that reasonable consumers understood that there were qualifications for the free TurboTax SKU being advertised, the nature and character of those qualifications, and where additional detail was available. (PFF ¶¶241-246, 302-330, 334). Even without those disclosures, reasonable consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

122. The “Game Show” TurboTax ads feature two contestants answering “free” to every question in a game show. (GX59 (Complaint Counsel); GX356 (Intuit); GX342 (Complaint Counsel) ¶ 52, at CC-00006921).

Response to Finding No. 122:

The Proposed Finding is incomplete and misleading because it is just a snippet of the full ad that actually ran and Complaint Counsel have omitted critical information for evaluating the advertisements, including that they contained disclosures about qualifications. (*See* CCFF ¶¶123-124; Responses to CCFF ¶¶123-124). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

The Proposed Finding fails to mention that the ads verbally informed consumers that the free offer was for “TurboTax Free.” (GX59 (FTC); GX356 (Intuit)). As Mr. Rubin explained, “TurboTax Free” was how Intuit referred to TurboTax Free Edition during that year, consistent with how it referred to the other TurboTax SKUs. (PFF ¶227). The reference to “TurboTax Free” was thus meant to convey the specific SKU being advertised, as reflected in the written disclosure appearing on the same title card at the end of the advertisement. (PFF ¶227). And after just a single year of using “TurboTax Free” in certain Tax Year 2018 advertisements, Intuit voluntarily updated the video advertisements in Tax Year 2019 to have the logo say “TurboTax Free *Edition*” to make the ads even clearer. (PFF ¶357). The Proposed Finding also fails to mention that the ads included a written disclosure stating “Free Edition product only. For simple U.S. returns” and “See details at turbotax.com.” (GX59 Complaint Counsel); GX356 (Intuit)).

Moreover, the Proposed Finding does not support an inference that the ads expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. To start, the repetition of the word “free” by itself is not a claim about TurboTax at all. (PFF ¶221). The ads do not state anything about TurboTax until the

end of the ads, when they informed viewers that the free offer applied to a specific TurboTax SKU that had qualifications. (GX59 (FTC); GX356 (Intuit); *see also* PFF ¶294). The ads informed consumers in writing that the free offer was for a specific TurboTax SKU, stating “Free Edition product only”; that the free offer had qualifications based on the complexity of a consumer’s tax return, by stating “[f]or simple U.S. returns”; and that consumers could learn more about the qualifications by “[s]ee[ing] details at turbotax.com.” (GX59 (FTC); GX356 (Intuit); PFF ¶244). Complaint Counsel offered no evidence that the written disclosures were not visible (PFF ¶230), nor could they given the prominence of those disclosures and the benchmarking analysis showing that the disclosures were consistent with those in comparable ads (PFF ¶¶232-241). The ads also informed consumers in spoken narrative that the free offer was for a specific TurboTax product, referencing “TurboTax Free.” (GX59 (FTC); GX356 (Intuit)). Complaint Counsel offered no evidence these words could not be heard by consumers. (PFF ¶231).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make the claims that Complaint Counsel allege. Instead, the undisputed testimony from Intuit’s executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (*See* PFF ¶¶167-177, 190, 192-202, 405, 852, 857, 860, 870).

The Proposed Finding also does not support an inference that the ads were likely to mislead reasonable consumers. Complaint Counsel offered no evidence that the ads were likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the disclosures in the ads ensured that reasonable consumers understood that

there were qualifications for the free TurboTax SKU being advertised, the nature and character of those qualifications, and where additional detail was available. (PFF ¶¶241-246, 302-330, 334). Even without those disclosures, reasonable consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

123. The “Game Show” TurboTax ads include the following claim: “That’s right, TurboTax free is free. Free, free free free.” (Shiller (Complaint Counsel) Tr. 181; GX59 (Complaint Counsel) at 00:31; GX356 (Intuit) at 00:10).

Response to Finding No. 123:

The Proposed Finding is incomplete and misleading because it is just a snippet of the full ads that actually ran and Complaint Counsel have omitted critical information for evaluating the advertisement. (CCFF ¶¶123-124; Responses to CCFF ¶¶123-124). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

The Proposed Finding fails to mention that the ads verbally informed consumers that the free offer was for “TurboTax Free.” (GX59 (FTC); GX356 (Intuit)). As Mr. Rubin explained, “TurboTax Free” was how Intuit referred to TurboTax Free Edition during that year, consistent with how it referred to the other TurboTax SKUs. (PFF ¶227). The reference to “TurboTax Free” was thus meant to convey the specific SKU being advertised, as reflected in the written disclosure appearing on the same title card at the end of the advertisement. (PFF ¶227). And after just a single year of using “TurboTax Free” in certain Tax Year 2018 advertisements, Intuit voluntarily updated the video advertisements in Tax Year 2019 to have the logo say “TurboTax Free *Edition*” to make the ads even clearer. (PFF ¶357). The Proposed Finding also fails to

mention that the ads include written disclosures stating “Free Edition product only. For simple U.S. returns” and “See details at turbotax.com.” (GX59 (FTC); GX356 (Intuit)).

Moreover, the Proposed Finding does not support an inference that the ads expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. To start, the repetition of the word “free” by itself is not a claim about TurboTax at all. (PFF ¶221). The ads do not state anything about TurboTax until the end of the ads, when they informed viewers that the free offer applied to a specific TurboTax SKU that had qualifications. (GX59 (FTC); GX356 (Intuit); *see also* PFF ¶294). In addition, the ads informed consumers in writing that the free offer was for a specific TurboTax SKU, stating “Free Edition product only”; that the free offer had qualifications based on the complexity of a consumer’s tax return, by stating “[f]or simple U.S. returns”; and inviting consumers to “[s]ee details at turbotax.com.” (GX59 (FTC); GX356 (Intuit); PFF ¶244). Complaint Counsel offered no evidence that the written disclosures were not visible (PFF ¶230), nor could they given the prominence of those disclosures and the benchmarking analysis showing that the disclosures were consistent with those in comparable ads (PFF ¶¶232-241). The ads also informed consumers in spoken narrative that the free offer was for a specific TurboTax product, referencing “TurboTax Free.” (GX59 (FTC); GX356 (Intuit)). Complaint Counsel offered no evidence these words could not be heard by consumers. (PFF ¶231).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make the claims that Complaint Counsel allege. Instead, the undisputed testimony from Intuit’s executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (*See* PFF ¶¶167-177, 190, 192-202, 405, 852, 857, 860, 870).

The Proposed Finding also does not support an inference that the ads were likely to mislead reasonable consumers. Complaint Counsel offered no evidence that the ads were likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the disclosures in the ad ensured that reasonable consumers understood that there were qualifications for the free TurboTax SKU being advertised, the nature and character of those qualifications, and where additional detail was available. (PFF ¶¶241-246, 302-330, 334). Even without those disclosures, reasonable consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

124. The “Game Show” TurboTax ads include the following written disclaimer which appears for a few seconds in small font at the bottom of the screen: “Free Edition product only. For simple U.S. returns. Offer subject to change. See details at turbotax.com.” (GX59 (Complaint Counsel) at 00:32; GX356 (Intuit) at 00:14).

Response to Finding No. 124:

The Proposed Finding is incorrect, incomplete, and misleading. It is wrong because in GX356, the language telling consumers “Free Edition product only. For simple U.S. returns. Offer subject to change. See details at turbotax.com” appears at 0:11, not 0:14, and appears for several seconds. (GX356 (Intuit)). Additionally, the scroll bar showing the time of the ad itself is not visible in GX59, which is a recording of the ad from a third-party website. (GX59 (FTC)). It is incomplete and misleading because it wrongly refers to language in the ad as a “disclaimer” and ignores other disclosures in the ad. GX59 and GX356 also include a verbal disclosure informing consumers that the free offer was for the “TurboTax Free” SKU. (GX59 (FTC); GX356 (Intuit); CCF ¶¶119, 121; Responses to CCF ¶¶119, 121). Further, the Proposed

Finding fails to recognize that by inviting consumers to “[s]ee details at TurboTax.com,” all content on the TurboTax website—including detailed information about qualifications—was “integrated” into the ads, and therefore all disclosures on the website are incorporated into the ads. (PFF ¶328; CCFF ¶455). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

Moreover, the Proposed Finding does not support an inference that the ads expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The ads informed consumers in writing that the free offer was for a specific TurboTax SKU, “Free Edition”; that the free offer had qualifications based on the complexity of a consumer’s tax return, by stating “[f]or simple U.S. returns”; and that consumers could learn more about the qualifications by “[s]ee[ing] details at turbotax.com.” (GX59 (FTC); GX356 (Intuit); PFF ¶244). Complaint Counsel offered no evidence that the written disclosures were not visible to consumers (PFF ¶230), nor could they given the prominence of those disclosures and the benchmarking analysis showing that the disclosures were consistent with those in comparable ads (PFF ¶¶232-241). The ads also informed consumers in spoken narrative that the free offer was for a specific TurboTax product, referencing “TurboTax Free.” (GX59 (FTC); GX356 (Intuit)). Complaint Counsel offered no evidence these words could not be heard by consumers. (PFF ¶231).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make the claims that Complaint Counsel allege. Instead, the undisputed testimony from Intuit’s executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax

products are free or that TurboTax would be free for a consumer when that was not the case. (See PFF ¶¶167-177, 190, 192-202, 405, 852, 857, 860, 870).

The Proposed Finding also does not support an inference that the ads were likely to mislead reasonable consumers. Complaint Counsel offered no evidence that the ads were likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. The evidence establishes that the disclosures in the ads ensured that reasonable consumers understood that there were qualifications for the free TurboTax SKU being advertised, the nature and character of those qualifications, and where additional detail was available. (PFF ¶¶241-246, 302-330, 334). Even without those disclosures, reasonable consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

125. The “Game Show” TurboTax ads aired on television in connection with TY 2018. (Shiller (Complaint Counsel) Tr. 181-82; GX60 (Intuit) at CC-00000668-69; GX61 (Intuit) at CC-00000682-83).

Response to Finding No. 125:

Intuit has no specific response except to note that the challenged ad aired in Tax Year 2018 and has not aired in the last four years. Moreover, the binding Consent Order with the attorneys general of all 50 states and the District of Columbia already prohibits Intuit from running this ad or substantially similar ads in the future, and Intuit has disclaimed any intention of running such ads again in the future. (See PFF ¶¶225, 810, 824).

126. The “Game Show” TurboTax ads aired on television in connection with TY 2019. (Shiller (Complaint Counsel) Tr. 181-82).

Response to Finding No. 126:

The Proposed Finding is incomplete and misleading because it is unclear which version of the “Game Show” ad it is referring to. Complaint Counsel have cited no “Game Show” advertisement from Tax Year 2019. GX59 and GX356 are from Tax Year 2018. (See CCFF ¶¶118, 120; Responses to CCFF ¶¶118, 120).

Moreover, the Proposed Finding misleadingly implies that Intuit ran the same TurboTax television ads in Tax Year 2018 and Tax Year 2019. That is not correct. Intuit voluntarily updated the written disclosures used in its television advertisements for TurboTax Free Edition in Tax Year 2019, including those used in the “Game Show” ads. (Compare, e.g., RX1115 (Intuit), with GX356 (Intuit); see also Shiller (FTC) Tr. 244-245). For example, the title card displayed at the end of Tax Year 2019 television advertisements was updated to refer to “TurboTax Free Edition,” instead of “TurboTax Free” as used in Tax Year 2018. (Compare, e.g., RX1115 (Intuit), with GX356 (Intuit)). The disclosures in Tax Year 2019 video ads were also made larger, with higher contrast, and updated to read “TurboTax Free Edition is for simple U.S. returns only. See if you qualify at turbotax.com.” (Compare, e.g., RX1115 (Intuit), with GX356 (Intuit)). Intuit’s executives explained that those changes were made as part of Intuit’s continuing efforts to be clear with consumers and to improve clarity in its advertising. (Ryan (Intuit) Tr. 726-727; Rubin (Intuit) Tr. 1560-1563).

127. The “Game Show” TurboTax ads appeared on television throughout the United States at least 5,858 times on at least 140 networks between November 1, 2018, and April 18, 2019. (GX342 (Complaint Counsel) ¶¶ 54-55, at CC-00006921-22; see also Shiller (Complaint Counsel) Tr. 181-82).

Response to Finding No. 127:

The Proposed Finding is incomplete and misleading because it is unclear which version of the “Game Show” ad it is referring to. As described in response to the preceding finding (see

Response to CCFE ¶126), different versions of the “Game Show” ad aired in Tax Years 2018 and 2019, and the version aired in Tax Year 2019 had larger font and higher contrast, with updated disclosures that stated in the middle of the title card, “TurboTax Free Edition,” and below that, “TurboTax Free Edition is for simple U.S. returns only. See if you qualify at turbotax.com.” (Compare, e.g., RX1115 (Intuit), with GX356 (Intuit); see Ryan (Intuit) Tr. 726-727; Rubin (Intuit) Tr. 1560-1563). Intuit’s executives explained that those changes were made as part of Intuit’s continuing efforts to be clear with consumers and to improve clarity in the advertising. (Ryan (Intuit) Tr. 726-727; Rubin (Intuit) Tr. 1560-1563).

Moreover, the Proposed Finding does not support an inference that the challenged ads were deceptive. The fact that ads aired is not evidence that the ads conveyed the claim asserted by Complaint Counsel or that reasonable consumers were likely to be deceived by the ads. To the contrary, the fact that Complaint Counsel have identified only 175 even potentially relevant consumer complaints from the five years spanning Tax Years 2015-2019 (see CCFE ¶¶676-677), even though the “Game Show” ad on its own was aired at least 5,858 times on at least 140 television networks during Tax Year 2018 alone, is strong evidence that reasonable consumers were not deceived by the “Game Show” ad or any of the other challenged advertisements that ran in Tax Year 2018 (see PFF ¶¶632, 637, 639, 641-647).

128. The “Game Show” TurboTax ads appeared throughout the United States at least 4,656 times on at least 214 television networks between November 1, 2019, and July 15, 2020. (GX342 (Complaint Counsel) ¶¶ 88-89, at CC-00006938-39; see also Shiller (Complaint Counsel) Tr. 181-82).

Response to Finding No. 128:

The Proposed Finding is incomplete and misleading because it is unclear which version of the “Game Show” ad it is referring to. As described in response to the preceding findings (see Responses to CCFE ¶¶126-127), different versions of the “Game Show” ad aired in Tax Years

2018 and 2019, and the version aired in Tax Year 2019 had larger font and higher contrast, with updated disclosures that stated in the middle of the title card, “TurboTax Free Edition,” and below that, “TurboTax Free Edition is for simple U.S. returns only. See if you qualify at turbotax.com.” (*Compare, e.g.,* RX1115 (Intuit), *with* GX356 (Intuit); *see* Ryan (Intuit) Tr. 726-727; Rubin (Intuit) Tr. 1560-1563). Intuit’s executives explained that those changes were made as part of Intuit’s continuing efforts to be clear with consumers and to improve clarity in the advertising. (Ryan (Intuit) Tr. 726-727; Rubin (Intuit) Tr. 1560-1563).

Moreover, the Proposed Finding does not support an inference that the challenged ads were deceptive. The fact that ads aired is not evidence that the ads conveyed the claim asserted by Complaint Counsel or that reasonable consumers were likely to be deceived by the ads. To the contrary, the fact that Complaint Counsel have identified only 175 even potentially relevant consumer complaints from the five years spanning Tax Years 2015-2019 (*see* CCF ¶¶676-677), even though the “Game Show” ad on its own was aired at least 4,656 times on at least 214 television networks during Tax Year 2019 alone, is strong evidence that reasonable consumers were not deceived by the “Game Show” ad or any of the other challenged advertisements that ran in Tax Year 2019 (*see* PFF ¶¶632, 637, 639, 641-647).

e. Court Reporter

129. A true and correct copy of a 15-second “Court Reporter” TurboTax ad is at GX348. (Shiller (Complaint Counsel) Tr. 176; GX348 (Intuit); GX342 (Complaint Counsel) ¶ 39, at CC-00006915).

Response to Finding No. 129:

Intuit has no specific response except to note that the challenged ad aired in Tax Year 2018 and has not aired in for the last four years. Moreover, the binding Consent Order with the attorneys general of all 50 states and the District of Columbia already prohibits Intuit from

running this ad or substantially similar ads in the future, and Intuit has disclaimed any intention of running such ads again in the future. (See PFF ¶¶225, 810, 824).

130. The 15-second “Court Reporter” TurboTax ad features a court stenographer transcribing a legal proceeding that only used the word “free.” (GX348 (Intuit); GX342 (Complaint Counsel) ¶ 39, at CC-00006915).

Response to Finding No. 130:

The Proposed Finding is incomplete and misleading because it is just a snippet of the full ad that actually ran and Complaint Counsel have omitted critical information for evaluating the advertisements, including that the ad contained disclosures about qualifications. (See CCFF ¶¶131-132; Responses to CCFF ¶¶131-132). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

The Proposed Finding fails to mention that the ad verbally informed consumers that the free offer was for “TurboTax Free.” (GX348 (Intuit)). As Mr. Rubin explained, “TurboTax Free” was how Intuit referred to TurboTax Free Edition during that year, consistent with how it referred to the other TurboTax SKUs. (PFF ¶227). The reference to “TurboTax Free” was thus meant to convey the specific SKU being advertised, as reflected in the written disclosure appearing on the same title card at the end of the advertisement. (PFF ¶227). And after just a single year of using “TurboTax Free” in certain Tax Year 2018 advertisements, Intuit voluntarily updated the video advertisements in Tax Year 2019 to have the logo say “TurboTax Free *Edition*” to make the ads even clearer. (PFF ¶357). The Proposed Finding also fails to mention that the ad included a written disclosure stating “Free Edition product only. For simple U.S. returns” and “See details at turbotax.com.” (GX348 (Intuit)).

Moreover, the Proposed Finding does not support an inference that the ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be

free for the consumer when it was not. To start, the repetition of the word “free” by itself is not a claim about TurboTax at all. (PFF ¶221). The ad does not state anything about TurboTax until the end of the ads, when they informed viewers that the free offer applied to a specific TurboTax SKU that had qualifications. (GX348 (Intuit); *see also* PFF ¶294). In addition, the ad informed consumers in writing that the free offer was for a specific TurboTax SKU, stating “Free Edition product only”; that the free offer had qualifications based on the complexity of a consumer’s tax return, by stating “[f]or simple U.S. returns”; and that consumers could learn more about the qualifications by “[s]ee[ing] details at turbotax.com.” (GX348 (Intuit); PFF ¶244). Complaint Counsel offered no evidence that the written disclosures were not visible (PFF ¶230), nor could they given the prominence of those disclosures and the benchmarking analysis showing that the disclosures were consistent with those in comparable ads (PFF ¶¶232-241). The ad also informed consumers in spoken narrative that the free offer was for a specific TurboTax product, referencing “TurboTax Free.” (GX348 (Intuit)). Complaint Counsel offered no evidence these words could not be heard by consumers. (PFF ¶231).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make the claims that Complaint Counsel allege. Instead, the undisputed testimony from Intuit’s executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (*See* PFF ¶¶167-177, 190, 192-202, 405, 852, 857, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel offered no evidence that the ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes

that the disclosures in the ad ensured that reasonable consumers understood that there were qualifications for the free TurboTax SKU being advertised, the nature and character of those qualifications, and where additional detail was available. (PFF ¶¶241-246, 302-330, 334). Even without those disclosures, reasonable consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

131. The 15-second “Court Reporter” TurboTax ad includes the following claim: “That’s right, TurboTax free is free. Free, free free free.” (GX348 (Intuit) at 00:09; *see also* Shiller (Complaint Counsel) Tr. 176).

Response to Finding No. 131:

The Proposed Finding is incomplete and misleading because it is just a snippet of the full ads that actually ran and Complaint Counsel have omitted critical information for evaluating the advertisement. (CCFF ¶¶123-124; Responses to CCFF ¶¶123-124). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

The Proposed Finding fails to mention that the ad verbally informed consumers that the free offer was for “TurboTax Free.” (GX348 (Intuit)). As Mr. Rubin explained, “TurboTax Free” was how Intuit referred to TurboTax Free Edition during that year, consistent with how it referred to the other TurboTax SKUs. (PFF ¶227). The reference to “TurboTax Free” was thus meant to convey the specific SKU being advertised, as reflected in the written disclosure appearing on the same title card at the end of the advertisement. (PFF ¶227). And after just a single year of using “TurboTax Free” in certain Tax Year 2018 advertisements, Intuit voluntarily updated the video advertisements in Tax Year 2019 to have the logo say “TurboTax Free *Edition*”

to make the ads even clearer. (PFF ¶357). The Proposed Finding also fails to mention that the ad included a written disclosure stating “Free Edition product only. For simple U.S. returns” and “See details at turbotax.com.” (GX348 (Intuit)).

Moreover, the Proposed Finding does not support an inference that the ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. To start, the repetition of the word “free” by itself is not a claim about TurboTax at all. (PFF ¶221). The ad does not state anything about TurboTax until the end of the ad, when it informed viewers that the free offer applied to a specific TurboTax SKU that had qualifications. (GX348 (Intuit); *see also* PFF ¶294). In addition, the ad informed consumers in writing that the free offer was for a specific TurboTax SKU, stating “Free Edition product only”; that the free offer had qualifications based on the complexity of a consumer’s tax return, by stating “[f]or simple U.S. returns”; and inviting consumers to “[s]ee details at turbotax.com.” (GX348 (Intuit); PFF ¶244). Complaint Counsel offered no evidence that the written disclosures were not visible (PFF ¶230), nor could they given the prominence of those disclosures and the benchmarking analysis showing that the disclosures were consistent with those in comparable ads (PFF ¶¶232-241). The ad also informed consumers in spoken narrative that the free offer was for a specific TurboTax product, referencing “TurboTax Free.” (GX348 (Intuit)). Complaint Counsel offered no evidence these words could not be heard by consumers. (PFF ¶231).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make the claims that Complaint Counsel allege. Instead, the undisputed testimony from Intuit’s executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax

products are free or that TurboTax would be free for a consumer when that was not the case. (See PFF ¶¶167-177, 190, 192-202, 405, 852, 857, 860, 870).

The Proposed Finding also does not support an inference that the ads were likely to mislead reasonable consumers. Complaint Counsel offered no evidence that the ads were likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the disclosures in the ad ensured that reasonable consumers understood that there were qualifications for the free TurboTax SKU being advertised, the nature and character of those qualifications, and where additional detail was available. (PFF ¶¶241-246, 302-330, 334). Even without those disclosures, reasonable consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

132. The 15-second “Court Reporter” TurboTax ad includes the following written disclaimer which appears for a few seconds in small font at the bottom of the screen: “Free Edition product only. For simple U.S. returns. Offer subject to change. See details at turbotax.com.” (GX348 (Intuit) at 00:10).

Response to Finding No. 132:

The Proposed Finding is incomplete and misleading because it wrongly refers to language in the ad as a “disclaimer” and ignores other disclosures in the ad. GX348 also includes a verbal disclosure informing consumers that the free offer was for the “TurboTax Free” SKU. (GX348 (Intuit); CCF ¶130; Response to CCF ¶130). Further, the Proposed Finding fails to recognize that by inviting consumers to “[s]ee details at TurboTax.com,” all content on the TurboTax website—including detailed information about qualifications—was “integrated” into the ad, and therefore all disclosures on the website are incorporated into the ad. (PFF ¶328;

CCFF ¶455). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

Moreover, the Proposed Finding does not support an inference that the ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The ad informed consumers in writing that the free offer was for a specific TurboTax SKU, “Free Edition”; that the free offer had qualifications based on the complexity of a consumer’s tax return, by stating “[f]or simple U.S. returns”; and that consumers could learn more about the qualifications by “[s]ee[ing] details at turbotax.com.” (GX348 (Intuit); PFF ¶244). Complaint Counsel offered no evidence that the written disclosures were not visible to consumers (PFF ¶230), nor could they given the prominence of those disclosures and the benchmarking analysis showing that the disclosures were consistent with those in comparable ads (PFF ¶¶232-241). The ad also informed consumers in spoken narrative that the free offer was for a specific TurboTax product, referencing “TurboTax Free.” (GX348 (Intuit)). Complaint Counsel offered no evidence these words could not be heard by consumers. (PFF ¶231).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make the claims that Complaint Counsel allege. Instead, the undisputed testimony from Intuit’s executives establishes that Intuit did not intend for any of the ad to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (See PFF ¶¶167-177, 190, 192-202, 405, 852, 857, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel offered no evidence that the ad was likely to mislead

reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. The evidence establishes that the disclosures in the ad ensured that reasonable consumers understood that there were qualifications for the free TurboTax SKU being advertised, the nature and character of those qualifications, and where additional detail was available. (PFF ¶¶241-246, 302-330, 334). Even without those disclosures, reasonable consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

133. The “Court Reporter” TurboTax ad appeared on television throughout the United States at least 1,358 times on at least 112 television networks between November 1, 2018, and April 18, 2019. (GX342 (Complaint Counsel) ¶¶ 40-41, at CC-00006915-16; *see also* Shiller (Complaint Counsel) Tr. 177).

Response to Finding No. 133:

The Proposed Finding is incomplete and misleading because it is unclear which version of the “Court Reporter” ad it is referring to. Different versions of the “Court Reporter” ad aired in Tax Years 2018 and 2019, and the version aired in Tax Year 2019 had larger font and higher contrast, with updated disclosures that stated in the middle of the title card, “TurboTax Free Edition,” and below that, “TurboTax Free Edition is for simple U.S. returns only. See if you qualify at turbotax.com.” (*Compare* RX1112 (Intuit) *with* GX348 (Intuit); *see also* Ryan (Intuit) Tr. 726-727; Rubin (Intuit) Tr. 1560-1563). Intuit’s executives explained that those changes were made as part of Intuit’s continuing efforts to be clear with consumers and to improve clarity in the advertising. (Ryan (Intuit) Tr. 726-727; Rubin (Intuit) Tr. 1560-1563).

Moreover, the Proposed Finding does not support an inference that the challenged ads were deceptive. The fact that ads aired is not evidence that the ads conveyed the claim asserted

by Complaint Counsel or that reasonable consumers were likely to be deceived by the ads. To the contrary, the fact that Complaint Counsel have identified only 175 even potentially relevant consumer complaints from the five years spanning Tax Years 2015-2019 (*see* CCFE ¶¶676-677), even though the “Court Reporter” ad on its own was aired at least 1,358 times on at least 112 television networks during Tax Year 2018 alone, is strong evidence that reasonable consumers were not deceived by the “Court Reporter” ad or any of the other challenged advertisements that ran in Tax Year 2018 (*see* PFF ¶¶632, 637, 639, 641-647).

134. The “Court Reporter” TurboTax ad appeared on television throughout the United States at least 1,502 times on at least 126 television networks between November 1, 2019, and July 15, 2020. (GX342 (Complaint Counsel) ¶¶ 84-85, at CC-00006936-37; *see also* Shiller (Complaint Counsel) Tr. 177).

Response to Finding No. 134:

The Proposed Finding is incomplete and misleading because it is unclear which version or versions of the “Court Reporter” ad it is referring to. As described in response to the preceding finding (*see* Response to CCFE ¶133), different versions of the Court Reporter ad aired in Tax Years 2018 and 2019, and the version aired in Tax Year 2019 had larger font and higher contrast, with updated disclosures that stated in the middle of the title card, “TurboTax Free Edition,” and below that, “TurboTax Free Edition is for simple U.S. returns only. See if you qualify at turbotax.com.” (*Compare* RX1112 (Intuit) *with* GX348 (Intuit); *see also* Ryan (Intuit) Tr. 726-727; Rubin (Intuit) Tr. 1560-1563). Intuit’s executives explained that those changes were made as part of Intuit’s continuing efforts to be clear with consumers and to improve clarity in the advertising. (Ryan (Intuit) Tr. 726-727; Rubin (Intuit) Tr. 1560-1563).

Moreover, the Proposed Finding does not support an inference that the challenged ads were deceptive. The fact that ads aired is not evidence that the ads conveyed the claim asserted by Complaint Counsel or that reasonable consumers were likely to be deceived by the ads. To

the contrary, the fact that Complaint Counsel have identified only 175 even potentially relevant consumer complaints from the five years spanning Tax Years 2015-2019 (*see* CCF ¶¶676-677), even though the “Court Reporter” ad on its own was aired at least 1,502 times on at least 126 television networks during Tax Year 2019 alone, is strong evidence that reasonable consumers were not deceived by the “Court Reporter” ad or any of the other challenged advertisements that ran in Tax Year 2019 (*see* PFF ¶¶632, 637, 639, 641-647).

f. Crossword

135. A true and correct copy of the 15-second “Crossword” TurboTax ad is at GX326. (Shiller (Complaint Counsel) Tr. 177-78; GX326 (Complaint Counsel); GX342 (Complaint Counsel) ¶ 42, at CC-00006916).

Response to Finding No. 135:

Intuit has no specific response except to note that the challenged ad aired in Tax Year 2018 and has not aired in the last four years. Moreover, the binding Consent Order with the attorneys general of all 50 states and the District of Columbia already prohibits Intuit from running this ad or substantially similar ads in the future, and Intuit has disclaimed any intention of running such ads again in the future. (*See* PFF ¶¶225, 810, 824).

136. The 15-second “Crossword” TurboTax ad features an older man sitting at a kitchen table working on a crossword puzzle where all the answers to the puzzle are the word “free.” (GX326 (Complaint Counsel); GX342 (Complaint Counsel) ¶ 42, at CC-00006916-17).

Response to Finding No. 136:

The Proposed Finding is incomplete and misleading because it is just a snippet of the full ad that actually ran and Complaint Counsel have omitted critical information for evaluating the advertisement, including that the ad contained disclosures about qualifications. (CCFF ¶¶137-138; Responses to CCF ¶¶137-138). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

The Proposed Finding fails to mention that the ad verbally informed consumers that the free offer was for “TurboTax Free.” (GX326 (FTC)). As Mr. Rubin explained, “TurboTax Free” was how Intuit referred to TurboTax Free Edition during that year, consistent with how it referred to the other TurboTax SKUs. (PFF ¶227). The reference to “TurboTax Free” was thus meant to convey the specific SKU being advertised, as reflected in the written disclosure appearing on the same title card at the end of the advertisement. (PFF ¶227). And after just a single year of using “TurboTax Free” in certain Tax Year 2018 advertisements, Intuit voluntarily updated the video advertisements in Tax Year 2019 to have the logo say “TurboTax Free *Edition*” to make the ads even clearer. (PFF ¶357). The Proposed Finding also fails to mention that the ad included a written disclosure stating “Free Edition product only. For simple U.S. returns” and “See details at turbotax.com.” (GX326 (Intuit)).

Moreover, the Proposed Finding does not support an inference that the ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. To start, the repetition of the word “free” by itself is not a claim about TurboTax at all. (PFF ¶221). The ad does not state anything about TurboTax until the end of the ad, when it informed viewers that the free offer applied to a specific TurboTax SKU that had qualifications. (GX326 (FTC); *see also* PFF ¶294). In addition, the ad informed consumers in writing that the free offer was for a specific TurboTax SKU, stating “Free Edition product only”; that the free offer had qualifications based on the complexity of a consumer’s tax return, by stating “[f]or simple U.S. returns”; and that consumers could learn more about the qualifications by “[s]ee[ing] details at turbotax.com.” (GX326 (FTC); PFF ¶244). Complaint Counsel offered no evidence that the written disclosures were not visible (PFF ¶230), nor could they given the prominence of those disclosures and the benchmarking analysis showing that the

disclosures were consistent with those in comparable ads (PFF ¶¶232-241). The ad also informed consumers in spoken narrative that the free offer was for a specific TurboTax product, referencing “TurboTax Free.” (GX326 (Intuit)). Complaint Counsel offered no evidence these words could not be heard by consumers. (PFF ¶231).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make the claims that Complaint Counsel allege. Instead, the undisputed testimony from Intuit’s executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (See PFF ¶¶167-177, 190, 192-202, 405, 852, 857, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel offered no evidence that the ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the disclosures in the ad ensured that reasonable consumers understood that there were qualifications for the free TurboTax SKU being advertised, the nature and character of those qualifications, and where additional detail was available. (PFF ¶¶241-246, 302-330, 334). Even without those disclosures, reasonable consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

137. The 15-second “Crossword” TurboTax ad includes the following claim: “That’s right, TurboTax free is free. Free, free free free.” (GX326 (Complaint Counsel) at 00:10; see also Shiller (Complaint Counsel) Tr. 178).

Response to Finding No. 137:

The Proposed Finding is incomplete and misleading because it is just a snippet of the full ad that actually ran and Complaint Counsel have omitted critical information for evaluating the advertisement, including that the ad contained other disclosures about qualifications. (CCFF ¶¶137-138; Responses to CCFF ¶¶137-138). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

The Proposed Finding fails to mention that the ad verbally informed consumers that the free offer was for “TurboTax Free.” (GX326 (FTC)). As Mr. Rubin explained, “TurboTax Free” was how Intuit referred to TurboTax Free Edition during that year, consistent with how it referred to the other TurboTax SKUs. (PFF ¶227). The reference to “TurboTax Free” was thus meant to convey the specific SKU being advertised, as reflected in the written disclosure appearing on the same title card at the end of the advertisement. (PFF ¶227). And after just a single year of using “TurboTax Free” in certain Tax Year 2018 advertisements, Intuit voluntarily updated the video advertisements in Tax Year 2019 to have the logo say “TurboTax Free *Edition*” to make the ads even clearer. (PFF ¶357). The Proposed Finding also fails to mention that the ad included a written disclosure stating “Free Edition product only. For simple U.S. returns” and “See details at turbotax.com.” (GX326 (Intuit)).

Moreover, the Proposed Finding does not support an inference that the ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. To start, the repetition of the word “free” by itself is not a claim about TurboTax at all. (PFF ¶221). The ad does not state anything about TurboTax until the end of the ad, when it informed viewers that the free offer applied to a specific TurboTax SKU that had qualifications. (GX326 (FTC); *see also* PFF ¶294). In addition, the ad informed

consumers in writing that the free offer was for a specific TurboTax SKU, stating “Free Edition product only”; that the free offer had qualifications based on the complexity of a consumer’s tax return, by stating “[f]or simple U.S. returns”; and that consumers could learn more about the qualifications by “[s]ee[ing] details at turbotax.com.” (GX326 (FTC); PFF ¶244). Complaint Counsel offered no evidence that the written disclosures were not visible (PFF ¶230), nor could they given the prominence of those disclosures and the benchmarking analysis showing that the disclosures were consistent with those in comparable ads (PFF ¶¶232-241). The ad also informed consumers in spoken narrative that the free offer was for a specific TurboTax product, referencing “TurboTax Free.” (GX326 (Intuit)). Complaint Counsel offered no evidence these words could not be heard by consumers. (PFF ¶231).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make the claims that Complaint Counsel allege. Instead, the undisputed testimony from Intuit’s executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (See PFF ¶¶167-177, 190, 192-202, 405, 852, 857, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel offered no evidence that the ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the disclosures in the ad ensured that reasonable consumers understood that there were qualifications for the free TurboTax SKU being advertised, the nature and character of those qualifications, and where additional detail was available. (PFF ¶¶241-246, 302-330, 334). Even without those disclosures, reasonable consumers understand that free tax-preparation offers are

qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

138. The 15-second “Crossword” TurboTax ad includes the following written disclaimer which appears for a few seconds in small font at the bottom of the screen: “Free Edition product only. For simple U.S. returns. Offer subject to change. See details at turbotax.com.” (GX326 (Complaint Counsel) at 00:11).

Response to Finding No. 138:

The Proposed Finding is incomplete and misleading because it wrongly refers to language in the ad as a “disclaimer” and ignores other disclosures in the ad. GX326 also includes a verbal disclosure informing consumers that the free offer was for the “TurboTax Free” SKU. (GX326 (Complaint Counsel; *see* CCF ¶136; Response to CCF ¶136). Further, the Proposed Finding fails to recognize that by inviting consumers to “[s]ee details at TurboTax.com,” all content on the TurboTax website—including detailed information about qualifications—was “integrated” into the ad, and therefore all disclosures on the website are incorporated into the ad. (PFF ¶328; CCF ¶455). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

Moreover, the Proposed Finding does not support an inference that the ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The ad informed consumers in writing that the free offer was for a specific TurboTax SKU, “Free Edition”; that the free offer had qualifications based on the complexity of a consumer’s tax return, by stating “[f]or simple U.S. returns”; and that consumers could learn more about the qualifications by “[s]ee[ing] details at turbotax.com.” (GX326 (FTC); PFF ¶244). Complaint Counsel offered no evidence that the written disclosures

were not visible to consumers (PFF ¶230), nor could they given the prominence of those disclosures and the benchmarking analysis showing that the disclosures were consistent with those in comparable ads (PFF ¶¶232-241). The ad also informed consumers in spoken narrative that the free offer was for a specific TurboTax product, referencing “TurboTax Free.” (GX326 (FTC)). Complaint Counsel offered no evidence these words could not be heard by consumers. (PFF ¶231).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make the claims that Complaint Counsel allege. Instead, the undisputed testimony from Intuit’s executives establishes that Intuit did not intend for any of the ad to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (See PFF ¶¶167-177, 190, 192-202, 405, 852, 857, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel offered no evidence that the ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. The evidence establishes that the disclosures in the ad ensured that reasonable consumers understood that there were qualifications for the free TurboTax SKU being advertised, the nature and character of those qualifications, and where additional detail was available. (PFF ¶¶241-246, 302-330, 334). Even without those disclosures, reasonable consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

139. The 15-second “Crossword” TurboTax ad aired on television in connection with TY 2018. (Shiller (Complaint Counsel) Tr. 178-79; GX61 (Intuit) at CC-00000682-83).

Response to Finding No. 139:

Intuit has no specific response except to note that the challenged ad aired in Tax Year 2018 and has not aired in the last four years. Moreover, the binding Consent Order with the attorneys general of all 50 states and the District of Columbia already prohibits Intuit from running this ad or substantially similar ads in the future, and Intuit has disclaimed any intention of running such ads again in the future. (See PFF ¶¶225, 810, 824).

140. The 15-second “Crossword” TurboTax ad aired on television in connection with TY 2019. (Shiller (Complaint Counsel) Tr. 178-79).

Response to Finding No. 140:

The Proposed Finding is incomplete and misleading because it is unclear which version of the “Crossword” ad it is referring to. Complaint Counsel have cited no “Crossword” advertisement from Tax Year 2019. GX348 is from Tax Year 2018. (See CCFF ¶135; Response to CCFF ¶135).

Moreover, the Proposed Finding misleadingly implies that Intuit ran the same TurboTax television ads in Tax Year 2018 and Tax Year 2019. That is not correct. Intuit voluntarily updated the written disclosures used in its television advertisements for TurboTax Free Edition in Tax Year 2019, including those used in the “Crossword” ads. (Compare RX1398 (Intuit), with GX326 (Intuit); see also Shiller (FTC) Tr. 244-245). For example, the title card displayed at the end of Tax Year 2019 television advertisements was updated to refer to “TurboTax Free Edition,” instead of “TurboTax Free” as used in Tax Year 2018. (Compare RX1398 (Intuit), with GX326 (Intuit)). The disclosures in Tax Year 2019 video ads were also made larger, with higher contrast, and updated to read “TurboTax Free Edition is for simple U.S. returns only. See if you qualify at turbotax.com.” (Compare RX1398 (Intuit), with GX326 (Intuit)). Intuit’s executives explained that those changes were made as part of Intuit’s continuing efforts to be clear with consumers

and to improve clarity in its advertising. (Ryan (Intuit) Tr. 726-727; Rubin (Intuit) Tr. 1560-1563).

141. The “Crossword” TurboTax ad appeared on television throughout the United States at least 1,187 times on at least 55 television networks between November 1, 2018, and April 18, 2019. (GX342 (Complaint Counsel) ¶¶ 44-45, at CC-00006917-18; *see also* Shiller (Complaint Counsel) Tr. 178-79).

Response to Finding No. 141:

The Proposed Finding is incomplete and misleading because it is unclear which version of the “Crossword” ad it is referring to. As described in response to the preceding finding (*see* Response to CCF ¶140), different versions of the “Crossword” ad aired in Tax Years 2018 and 2019, and the version aired in Tax Year 2019 had larger font and higher contrast, with updated disclosures that stated in the middle of the title card, “TurboTax Free Edition,” and below that, “TurboTax Free Edition is for simple U.S. returns only. See if you qualify at turbotax.com.” (*See* Response to CCF ¶140; *see also* Ryan (Intuit) Tr. 726-727; Rubin (Intuit) Tr. 1560-1563). Intuit’s executives explained that those changes were made as part of Intuit’s continuing efforts to be clear with consumers and to improve clarity in the advertising. (Ryan (Intuit) Tr. 726-727; Rubin (Intuit) Tr. 1560-1563).

Moreover, the Proposed Finding does not support an inference that the challenged ads were deceptive. The fact that ads aired is not evidence that the ads conveyed the claim asserted by Complaint Counsel or that reasonable consumers were likely to be deceived by the ads. To the contrary, the fact that Complaint Counsel have identified only 175 even potentially relevant consumer complaints from the five years spanning Tax Years 2015-2019 (*see* CCF ¶¶676-677), even though the “Crossword” ad on its own was aired at least 1,187 times on at least 55 television networks during Tax Year 2018 alone, is strong evidence that reasonable consumers

were not deceived by the “Crossword” ad or any of the other challenged advertisements that ran in Tax Year 2018 (*see* PFF ¶¶632, 637, 639, 641-647).

142. The “Crossword” TurboTax ad appeared on television throughout the United States at least 3,195 times on at least 327 television networks between November 1, 2019, and July 15, 2020. (GX342 (Complaint Counsel) ¶¶ 86-87, at CC-00006937-38; *see also* Shiller (Complaint Counsel) Tr. 178-79).

Response to Finding No. 142:

The Proposed Finding is incomplete and misleading because it is unclear which version of the “Crossword” ad it is referring to. As described in response to the preceding findings (*see* Responses to CCF ¶¶140-141), different versions of the “Crossword” ad aired in Tax Years 2018 and 2019, and the version aired in Tax Year 2019 had larger font and higher contrast, with updated disclosures that stated in the middle of the title card, “TurboTax Free Edition,” and below that, “TurboTax Free Edition is for simple U.S. returns only. See if you qualify at turbotax.com.” (*See* Response to CCF ¶140; *see also* Ryan (Intuit) Tr. 726-727; Rubin (Intuit) Tr. 1560-1563). Intuit’s executives explained that those changes were made as part of Intuit’s continuing efforts to be clear with consumers and to improve clarity in the advertising. (Ryan (Intuit) Tr. 726-727; Rubin (Intuit) Tr. 1560-1563).

Moreover, the Proposed Finding does not support an inference that the challenged ads were deceptive. The fact that ads aired is not evidence that the ads conveyed the claim asserted by Complaint Counsel or that reasonable consumers were likely to be deceived by the ads. To the contrary, the fact that Complaint Counsel have identified only 175 even potentially relevant consumer complaints from the five years spanning Tax Years 2015-2019 (*see* CCF ¶¶676-677), even though the “Crossword” ad on its own was aired at least 3,195 times on at least 327 television networks during Tax Year 2019 alone, is strong evidence that reasonable consumers

were not deceived by the “Crossword” ad or any of the other challenged advertisements that ran in Tax Year 2019 (*see* PFF ¶¶632, 637, 639, 641-647).

g. Football/“Big Kick”

143. A true and correct copy of the 60-second “Big Kick” TurboTax ad is at GX349. (GX349 (Intuit); GX342 (Complaint Counsel) ¶ 48, at CC-00006919).

Response to Finding No. 143:

Intuit has no specific response except to note that the challenged ad aired in Tax Year 2018 and has not aired in the last four years. Moreover, the binding Consent Order with the attorneys general of all 50 states and the District of Columbia already prohibits Intuit from running this ad or substantially similar ads in the future, and Intuit has disclaimed any intention of running such ads again in the future. (*See* PFF ¶¶225, 810, 824).

144. A true and correct copy of the 30-second “Big Kick” TurboTax ad is at GX327. (Shiller (Complaint Counsel) Tr. 179-80; GX327 (Complaint Counsel); GX342 (Complaint Counsel) ¶ 46, at CC-00006918).

Response to Finding No. 144:

Intuit has no specific response except to note that the challenged ad aired in Tax Year 2018 and has not aired in the last four years. Moreover, the binding Consent Order with the attorneys general of all 50 states and the District of Columbia already prohibits Intuit from running this ad or substantially similar ads in the future, and Intuit has disclaimed any intention of running such ads again in the future. (*See* PFF ¶¶225, 810, 824).

145. The “Big Kick” TurboTax ads feature a young football player playing football and reminiscing about his dad. “Free” is the only word spoken by the football player and dad in the “Big Kick” TurboTax ads. (GX327 (Complaint Counsel); GX349 (Intuit); GX342 (Complaint Counsel) ¶ 46, at CC-00006918).

Response to Finding No. 145:

The Proposed Finding is incomplete and misleading because it is just a snippet of the full ad that actually ran and Complaint Counsel have omitted critical information for evaluating the

advertisements, including that the ads contained disclosures about qualifications. (*See* CCFF ¶¶146-147; Responses to CCFF ¶¶146-147). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

The Proposed Finding fails to mention that the ads verbally informed consumers that the free offer was for “TurboTax Free.” (GX327 (FTC); GX349 (Intuit)). As Mr. Rubin explained, “TurboTax Free” was how Intuit referred to TurboTax Free Edition during that year, consistent with how it referred to the other TurboTax SKUs. (PFF ¶227). The reference to “TurboTax Free” was thus meant to convey the specific SKU being advertised, as reflected in the written disclosure appearing on the same title card at the end of the advertisement. (PFF ¶227). And after just a single year of using “TurboTax Free” in certain Tax Year 2018 advertisements, Intuit voluntarily updated the video advertisements in Tax Year 2019 to have the logo say “TurboTax Free *Edition*” to make the ads even clearer. (PFF ¶357). The Proposed Finding also fails to mention that the ads included a written disclosure stating “Free Edition product only. For simple U.S. returns” and “See details at turbotax.com.” (GX327 (FTC); GX349 (Intuit)).

Moreover, the Proposed Finding does not support an inference that the ads expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. To start, the repetition of the word “free” by itself is not a claim about TurboTax at all. (PFF ¶221). The ads do not state anything about TurboTax until the end of the ads, when they informed viewers that the free offer applied to a specific TurboTax SKU that had qualifications. (GX327 (FTC); GX349 (Intuit); *see also* PFF ¶294). In addition, the ads informed consumers in writing that the free offer was for a specific TurboTax SKU, stating “Free Edition product only”; that the free offer had qualifications based on the complexity

of a consumer's tax return, by stating "[f]or simple U.S. returns"; and that consumers could learn more about the qualifications by "See[ing] details at turbotax.com." (GX327 (FTC); GX349 (Intuit); PFF ¶244). Complaint Counsel offered no evidence that the written disclosures were not visible (PFF ¶230), nor could they given the prominence of those disclosures and the benchmarking analysis showing that the disclosures were consistent with those in comparable ads (PFF ¶¶232-241). The ads also informed consumers in spoken narrative that the free offer was for a specific TurboTax product, referencing "TurboTax Free." (GX327 (FTC); GX349 (Intuit)). Complaint Counsel offered no evidence these words could not be heard by consumers. (PFF ¶231).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make the claims that Complaint Counsel allege. Instead, the undisputed testimony from Intuit's executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (See PFF ¶¶167-177, 190, 192-202, 405, 852, 857, 860, 870).

The Proposed Finding also does not support an inference that the ads were likely to mislead reasonable consumers. Complaint Counsel offered no evidence that the ads were likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the disclosures in the ads ensured that reasonable consumers understood that there were qualifications for the free TurboTax SKU being advertised, the nature and character of those qualifications, and where additional detail was available. (PFF ¶¶241-246, 302-330, 334). Even without those disclosures, reasonable consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax

returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

146. The “Big Kick” TurboTax ads include the following claim: “That’s right, TurboTax free is free. Free, free free free.” (GX327 (Complaint Counsel) at 00:26; GX349 (Intuit) at 00:56; *see also* Shiller (Complaint Counsel) Tr. 179).

Response to Finding No. 146:

The Proposed Finding is incomplete and misleading because it is just a snippet of the full ads that actually ran and Complaint Counsel have omitted critical information for evaluating the advertisements, including that the ads contained disclosures about qualifications. (CCFF ¶¶146-147; Responses to CCFF ¶¶146-147). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

The Proposed Finding fails to mention that the ads verbally informed consumers that the free offer was for “TurboTax Free.” (GX327 (FTC); GX349 (Intuit)). As Mr. Rubin explained, “TurboTax Free” was how Intuit referred to TurboTax Free Edition during that year, consistent with how it referred to the other TurboTax SKUs. (PFF ¶227). The reference to “TurboTax Free” was thus meant to convey the specific SKU being advertised, as reflected in the written disclosure appearing on the same title card at the end of the advertisement. (PFF ¶227). And after just a single year of using “TurboTax Free” in certain Tax Year 2018 advertisements, Intuit voluntarily updated the video advertisements in Tax Year 2019 to have the logo say “TurboTax Free *Edition*” to make the ads even clearer. (PFF ¶357). The Proposed Finding also fails to mention that the ads included written disclosures stating “Free Edition product only. For simple U.S. returns” and “See details at TurboTax.com.” (GX237 (FTC); GX349 (Intuit)).

Moreover, the Proposed Finding does not support an inference that the ads expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be

free for the consumer when it was not. The ads informed consumers in writing that the free offer was for a specific TurboTax SKU, stating “Free Edition product only”; that the free offer had qualifications based on the complexity of a consumer’s tax return, by stating “[f]or simple U.S. returns”; and inviting consumers to “[s]ee details at turbotax.com.” (GX327 (FTC); GX349 (Intuit); PFF ¶244). Complaint Counsel offered no evidence that the written disclosures were not visible (PFF ¶230), nor could they given the prominence of those disclosures and the benchmarking analysis showing that the disclosures were consistent with those in comparable ads (PFF ¶¶232-241). The ads also informed consumers in spoken narrative that the free offer was for a specific TurboTax product, referencing “TurboTax Free.” (GX327 (FTC); GX349 (Intuit)). Complaint Counsel offered no evidence these words could not be heard by consumers. (PFF ¶231).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make the claims that Complaint Counsel allege. Instead, the undisputed testimony from Intuit’s executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (See PFF ¶¶167-177, 190, 192-202, 405, 852, 857, 860, 870).

The Proposed Finding also does not support an inference that the ads were likely to mislead reasonable consumers. Complaint Counsel offered no evidence that the ads were likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the disclosures in the ad ensured that reasonable consumers understood that there were qualifications for the free TurboTax SKU being advertised, the nature and character of those qualifications, and where additional detail was available. (PFF ¶¶241-246, 302-330, 334).

Even without those disclosures, reasonable consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

147. The “Big Kick” TurboTax ads include the following written disclaimer which appears for a few seconds in small font at the bottom of the screen: “Free Edition product only. For simple U.S. returns. Offer subject to change. See details at turbotax.com.” (GX327 (Complaint Counsel) at 00:27; GX349 (Intuit) at 00:57).

Response to Finding No. 147:

The Proposed Finding is incomplete and misleading because it wrongly refers to language in the ad as a “disclaimer” and ignores other disclosures in the ad. GX327 and GX349 also include a verbal disclosure informing consumers that the free offer was for the “TurboTax Free” SKU. (GX327 (FTC); GX349 (Intuit); *see* CCFE ¶146; Response to CCFE ¶146).

Further, the Proposed Finding fails to recognize that by inviting consumers to “[s]ee details at TurboTax.com,” all content on the TurboTax website—including detailed information about qualifications—was “integrated” into the ads, and therefore all disclosures on the website are incorporated into the ads. (PFF ¶328; CCFE ¶455). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

Moreover, the Proposed Finding does not support an inference that the ads expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The ads informed consumers in writing that the free offer was for a specific TurboTax SKU, “Free Edition”; that the free offer had qualifications based on the complexity of a consumer’s tax return, by stating “[f]or simple U.S. returns”; and that consumers could learn more about the qualifications by “[s]ee[ing] details at turbotax.com.”

(GX327 (FTC); GX349 (Intuit); PFF ¶244). Complaint Counsel offered no evidence that the written disclosures were not visible to consumers (PFF ¶230), nor could they given the prominence of those disclosures and the benchmarking analysis showing that the disclosures were consistent with those in comparable ads (PFF ¶¶232-241). The ads also informed consumers in spoken narrative that the free offer was for a specific TurboTax product, referencing “TurboTax Free.” (GX327 (FTC); GX349 (Intuit)). Complaint Counsel offered no evidence these words could not be heard by consumers. (PFF ¶231).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make the claims that Complaint Counsel allege. Instead, the undisputed testimony from Intuit’s executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (*See* PFF ¶¶167-177, 190, 192-202, 405, 852, 857, 860, 870).

The Proposed Finding also does not support an inference that the ads were likely to mislead reasonable consumers. Complaint Counsel offered no evidence that the ads were likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. The evidence establishes that the disclosures in the ads ensured that reasonable consumers understood that there were qualifications for the free TurboTax SKU being advertised, the nature and character of those qualifications, and where additional detail was available. (PFF ¶¶241-246, 302-330, 334). Even without those disclosures, reasonable consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

148. The “Big Kick” TurboTax ads aired on television in connection with TY 2017. (GX60 (Intuit) at CC-00000668-69).

Response to Finding No. 148:

Intuit has no specific response except to note that the challenged ad aired in Tax Year 2017 and has not aired since. Moreover, the binding Consent Order with the attorneys general of all 50 states and the District of Columbia already prohibits Intuit from running this ad or substantially similar ads in the future, and Intuit has disclaimed any intention of running such ads again in the future. (See PFF ¶¶225, 810, 824.)

149. The “Big Kick” TurboTax ads aired on television in connection with TY 2018. (Shiller (Complaint Counsel) Tr. 180; GX61 (Intuit) at CC-00000682-83).

Response to Finding No. 149:

Intuit has no specific response except to note that the challenged ads aired in Tax Year 2018 and have not aired since. Moreover, the binding Consent Order with the attorneys general of all 50 states and the District of Columbia already prohibits Intuit from running this ad or substantially similar ads in the future, and Intuit has disclaimed any intention of running such ads again in the future. (See PFF ¶¶225, 810, 824).

150. The “Big Kick” TurboTax ads appeared on television throughout the United States at least 2,811 times on at least 139 television networks between November 1, 2018, and April 18, 2019. (GX342 (Complaint Counsel) ¶¶ 49-50, at CC-00006919-20; *see also* Shiller (Complaint Counsel) Tr. 180).

Response to Finding No. 150:

The Proposed Finding is incomplete and misleading because it is unclear which version of the “Big Kick” ad it is referring to. Moreover, the Proposed Finding does not support an inference that the challenged ads were deceptive. The fact that ads aired is not evidence that the ads conveyed the claim asserted by Complaint Counsel or that reasonable consumers were likely to be deceived by the ads. To the contrary, the fact that Complaint Counsel have identified only

175 even potentially relevant consumer complaints from the five years spanning Tax Years 2015-2019 (*see* CCF ¶¶676-677), even though the “Big Kick” ad on its own was aired at least 2,811 times on at least 139 television networks during Tax Year 2018 alone, is strong evidence that reasonable consumers were not deceived by the “Big Kick” ad or any of the other challenged advertisements that ran in Tax Year 2018 (*see* PFF ¶¶632, 637, 639, 641-647).

h. Spelling Bee

151. True and correct copies of two 30-second “Spelling Bee” TurboTax ads are at GX350 and GX351. (GX350 (Intuit); GX351 (Intuit); GX342 (Complaint Counsel) ¶ 73, at CC-00006929)).

Response to Finding No. 151:

Intuit has no specific response except to note that the challenged ad aired in Tax Year 2018 and has not aired in the last four years. Moreover, the binding Consent Order with the attorneys general of all 50 states and the District of Columbia already prohibits Intuit from running this ad or substantially similar ads in the future, and Intuit has disclaimed any intention of running such ads again in the future. (*See* PFF ¶¶225, 810, 824).

152. A true and correct copy of the 15-second “Spelling Bee” TurboTax ad is at GX332. (Shiller (Complaint Counsel) Tr. 184-85; GX332 (Complaint Counsel); GX342 (Complaint Counsel) ¶ 71, at CC-00006929).

Response to Finding No. 152:

Intuit has no specific response except to note that the challenged ad aired in Tax Year 2018 and has not aired in the last four years. Moreover, the binding Consent Order with the attorneys general of all 50 states and the District of Columbia already prohibits Intuit from running this ad or substantially similar ads in the future, and Intuit has disclaimed any intention of running such ads again in the future. (*See* PFF ¶¶225, 810, 824).

153. The “Spelling Bee” TurboTax ads feature a spelling bee where “free” is the word being spelled. (GX332 (Complaint Counsel); GX350 (Intuit); GX351 (Intuit); GX342 (Complaint Counsel) ¶ 71, at CC-00006929).

Response to Finding No. 153:

The Proposed Finding is incomplete and misleading because it is just a snippet of the full ad that actually ran and Complaint Counsel have omitted critical information for evaluating the advertisements, including that the ads contain disclosures about qualifications. (See CCFF ¶¶154-155; Responses to CCFF ¶¶154-155). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

The Proposed Finding fails to mention that the ads verbally informed consumers that the free offer was for “TurboTax Free.” (GX332 (FTC); GX350 (Intuit); GX351 (Intuit)). As Mr. Rubin explained, “TurboTax Free” was how Intuit referred to TurboTax Free Edition during that year, consistent with how it referred to the other TurboTax SKUs. (PFF ¶227). The reference to “TurboTax Free” was thus meant to convey the specific SKU being advertised, as reflected in the written disclosure appearing on the same title card at the end of the advertisement. (PFF ¶227). And after just a single year of using “TurboTax Free” in certain Tax Year 2018 advertisements, Intuit voluntarily updated the video advertisements in Tax Year 2019 to have the logo say “TurboTax Free *Edition*” to make the ads even clearer. (PFF ¶357). The Proposed Finding also fails to mention that the ads include written disclosures stating “Free Edition product only. For simple U.S. returns” and “See details at turbotax.com.” (GX332 (FTC); GX350 (Intuit); GX351 (Intuit)).

Moreover, the Proposed Finding does not support an inference that the ads expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. To start, the repetition of the word “free” by itself is not a claim about TurboTax at all. (PFF ¶221). The ads do not state anything about TurboTax until the end of the ads, when they informed viewers that the free offer applied to a specific TurboTax

SKU that had qualifications. (GX332 (FTC); GX350 (Intuit); GX351 (Intuit); *see also* PFF ¶294). The ads informed consumers in writing that the free offer was for a specific TurboTax SKU, stating “Free Edition product only”; that the free offer had qualifications based on the complexity of a consumer’s tax return, by stating “[f]or simple U.S. returns”; and that consumers could learn more about the qualifications by “[s]ee[ing] details at turbotax.com.” (GX332 (FTC); GX350 (Intuit); GX351 (Intuit); PFF ¶244). Complaint Counsel offered no evidence that the written disclosures were not visible (PFF ¶230), nor could they given the prominence of those disclosures and the benchmarking analysis showing that the disclosures were consistent with those in comparable ads (PFF ¶¶232-241). The ads also informed consumers in spoken narrative that the free offer was for a specific TurboTax product, referencing “TurboTax Free.” (GX332 (FTC); GX350 (Intuit); GX351 (Intuit)). Complaint Counsel offered no evidence these words could not be heard by consumers. (PFF ¶231).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make the claims that Complaint Counsel allege. Instead, the undisputed testimony from Intuit’s executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (*See* PFF ¶¶167-177, 190, 192-202, 405, 852, 857, 860, 870).

The Proposed Finding also does not support an inference that the ads were likely to mislead reasonable consumers. Complaint Counsel offered no evidence that the ads were likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the disclosures in the ads ensured that reasonable consumers understood that there were qualifications for the free TurboTax SKU being advertised, the nature and character of

those qualifications, and where additional detail was available. (PFF ¶¶241-246, 302-330, 334). Even without those disclosures, reasonable consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

154. The “Spelling Bee” TurboTax ads include the following claim: “That’s right, TurboTax free is free. Free, free free free.” (GX332 (Complaint Counsel) at 00:11; GX350 (Intuit) at 00:26; GX351 (Intuit) at 00:26; *see also* Shiller (Complaint Counsel) Tr. 185).

Response to Finding No. 154:

The Proposed Finding is incomplete and misleading because it is just a snippet of the full ads that actually ran and Complaint Counsel have omitted critical information for evaluating the advertisement, including that the ads contained disclosures about qualifications. (CCFF ¶¶154-155; Responses to CCFF ¶¶154-155). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

The Proposed Finding fails to mention that the ads verbally informed consumers that the free offer was for “TurboTax Free.” (GX332 (FTC); GX350 (Intuit); GX351 (Intuit)). As Mr. Rubin explained, “TurboTax Free” was how Intuit referred to TurboTax Free Edition during that year, consistent with how it referred to the other TurboTax SKUs. (PFF ¶227). The reference to “TurboTax Free” was thus meant to convey the specific SKU being advertised, as reflected in the written disclosure appearing on the same title card at the end of the advertisement. (PFF ¶227). And after just a single year of using “TurboTax Free” in certain Tax Year 2018 advertisements, Intuit voluntarily updated the video advertisements in Tax Year 2019 to have the logo say “TurboTax Free *Edition*” to make the ads even clearer. (PFF ¶357). The Proposed Finding also fails to mention that the ads include written disclosures stating “Free Edition product only. For

simple U.S. returns” and “See details at turbotax.com.” (GX332 (FTC); GX350 (Intuit); GX351 (Intuit)).

Moreover, the Proposed Finding does not support an inference that the ads expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. To start, the repetition of the word “free” by itself is not a claim about TurboTax at all. (PFF ¶221). The ads do not state anything about TurboTax until the end of the ads, when they informed viewers that the free offer applied to a specific TurboTax SKU that had qualifications. (GX332 (FTC); GX350 (Intuit); GX351 (Intuit); *see also* PFF ¶294). The ads informed consumers in writing that the free offer was for a specific TurboTax SKU, stating “Free Edition product only”; that the free offer had qualifications based on the complexity of a consumer’s tax return, by stating “[f]or simple U.S. returns”; and that consumers could learn more about the qualifications by “[s]ee[ing] details at turbotax.com.” (GX332 (FTC); GX350 (Intuit); GX351 (Intuit); PFF ¶244). Complaint Counsel offered no evidence that the written disclosures were not visible (PFF ¶230), nor could they given the prominence of those disclosures and the benchmarking analysis showing that the disclosures were consistent with those in comparable ads (PFF ¶¶232-241). The ads also informed consumers in spoken narrative that the free offer was for a specific TurboTax product, referencing “TurboTax Free.” (GX332 (FTC); GX350 (Intuit); GX351 (Intuit)). Complaint Counsel offered no evidence these words could not be heard by consumers. (PFF ¶231).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make the claims that Complaint Counsel allege. Instead, the undisputed testimony from Intuit’s executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax

products are free or that TurboTax would be free for a consumer when that was not the case. (See PFF ¶¶167-177, 190, 192-202, 405, 852, 857, 860, 870).

The Proposed Finding also does not support an inference that the ads were likely to mislead reasonable consumers. Complaint Counsel offered no evidence that the ads were likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the disclosures in the ad ensured that reasonable consumers understood that there were qualifications for the free TurboTax SKU being advertised, the nature and character of those qualifications, and where additional detail was available. (PFF ¶¶241-246, 302-330, 334). Even without those disclosures, reasonable consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

155. The “Spelling Bee” TurboTax ads include the following written disclaimer which appears for a few seconds in small font at the bottom of the screen: “Free Edition product only. For simple U.S. returns. Offer subject to change. See details at turbotax.com.” (GX332 (Complaint Counsel) at 00:11; GX350 (Intuit) at 00:27; GX351 (Intuit) at 00:26).

Response to Finding No. 155:

The Proposed Finding is incomplete and misleading because it wrongly refers to language in the ad as a “disclaimer” and ignores other disclosures in the ad. GX332, GX350, and GX351 also include a verbal disclosure informing consumers that the free offer was for the “TurboTax Free” SKU. (GX332 (FTC); GX350 (Intuit); GX351 (Intuit); see CCF ¶154; Response to CCF ¶154). Further, the Proposed Finding fails to recognize that by inviting consumers to “[s]ee details at TurboTax.com,” all content on the TurboTax website—including detailed information about qualifications—was “integrated” into the ads, and therefore all

disclosures on the website are incorporated into the ads. (PFF ¶¶328; CCF ¶455). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

Moreover, the Proposed Finding does not support an inference that the ads expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The ads informed consumers in writing that the free offer was for a specific TurboTax SKU, “Free Edition”; that the free offer had qualifications based on the complexity of a consumer’s tax return, by stating “[f]or simple U.S. returns”; and that consumers could learn more about the qualifications by “[s]ee[ing] details at turbotax.com.” (GX332 (FTC); GX350 (Intuit); GX351 (Intuit); PFF ¶244). Complaint Counsel offered no evidence that the written disclosures were not visible to consumers (PFF ¶230), nor could they given the prominence of those disclosures and the benchmarking analysis showing that the disclosures were consistent with those in comparable ads (PFF ¶¶232-241). The ads also informed consumers in spoken narrative that the free offer was for a specific TurboTax product, referencing “TurboTax Free.” (GX332 (FTC); GX350 (Intuit); GX351 (Intuit)). Complaint Counsel offered no evidence these words could not be heard by consumers. (PFF ¶231).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make the claims that Complaint Counsel allege. Instead, the undisputed testimony from Intuit’s executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (See PFF ¶¶167-177, 190, 192-202, 405, 852, 857, 860, 870).

The Proposed Finding also does not support an inference that the ads were likely to mislead reasonable consumers. Complaint Counsel offered no evidence that the ads were likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. The evidence establishes that the disclosures in the ads ensured that reasonable consumers understood that there were qualifications for the free TurboTax SKU being advertised, the nature and character of those qualifications, and where additional detail was available. (PFF ¶¶241-246, 302-330, 334). Even without those disclosures, reasonable consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

156. In GX350, the phrase “Start now at turbotax.com” appears in bold text above the written disclaimer. (GX350 (Intuit) at 00:27). It is otherwise identical to GX351. (*Compare* GX350 (Intuit) & GX351 (Intuit)).

Response to Finding No. 156:

Intuit has no specific response except to note that based on Complaint Counsel’s own Proposed Findings, the language explaining the qualifications to consumers appears at a different point in the advertisement. (*See* CCF ¶153; Response to CCF ¶153; *see also* GX350 (Intuit) at 00:27; GX351 (Intuit) at 00:26). Intuit also notes that by inviting consumers to visit the TurboTax website, all content on the website—including detailed information about qualifications—was “integrated” into the ads, and therefore all disclosures on the website are incorporated into the ads. (PFF ¶328; CCF ¶455).

157. The “Spelling Bee” TurboTax ads aired on television in connection with TY 2018. (Shiller (Complaint Counsel) Tr. 186; GX60 (Intuit) at CC-00000668-69; GX61 (Intuit) at CC-00000682-83).

Response to Finding No. 157:

Intuit has no specific response except to note that the challenged ad aired in Tax Year 2018 and has not aired in the last four years. Moreover, the binding Consent Order with the attorneys general of all 50 states and the District of Columbia already prohibits Intuit from running this ad or substantially similar ads in the future, and Intuit has disclaimed any intention of running such ads again in the future. (*See* PFF ¶¶225, 810, 824).

158. The “Spelling Bee” TurboTax ads aired on television in connection with TY 2019. (Shiller (Complaint Counsel) Tr. 186).

Response to Finding No. 158:

The Proposed Finding is incomplete and misleading because it is unclear which version of the “Spelling Bee” ad it is referring to. Complaint Counsel have cited no “Spelling Bee” advertisement from Tax Year 2019. GX332, GX350, and GX351 are from Tax Year 2018. (*See* CCF ¶¶151-152; Responses to CCF ¶¶151-152).

Moreover, the Proposed Finding misleadingly implies that Intuit ran the same TurboTax television ads in Tax Year 2018 and Tax Year 2019. That is not correct. Intuit voluntarily updated the written disclosures used in its television advertisements for TurboTax Free Edition in Tax Year 2019, including those used in the “Spelling Bee” ads. (*Compare, e.g.,* RX1399 (Intuit), *with* GX332 (Intuit); *see also* Shiller (FTC) Tr. 244-245). For example, the title card displayed at the end of Tax Year 2019 television advertisements was updated to refer to “TurboTax Free Edition,” instead of “TurboTax Free” as used in Tax Year 2018. (*Compare, e.g.,* RX1399 (Intuit), *with* GX332 (Intuit)). The disclosures in Tax Year 2019 video ads were also made larger, with higher contrast, and updated to read “TurboTax Free Edition is for simple U.S. returns only. See if you qualify at turbotax.com.” (*Compare, e.g.,* RX1399 (Intuit), *with* GX332 (Intuit)). Intuit’s executives explained that those changes were made as part of Intuit’s continuing efforts

to be clear with consumers and to improve clarity in its advertising. (Ryan (Intuit) Tr. 726-727; Rubin (Intuit) Tr. 1560-1563).

159. The “Spelling Bee” TurboTax ads appeared throughout the United States at least 5,141 times on at least 313 television networks between November 1, 2018, and April 18, 2019. (GX342 (Complaint Counsel) ¶¶ 74-75, at CC-00006929-30; *see also* Shiller (Complaint Counsel) Tr. 186).

Response to Finding No. 159:

The Proposed Finding is incomplete and misleading because it is unclear which version of the “Spelling Bee” ad it is referring to. As described in the response to the preceding finding (*see* Response to CCF ¶158), different versions of the “Spelling Bee” ad aired in Tax Years 2018 and 2019, and the version aired in Tax Year 2019 had larger font and higher contrast, with updated disclosures that stated in the middle of the title card, “TurboTax Free Edition,” and below that, “TurboTax Free Edition is for simple U.S. returns only. See if you qualify at turbotax.com.” (*See* CCF ¶158; Response to CCF ¶158; *see also* Ryan (Intuit) Tr. 726-727; Rubin (Intuit) Tr. 1560-1563). Intuit’s executives explained that those changes were made as part of Intuit’s continuing efforts to be clear with consumers and to improve clarity in the advertising. (Ryan (Intuit) Tr. 726-727; Rubin (Intuit) Tr. 1560-1563).

Moreover, the Proposed Finding does not support an inference that the challenged ads were deceptive. The fact that ads aired is not evidence that the ads conveyed the claim asserted by Complaint Counsel or that reasonable consumers were likely to be deceived by the ads. To the contrary, the fact that Complaint Counsel have identified only 175 even potentially relevant consumer complaints from the five years spanning Tax Years 2015-2019 (*see* CCF ¶¶676-677), even though the “Spelling Bee” ad on its own was aired at least 5,141 times on at least 313 television networks during Tax Year 2018 alone, is strong evidence that reasonable consumers

were not deceived by the “Spelling Bee” ad or any of the other challenged advertisements that ran in Tax Year 2018 (*see* PFF ¶¶632, 637, 639, 641-647).

160. The “Spelling Bee” TurboTax ads appeared throughout the United States at least 2,618 times on at least 322 television networks between November 1, 2019, and July 15, 2020. (GX342 (Complaint Counsel) ¶¶ 92-93, at CC-00006941-42; *see also* Shiller (Complaint Counsel) Tr. 186).

Response to Finding No. 160:

The Proposed Finding is incomplete and misleading because it is unclear which version of the “Spelling Bee” ad it is referring to. As described in the response to the preceding findings (*see* Responses to CCF ¶¶158-159), different versions of the “Spelling Bee” ad aired in Tax Years 2018 and 2019, and the version aired in Tax Year 2019 had larger font and higher contrast, with updated disclosures that stated in the middle of the title card, “TurboTax Free Edition,” and below that, “TurboTax Free Edition is for simple U.S. returns only. See if you qualify at turbotax.com.” (*See* CCF ¶¶158-159; Response to CCF ¶158; *see also* Ryan (Intuit) Tr. 726-727; Rubin (Intuit) Tr. 1560-1563). Intuit’s executives explained that those changes were made as part of Intuit’s continuing efforts to be clear with consumers and to improve clarity in the advertising. (Ryan (Intuit) Tr. 726-727; Rubin (Intuit) Tr. 1560-1563).

Moreover, the Proposed Finding does not support an inference that the challenged ads were deceptive. The fact that ads aired is not evidence that the ads conveyed the claim asserted by Complaint Counsel or that reasonable consumers were likely to be deceived by the ads. To the contrary, the fact that Complaint Counsel have identified only 175 even potentially relevant consumer complaints from the five years spanning Tax Years 2015-2019 (*see* CCF ¶¶676-677), even though the “Spelling Bee” ad on its own was aired at least 2,618 times on at least 322 television networks during Tax Year 2019 alone, is strong evidence that reasonable consumers

were not deceived by the “Spelling Bee” ad or any of the other challenged advertisements that ran in Tax Year 2019 (*see* PFF ¶¶632, 637, 639, 641-647).

5. TurboTax Television and Video Ads TY 2020 and TY 2021

a. Auctioneer

161. RX1415 is a video recording of the 30-second “Auctioneer” TurboTax ad for TY 2021. (RX1415 (Intuit)).

Response to Finding No. 161:

Intuit has no specific response except to note that the challenged ad aired in Tax Year 2021 and has not aired in the last year. Moreover, the binding Consent Order with the attorneys general of all 50 states and the District of Columbia already prohibits Intuit from running this ad or substantially similar ads in the future, and Intuit has disclaimed any intention of running such ads again in the future. (*See* PFF ¶¶225, 810, 824).

162. GX200 is a video recording of the 30-second “Auctioneer” TurboTax ad as it appeared on the TurboTax YouTube Channel in 2022. (Shiller (Complaint Counsel) Tr. 165-67; GX200 (Complaint Counsel); GX342 (Complaint Counsel) ¶ 129, at CC-00006963).

Response to Finding No. 162:

Intuit has no specific response except to note that the challenged ad aired in Tax Year 2021 and has not aired in the last year. Moreover, the binding Consent Order with the attorneys general of all 50 states and the District of Columbia already prohibits Intuit from running this ad or substantially similar ads in the future, and Intuit has disclaimed any intention of running such ads again in the future. (*See* PFF ¶¶225, 810, 824).

163. The following is a transcription of the words spoken in the “Auctioneer” 30-second TurboTax ads:

AUCTIONEER: And free, and free, and free, and free, and free. Now a bidder and free! Now give me another bidder and free and a free here and a free free free a free free free. Now a bidder and free! Now give me another bidder and free, and a free free free. And free, and free, and free, and free free and free. Here we go at free, free, free, and freeeeeeeeeeee. Free!

VOICEOVER: That's right. TurboTax Free Edition is free. See details at TurboTax.com.

(GX342 (Complaint Counsel) ¶ 132, at CC-00006965; RX1415 (Intuit); GX200 (Complaint Counsel); *see also* Shiller (Complaint Counsel) Tr. 166-67).

Response to Finding No. 163:

The Proposed Finding is incomplete and misleading because it is just a snippet of the full ad that actually ran and Complaint Counsel have omitted critical information for evaluating the advertisement, including that the ad contained disclosures about qualifications. (*See* CCF ¶167; Response to CCF ¶167). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334). The Proposed Finding fails to mention that the ad verbally informed consumers that the free offer was for “TurboTax Free Edition” and that they could “see details at TurboTax.com.” (RX1415 (Intuit)). The Proposed Finding also fails to mention that the ad included a written disclosure stating “TurboTax Free Edition is for simple U.S. returns only. See if you qualify at turbotax.com.” (RX1415 (Intuit)).

Moreover, the Proposed Finding does not support an inference that the ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. To start, the repetition of the word “free” by itself is not a claim about TurboTax at all. (PFF ¶¶221-222). The ad does not state anything about TurboTax until the end of the ad, when it informed viewers that the free offer applied to a specific TurboTax SKU that had qualifications. (RX1415 (Intuit); PFF ¶223; *see also* PFF ¶224). The ad informed consumers in writing that the free offer was for a specific TurboTax SKU, stating “TurboTax Free Edition”; that the free offer had qualifications based on the complexity of a consumer’s tax return, by stating “for simple U.S. returns only”; and that consumers could learn

more about the qualifications and “[s]ee if [they] qualify at turbotax.com.” (RX1415 (Intuit); PFF ¶244). Complaint Counsel offered no evidence that the written disclosures were not visible (PFF ¶230), nor could they given the prominence of those disclosures and the benchmarking analysis showing that the disclosures were consistent with those in comparable ads (PFF ¶¶232-241). The ad also informed consumers in spoken narrative that the free offer was for a specific TurboTax product, stating “TurboTax Free Edition.” (RX1415 (Intuit)). Complaint Counsel offered no evidence these words could not be heard by consumers. (PFF ¶231).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make the claims that Complaint Counsel allege. Instead, the undisputed testimony from Intuit’s executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (*See* PFF ¶¶167-177, 190, 192-202, 405, 852, 857, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel offered no evidence that the ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the disclosures in the ad ensured that reasonable consumers understood that there were qualifications for the free TurboTax SKU being advertised, the nature and character of those qualifications, and where additional detail was available. (PFF ¶¶241-246, 302-330, 334). Even without those disclosures, reasonable consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

164. GX202 is a video recording of the 15-second “Auctioneer” TurboTax ad that aired in TY 2021. (GX202 (Complaint Counsel); GX342 (Complaint Counsel) ¶ 130, at CC-00006964).

Response to Finding No. 164:

Intuit has no specific response except to note that the challenged ad aired in Tax Year 2021 and has not aired in the last year. Moreover, the binding Consent Order with the attorneys general of all 50 states and the District of Columbia already prohibits Intuit from running this ad or substantially similar ads in the future, and Intuit has disclaimed any intention of running such ads again in the future. (See PFF ¶¶225, 810, 824).

165. Screenshots of GX202 taken at three-minute intervals are at GX203. (GX202 (Complaint Counsel); GX203 (Complaint Counsel); GX342 (Complaint Counsel) ¶ 130, at CC-00006964).

Response to Finding No. 165:

The Proposed Finding is inaccurate because the screenshots in GX203 are taken at three-second intervals. (GX203 (FTC)). Moreover, the Proposed Finding is misleading because the screenshots are just snippets of the full ad that actually ran and Complaint Counsel have omitted critical information for evaluating the advertisement, including that the ad contained disclosures about qualifications. (See CCF ¶167; Response to CCF ¶167). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334). The Proposed Finding fails to mention that the ad verbally informed consumers that the free offer was for “TurboTax Free Edition” and that they could “see details at TurboTax.com.” (GX202 (Intuit)). The Proposed Finding also fails to mention that the ad included a written disclosure stating “TurboTax Free Edition is for simple U.S. returns only. See if you qualify at turbotax.com.” (GX202 (Intuit)).

Moreover, the Proposed Finding does not support an inference that the ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. To start, the repetition of the word “free” by itself is not a claim about TurboTax at all. (PFF ¶¶221-222). The ad does not state anything about TurboTax until the end of the ad, when it informed viewers that the free offer applied to a specific TurboTax SKU that had qualifications. (GX202 (Intuit); PFF ¶223; *see also* PFF ¶224). The ad informed consumers in writing that the free offer was for a specific TurboTax SKU, stating “TurboTax Free Edition”; that the free offer had qualifications based on the complexity of a consumer’s tax return, by stating “for simple U.S. returns only”; and that consumers could learn more about the qualifications and “[s]ee if [they] qualify at turbotax.com.” (GX202 (Intuit); PFF ¶244). Complaint Counsel offered no evidence that the written disclosures were not visible (PFF ¶230), nor could they given the prominence of those disclosures and the benchmarking analysis showing that the disclosures were consistent with those in comparable ads (PFF ¶¶232-241). The ad also informed consumers in spoken narrative that the free offer was for a specific TurboTax product, stating “TurboTax Free Edition.” (GX202 (Intuit)). Complaint Counsel offered no evidence these words could not be heard by consumers. (PFF ¶231).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make the claims that Complaint Counsel allege. Instead, the undisputed testimony from Intuit’s executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (*See* PFF ¶¶167-177, 190, 192-202, 405, 852, 857, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel offered no evidence that the ad was likely to mislead

reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the disclosures in the ad ensured that reasonable consumers understood that there were qualifications for the free TurboTax SKU being advertised, the nature and character of those qualifications, and where additional detail was available. (PFF ¶¶241-246, 302-330, 334). Even without those disclosures, reasonable consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

166. The following is a transcription of the words spoken in the 15-second “Auctioneer” TurboTax ad:

AUCTIONEER: And free, and free, and free, and free, and free. Now a bidder and free! Now give me another bidder and free and a free here and a free free free a free free free. Now a bidder and free! Now give me another bidder and free, and a free free free. And free, and free here, and free there, and free free and free. Make it Free. Free!

VOICEOVER: That’s right. TurboTax Free Edition is Free. See details at TurboTax.com.

(GX342 (Complaint Counsel) ¶ 130, at CC-00006964-65; GX202 (Complaint Counsel)).

Response to Finding No. 166:

The Proposed Finding is incomplete and misleading because it is just a snippet of the full ad that actually ran and Complaint Counsel have omitted critical information for evaluating the advertisement, including that it contained other disclosures about eligibility. (See CCF ¶167; Response to CCF ¶167). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334). The Proposed Finding fails to

mention that the ad verbally informed consumers that the free offer was for “TurboTax Free Edition” and that they could “see details at TurboTax.com.” (GX202 (Intuit)). The Proposed Finding also fails to mention that the ad included a written disclosure stating “TurboTax Free Edition is for simple U.S. returns only. See if you qualify at turbotax.com.” (GX202 (Intuit)).

Moreover, the Proposed Finding does not support an inference that the ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. To start, the repetition of the word “free” by itself is not a claim about TurboTax at all. (PFF ¶¶221-222). The ad does not state anything about TurboTax until the end of the ad, when it informed viewers that the free offer applied to a specific TurboTax SKU that had qualifications. (GX202 (Intuit); PFF ¶223; *see also* PFF ¶224). The ad informed consumers in writing that the free offer was for a specific TurboTax SKU, stating “TurboTax Free Edition”; that the free offer had qualifications based on the complexity of a consumer’s tax return, by stating “for simple U.S. returns only”; and that consumers could learn more about the qualifications and “[s]ee if [they] qualify at turbotax.com.” (GX202 (Intuit); PFF ¶244). Complaint Counsel offered no evidence that the written disclosures were not visible (PFF ¶230), nor could they given the prominence of those disclosures and the benchmarking analysis showing that the disclosures were consistent with those in comparable ads (PFF ¶¶232-241). The ad also informed consumers in spoken narrative that the free offer was for a specific TurboTax product, stating “TurboTax Free Edition.” (GX202 (Intuit)). Complaint Counsel offered no evidence these words could not be heard by consumers. (PFF ¶231).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make the claims that Complaint Counsel allege. Instead, the undisputed testimony from Intuit’s executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax

products are free or that TurboTax would be free for a consumer when that was not the case. (See PFF ¶¶167-177, 190, 192-202, 405, 852, 857, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel offered no evidence that the ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the disclosures in the ad ensured that reasonable consumers understood that there were qualifications for the free TurboTax SKU being advertised, the nature and character of those qualifications, and where additional detail was available. (PFF ¶¶241-246, 302-330, 334). Even without those disclosures, reasonable consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

167. A disclaimer shown at the end of the 15-second “Auctioneer” TurboTax ad and the 30-second “Auctioneer” TurboTax ad and which appears for a few seconds in small font at the bottom of the screen reads, “TurboTax Free Edition is for simple U.S. returns only. See if you qualify at turbotax.com. Offer subject to change.” (RX1415 (Intuit) at 00:26; GX202 (Complaint Counsel) at 00:11).

Response to Finding No. 167:

The Proposed Finding is incomplete and misleading because it wrongly refers to language in the ads as a “disclaimer” and ignores other disclosures in the ads. RX1415 and GX202 also include a verbal disclosure informing consumers that the free offer was for the “TurboTax Free Edition” SKU. (RX1415 (Intuit); GX202 (FTC); see CCF ¶166; Response to CCF ¶166). Further, the Proposed Finding fails to recognize that by inviting consumers to “[s]ee if [they] qualify at turbotax.com,” all content on the TurboTax website—including detailed information about qualifications—was “integrated” into the ads, and therefore all disclosures on

the website are incorporated into the ads. (PFF ¶¶328; CCF ¶455). In determining the claims conveyed by an advertisement and whether they were likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

Moreover, the Proposed Finding does not support an inference that the ads expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The ads informed consumers in writing that the free offer was for a specific TurboTax SKU, “Free Edition”; that the free offer had qualifications based on the complexity of a consumer’s tax return, by stating “for simple U.S. returns only”; and that consumers could learn more about the qualifications and “[s]ee if [they] qualify at turbotax.com.” (RX1415 (Intuit); GX202 (FTC); PFF ¶244). Complaint Counsel offered no evidence that the written disclosures were not visible to consumers (PFF ¶230), nor could they given the prominence of those disclosures and the benchmarking analysis showing that the disclosures were consistent with those in comparable ads (PFF ¶¶232-241). The ads also informed consumers in spoken narrative that the free offer was for a specific TurboTax product, referencing “TurboTax Free Edition.” (RX1415 (Intuit); GX202 (FTC)). Complaint Counsel offered no evidence these words could not be heard by consumers. (PFF ¶231).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make the claims that Complaint Counsel allege. Instead, the undisputed testimony from Intuit’s executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (See PFF ¶¶167-177, 190, 192-202, 405, 852, 857, 860, 870).

The Proposed Finding also does not support an inference that the ads were likely to mislead reasonable consumers. Complaint Counsel offered no evidence that the ads were likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. The evidence establishes that the disclosures in the ads ensured that reasonable consumers understood that there were qualifications for the free TurboTax SKU being advertised, the nature and character of those qualifications, and where additional detail was available. (PFF ¶¶241-246, 302-330, 334). Even without those disclosures, reasonable consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

168. Intuit aired “Auctioneer” ads on television throughout the United States at least 8,281 times on at least 670 television networks between November 1, 2020, and May 17, 2021. (GX342 (Complaint Counsel) ¶¶ 106-07, at CC-00006947-49; *see also* Shiller (Complaint Counsel) Tr. 167-68).

Response to Finding No. 168:

The Proposed Finding is incomplete and misleading because it is unclear which version of the “Auctioneer” ad it is referring to. Moreover, the Proposed Finding does not support an inference that the challenged ads were deceptive. The fact that ads aired is not evidence that the ads conveyed the claim asserted by Complaint Counsel or that reasonable consumers were likely to be deceived by the ads. To the contrary, the fact that Complaint Counsel have identified only 17 even potentially relevant consumer complaints from Tax Year 2020 (*see* CCF ¶677), even though the “Auctioneer” ad on its own was aired at least 8,281 times on at least 670 television networks during Tax Year 2020 alone, is strong evidence that reasonable consumers were not

deceived by the “Auctioneer” ad or any of the other challenged advertisements that ran in Tax Year 2020 (*see* PFF ¶¶632, 637, 639, 641-647).

169. The “Auctioneer” ads appeared on television throughout the United States at least 1,876 times on at least 86 television networks between November 1, 2021, and April 18, 2022. (GX342 (Complaint Counsel) ¶¶ 133-34, at CC-00006966; *see also* Shiller (Complaint Counsel) Tr. 167-68).

Response to Finding No. 169:

The Proposed Finding is incomplete and misleading because it is unclear which version of the “Auctioneer” ad it is referring to. Moreover, the Proposed Finding does not support an inference that the challenged ads were deceptive. The fact that ads aired is not evidence that the ads conveyed the claim asserted by Complaint Counsel or that reasonable consumers were likely to be deceived by the ads. To the contrary, the fact that Complaint Counsel have identified only 26 even potentially relevant consumer complaints from Tax Year 2021 (*see* CCF ¶677), even though the “Auctioneer” ad on its own was aired at least 1,876 times on at least 86 television networks during Tax Year 2021 alone, is strong evidence that reasonable consumers were not deceived by the “Auctioneer” ad or any of the other challenged advertisements that ran in Tax Year 2021 (*see* PFF ¶¶632, 637, 639, 641-647).

170. As of March 28, 2022, the 30-second version of the “Auctioneer” ad (GX200 (Complaint Counsel)) had more than 5.6 million views on YouTube. (GX342 (Complaint Counsel) ¶ 129, at CC-00006963-64; GX202 (Complaint Counsel); GX478 (Complaint Counsel), at CC-00010143; *see also* Shiller (Complaint Counsel) Tr. 166).

Response to Finding No. 170:

The Proposed Finding does not support an inference that the challenged ads were deceptive. The fact that the ad was viewed is not evidence that the ad conveyed the claim asserted by Complaint Counsel or that reasonable consumers were likely to be deceived by the ads. To the contrary, the fact that Complaint Counsel have identified only 43 even potentially relevant consumer complaints from Tax Years 2020 and 2021 (*see* CCF ¶677), even though the

“Auctioneer” ad on its own was viewed more than 5.6 million times on YouTube alone, is strong evidence that reasonable consumers were not deceived by the “Auctioneer” ad or any of the other challenged advertisements that ran in Tax Years 2021 and 2021 (*see* PFF ¶¶632, 637, 639, 641-647).

b. Dance Workout

171. GX206 is a video recording of the 30-second “Dance Workout” TurboTax ad as it appeared on the TurboTax YouTube Channel in 2022. (Shiller (Complaint Counsel) Tr. 169-70; GX206 (Complaint Counsel); GX342 (Complaint Counsel) ¶ 135, at CC-00006966-67).

Response to Finding No. 171:

Intuit has no specific response except to note that the challenged ad aired in Tax Year 2021 and has not aired in the last year. Moreover, the binding Consent Order with the attorneys general of all 50 states and the District of Columbia already prohibits Intuit from running this ad or substantially similar ads in the future, and Intuit has disclaimed any intention of running such ads again in the future. (*See* PFF ¶¶225, 810, 824).

172. The following is transcription of the words spoken in the 30-second “Dance Workout” TurboTax ad:

DANCE WORKOUT INSTRUCTOR: And free! Free, free. And free, and free. And freeeeeeeeee. And free, and free, and free, and free, and free. And free. And free, free. And free.

VOICEOVER: That’s right, TurboTax Free Edition is free. See details at TurboTax.com.

(GX206 (Complaint Counsel); GX342 (Complaint Counsel) ¶ 138, at CC-00006968; *see also* Shiller (Complaint Counsel) Tr. 170).

Response to Finding No. 172:

The Proposed Finding is incomplete and misleading because it is just a snippet of the full ad that actually ran and Complaint Counsel have omitted critical information for evaluating the advertisement, including that the ad contained disclosures about qualifications. (CCFF ¶173;

Response to CCFE ¶173). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334). The Proposed Finding fails to mention that the ad verbally informed consumers that the free offer was for “TurboTax Free Edition” and that they could “see details at TurboTax.com.” (GX206 (FTC)). The Proposed Finding also fails to mention that the ad included a written disclosure stating “TurboTax Free Edition is for simple U.S. returns only. See if you qualify at turbotax.com.” (GX206 (FTC)).

Moreover, the Proposed Finding does not support an inference that the ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. To start, the repetition of the word “free” by itself is not a claim about TurboTax at all. (PFF ¶¶221-222). The ad does not state anything about TurboTax until the end of the ad, when it informed viewers that the free offer applied to a specific TurboTax SKU that had qualifications. (GX206 (FTC); PFF ¶223; *see also* PFF ¶224). The ad informed consumers in writing that the free offer was for a specific TurboTax SKU, stating “TurboTax Free Edition”; that the free offer had qualifications based on the complexity of a consumer’s tax return, by stating “for simple U.S. returns only”; and that consumers could learn more about the qualifications and “[s]ee if [they] qualify at turbotax.com.” (GX206 (FTC); PFF ¶244). Complaint Counsel offered no evidence that the written disclosures were not visible (PFF ¶230), nor could they given the prominence of those disclosures and the benchmarking analysis showing that the disclosures were consistent with those in comparable ads (PFF ¶¶232-241). The ad also informed consumers in spoken narrative that the free offer was for a specific TurboTax product, stating “TurboTax Free Edition.” (GX206 (Intuit)). Complaint Counsel offered no evidence these words could not be heard by consumers. (PFF ¶231).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make the claims that Complaint Counsel allege. Instead, the undisputed testimony from Intuit's executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (See PFF ¶¶167-177, 190, 192-202, 405, 852, 857, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel offered no evidence that the ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the disclosures in the ad ensured that reasonable consumers understood that there were qualifications for the free TurboTax SKU being advertised, the nature and character of those qualifications, and where additional detail was available. (PFF ¶¶241-246, 302-330, 334). Even without those disclosures, reasonable consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

173. The disclaimer shown at the end of the 30-second "Dance Workout" TurboTax ad and which appears for a few seconds in small font at the bottom of the screen reads, "TurboTax Free Edition is for simple U.S. returns only. See if you qualify at turbotax.com. Offer subject to change." (GX206 (Complaint Counsel) at 0:34).

Response to Finding No. 173:

The Proposed Finding is incomplete and misleading. The time stamp given by the Proposed Finding is not for the advertisement in GX206, as the scroll bar showing the time of the ad itself is not visible in GX206, which is a video of an advertisement playing on another website. (GX206 (FTC)). Additionally, it wrongly refers to language in the ad as a "disclaimer"

and ignores other disclosures in the ad. GX206 also includes a verbal disclosure informing consumers that the free offer was for the “TurboTax Free Edition” SKU. (GX206 (FTC); *see* CCFE ¶172; Response to CCFE ¶172). Further, the Proposed Finding fails to recognize that by inviting consumers to “[s]ee if [they] qualify at turbotax.com,” all content on the TurboTax website—including detailed information about qualifications—was “integrated” into the ads, and therefore all disclosures on the website are incorporated into the ads. (PFF ¶328; CCFE ¶455). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

Moreover, the Proposed Finding does not support an inference that the ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The ad informed consumers in writing that the free offer was for a specific TurboTax SKU, “Free Edition”; that the free offer had qualifications based on the complexity of a consumer’s tax return, by stating “for simple U.S. returns only”; and that consumers could learn more about the qualifications and “[s]ee if [they] qualify at turbotax.com.” (GX206 (FTC); PFF ¶244). Complaint Counsel offered no evidence that the written disclosures were not visible to consumers (PFF ¶230), nor could they given the prominence of those disclosures and the benchmarking analysis showing that the disclosures were consistent with those in comparable ads (PFF ¶¶232-241). The ad also informed consumers in spoken narrative that the free offer was for a specific TurboTax product, referencing “TurboTax Free Edition.” (GX206 (FTC)). Complaint Counsel offered no evidence these words could not be heard by consumers. (PFF ¶231).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make the claims that Complaint Counsel allege. Instead, the undisputed testimony from Intuit's executives establishes that Intuit did not intend for any of the ad to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (See PFF ¶¶167-177, 190, 192-202, 405, 852, 857, 860, 870).

The Proposed Finding also does not support an inference that the ads were likely to mislead reasonable consumers. Complaint Counsel offered no evidence that the ads were likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. The evidence establishes that the disclosures in the ads ensured that reasonable consumers understood that there were qualifications for the free TurboTax SKU being advertised, the nature and character of those qualifications, and where additional detail was available. (PFF ¶¶241-246, 302-330, 334). Even without those disclosures, reasonable consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

174. GX208 is a video recording of the 15-second "Dance Workout" TurboTax ad. (GX208 (Complaint Counsel); GX342 (Complaint Counsel) ¶ 136, at CC-00006967).

Response to Finding No. 174:

Intuit has no specific response except to note that the challenged ad aired in Tax Year 2021 and has not aired in the last year. Moreover, the binding Consent Order with the attorneys general of all 50 states and the District of Columbia already prohibits Intuit from running this ad or substantially similar ads in the future, and Intuit has disclaimed any intention of running such ads again in the future. (See PFF ¶¶225, 810, 824).

175. The following is a transcription of the words spoken in the 15-second “Dance Workout” TurboTax ad:

DANCE WORKOUT INSTRUCTOR: Free! And free! And free!
And free! Free. And free, and free. Free free. And free, and free,
and free, and free, and free.

VOICEOVER: That’s right, TurboTax Free Edition is free. See
details at TurboTax.com.

(GX208 (Complaint Counsel); GX342 (Complaint Counsel) ¶ 136, at CC-00006967-68).

Response to Finding No. 175:

The Proposed Finding is incomplete and misleading because it is just a snippet of the full ad that actually ran and Complaint Counsel have omitted critical information for evaluating the advertisement, including that the ad contained disclosures about qualifications. (CCFF ¶176; Response to CCFF ¶176). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334). The Proposed Finding fails to mention that the ad verbally informed consumers that the free offer was for “TurboTax Free Edition” and that they could “see details at TurboTax.com.” (GX208 (FTC)). The Proposed Finding also fails to mention that the ad included a written disclosure stating “TurboTax Free Edition is for simple U.S. returns only. See if you qualify at turbotax.com.” (GX208 (FTC)).

Moreover, the Proposed Finding does not support an inference that the ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. To start, the repetition of the word “free” by itself is not a claim about TurboTax at all. (PFF ¶¶221-222). The ad does not state anything about TurboTax until the end of the ad, when it informed viewers that the free offer applied to a specific TurboTax SKU that had qualifications. (PFF ¶223; *see also* PFF ¶224). The ad informed consumers in writing that the free offer was for a specific TurboTax SKU, stating “TurboTax

Free Edition”; that the free offer had qualifications based on the complexity of a consumer’s tax return, by stating “for simple U.S. returns only”; and that consumers could learn more about the qualifications and “[s]ee if [they] qualify at turbotax.com.” (GX208 (FTC); PFF ¶244).

Complaint Counsel offered no evidence that the written disclosures were not visible (PFF ¶230), nor could they given the prominence of those disclosures and the benchmarking analysis showing that the disclosures were consistent with those in comparable ads (PFF ¶¶232-241).

The ad also informed consumers in spoken narrative that the free offer was for a specific TurboTax product, stating “TurboTax Free Edition.” (GX208 (FTC)). Complaint Counsel offered no evidence these words could not be heard by consumers. (PFF ¶231).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make the claims that Complaint Counsel allege. Instead, the undisputed testimony from Intuit’s executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (See PFF ¶¶167-177, 190, 192-202, 405, 852, 857, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel offered no evidence that the ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the disclosures in the ad ensured that reasonable consumers understood that there were qualifications for the free TurboTax SKU being advertised, the nature and character of those qualifications, and where additional detail was available. (PFF ¶¶241-246, 302-330, 334). Even without those disclosures, reasonable consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax

returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

176. The disclaimer shown at the end of the 15-second “Dance Workout” TurboTax ad and which appears for a few seconds in small font at the bottom of the screen reads, “TurboTax Free Edition is for simple U.S. returns only. See if you qualify at turbotax.com. Offer subject to change.” (GX208 (Complaint Counsel) at 00:12; GX209 (Complaint Counsel) at CC-00005856).

Response to Finding No. 176:

The Proposed Finding is incorrect, incomplete, and misleading. It wrongly states that the language telling consumers “TurboTax Free Edition is for simple U.S. returns only. See if you qualify at turbotax.com. Offer subject to change” appears at 0:12; however, it appears at 0:10 and appears for several seconds. (GX208 (FTC)). Additionally, it wrongly refers to language in the ad as a “disclaimer” and ignores other disclosures in the ad. GX208 also includes a verbal disclosure informing consumers that the free offer was for the “TurboTax Free Edition” SKU. (GX208 (FTC); *see* CCFE ¶175; Response to CCFE ¶175). Further, the Proposed Finding fails to recognize that by inviting consumers to “[s]ee if [they] qualify at turbotax.com,” all content on the TurboTax website—including detailed information about qualifications—was “integrated” into the ads, and therefore all disclosures on the website are incorporated into the ads. (PFF ¶328; CCFE ¶455). In determining the claims conveyed by an advertisements and whether they were likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

Moreover, the Proposed Finding does not support an inference that the ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The ad informed consumers in writing that the free offer was for a specific TurboTax SKU, “Free Edition”; that the free offer had qualifications based on the complexity of a consumer’s tax return, by stating “for simple U.S. returns only”; and that

consumers could learn more about the qualifications and “[s]ee if [they] qualify at turbotax.com.” (GX208 (FTC); PFF ¶244). Complaint Counsel offered no evidence that the written disclosures were not visible to consumers (PFF ¶230), nor could they given the prominence of those disclosures and the benchmarking analysis showing that the disclosures were consistent with those in comparable ads (PFF ¶¶232-241). The ad also informed consumers in spoken narrative that the free offer was for a specific TurboTax product, referencing “TurboTax Free Edition.” (GX208 (FTC)). Complaint Counsel offered no evidence these words could not be heard by consumers. (PFF ¶231).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make the claims that Complaint Counsel allege. Instead, the undisputed testimony from Intuit’s executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (See PFF ¶¶167-177, 190, 192-202, 405, 852, 857, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel offered no evidence that the ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. The evidence establishes that the disclosures in the ad ensured that reasonable consumers understood that there were qualifications for the free TurboTax SKU being advertised, the nature and character of those qualifications, and where additional detail was available. (PFF ¶¶241-246, 302-330, 334). Even without those disclosures, reasonable consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional

information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

177. Intuit aired the “Dance Workout” TurboTax ads throughout the United States at least 9,909 times on 714 television networks between November 1, 2020, and May 17, 2021. (GX342 (Complaint Counsel) ¶¶ 109-10, at CC-00006950-51; *see also* Shiller (Complaint Counsel) Tr. 170-71).

Response to Finding No. 177:

The Proposed Finding is incomplete and misleading because it is unclear which version of the “Dance Workout” ad it is referring to. Moreover, the Proposed Finding does not support an inference that the challenged ads were deceptive. The fact that ads aired is not evidence that the ads conveyed the claim asserted by Complaint Counsel or that reasonable consumers were likely to be deceived by the ads. To the contrary, the fact that Complaint Counsel have identified only 17 even potentially relevant consumer complaints from Tax Year 2020 (*see* CCFF ¶677), even though the “Dance Workout” ad on its own was aired at least 9,909 times on at least 714 television networks during Tax Year 2020 alone, is strong evidence that reasonable consumers were not deceived by the “Dance Workout” ad or any of the other challenged advertisements that ran in Tax Year 2020 (*see* PFF ¶¶632, 637, 639, 641-647).

178. The “Dance Workout” TurboTax ads appeared throughout the United States at least 7,988 times on at least 623 television networks between November 1, 2021, and April 18, 2022. (GX342 (Complaint Counsel) ¶¶ 139-40, at CC-00006968-70; *see also* Shiller (Complaint Counsel) Tr. 170-71).

Response to Finding No. 178:

The Proposed Finding is incomplete and misleading because it is unclear which version or versions of the “Dance Workout” ad it is referring to. Moreover, the Proposed Finding does not support an inference that the challenged ads were deceptive. The fact that ads aired is not evidence that the ads conveyed the claim asserted by Complaint Counsel or that reasonable consumers were likely to be deceived by the ads. To the contrary, the fact that Complaint

Counsel have identified only 26 even potentially relevant consumer complaints from Tax Year 2021 (*see* CCFE ¶677), even though the “Dance Workout” ad on its own was aired at least 7,988 times on at least 623 television networks during Tax Year 2021 alone, is strong evidence that reasonable consumers were not deceived by the “Dance Workout” ad or any of the other challenged advertisements that ran in Tax Year 2021 (*see* PFF ¶¶632, 637, 639, 641-647).

179. As of March 28, 2022, the 30-second version of the “Dance Workout” TurboTax ad (GX206 (Complaint Counsel)) had been viewed more than 11.3 million times on YouTube. (GX342 (Complaint Counsel) ¶ 135, at CC-00006966-67; *see also* Shiller (Complaint Counsel) Tr. 170).

Response to Finding No. 179:

The Proposed Finding does not support an inference that the challenged ads were deceptive. The fact that the ad was viewed is not evidence that the ad conveyed the claim asserted by Complaint Counsel or that reasonable consumers were likely to be deceived by the ads. To the contrary, the fact that Complaint Counsel have identified only 43 even potentially relevant consumer complaints from Tax Years 2020 and 2021 (*see* CCFE ¶677), even though the “Dance Workout” ad on its own was viewed more than 11.3 million times on YouTube alone, is strong evidence that reasonable consumers were not deceived by the “Dance Workout” ad or any of the other challenged advertisements that ran in Tax Years 2021 and 2021 (*see* PFF ¶¶632, 637, 639, 641-647).

c. Dog Show

180. GX204 is a video recording of the 15-second “Dog Show” TurboTax ad. (Shiller (Complaint Counsel) Tr. 172-73; GX204 (Complaint Counsel); GX342 (Complaint Counsel) ¶ 141, at CC-00006971).

Response to Finding No. 180:

Intuit has no specific response except to note that the challenged ad aired in Tax Year 2021 and has not aired in the last year. Moreover, the binding Consent Order with the attorneys

general of all 50 states and the District of Columbia already prohibits Intuit from running this ad or substantially similar ads in the future, and Intuit has disclaimed any intention of running such ads again in the future. (See PFF ¶¶225, 810, 824).

181. The following is a transcription of the words spoken in the 15-second “Dog Show” TurboTax ad:

DOG SHOW JUDGE: Free (pointing at Dog 1), free (pointing at Dog 2), Free! (pointing at winning Dog 3).

WINNING DOG HANDLER: Free! Free! (shrieking excitedly)

VOICEOVER: That’s right, TurboTax Free Edition is free. See details at TurboTax.com.

(GX204 (Complaint Counsel); GX342 (Complaint Counsel) ¶ 143, at CC-00006971; *see also* Shiller (Complaint Counsel) Tr. 172).

Response to Finding No. 181:

The Proposed Finding is incorrect, incomplete, and misleading. It is wrong because the “winning dog handler” does not shriek “Free! Free!” as asserted. (See GX204 (FTC)). It is incomplete and misleading because it is just a snippet of the full ad that actually ran and Complaint Counsel have omitted critical information for evaluating the advertisement, including that it contained disclosures about qualifications. (CCFF ¶182; Response to CCFF ¶182). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334). The Proposed Finding fails to mention that the ad verbally informed consumers that the free offer was for “TurboTax Free Edition” and that they could “see details at TurboTax.com.” (GX204 (FTC)). The Proposed Finding also fails to mention that the ad included a written disclosure stating “TurboTax Free Edition is for simple U.S. returns only. See if you qualify at turbotax.com.” (GX204 (FTC)).

Moreover, the Proposed Finding does not support an inference that the ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. To start, the repetition of the word “free” by itself is not a claim about TurboTax at all. (PFF ¶¶221-222). The ad does not state anything about TurboTax until the end of the ad, when it informed viewers that the free offer applied to a specific TurboTax SKU that had qualifications. (PFF ¶223; *see also* PFF ¶224). The ad informed consumers in writing that the free offer was for a specific TurboTax SKU, stating “TurboTax Free Edition”; that the free offer had qualifications based on the complexity of a consumer’s tax return, by stating “for simple U.S. returns only”; and that consumers could learn more about the qualifications and “[s]ee if [they] qualify at turbotax.com.” (GX204 (FTC); PFF ¶244). Complaint Counsel offered no evidence that the written disclosures were not visible (PFF ¶230), nor could they given the prominence of those disclosures and the benchmarking analysis showing that the disclosures were consistent with those in comparable ads (PFF ¶¶232-241). The ad also informed consumers in spoken narrative that the free offer was for a specific TurboTax product, stating “TurboTax Free Edition.” (GX204 (FTC)). Complaint Counsel offered no evidence these words could not be heard by consumers. (PFF ¶231).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make the claims that Complaint Counsel allege. Instead, the undisputed testimony from Intuit’s executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (*See* PFF ¶¶167-177, 190, 192-202, 405, 852, 857, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel offered no evidence that the ad was likely to mislead

reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the disclosures in the ad ensured that reasonable consumers understood that there were qualifications for the free TurboTax SKU being advertised, the nature and character of those qualifications, and where additional detail was available. (PFF ¶¶241-246, 302-330, 334). Even without those disclosures, reasonable consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

182. The disclaimer shown at the end of the 15-second “Dog Show” TurboTax ad and which appears for a few seconds in small font at the bottom of the screen reads, “TurboTax Free Edition is for simple U.S. returns only. See if you qualify at turbotax.com. Offer subject to change.” (GX204 (Complaint Counsel) at 00:12; GX205 (Complaint Counsel) at CC-00005851; GX342 (Complaint Counsel) ¶ 142, at CC-00006971). The following screen is displayed to consumers for a few seconds at the end of commercials aired as part of the “Free, Free, Free, Free” campaign in TY 2021, including the 15-second “Dog Show” TurboTax ad:



(GX204 (Complaint Counsel) at 00:12; GX205 (Complaint Counsel) at CC-00005851; GX342 (Complaint Counsel) ¶157, at CC-00006979). While this screen is displayed, a voiceover states: “That’s right, TurboTax Free Edition is free. See details at turbotax.com.” (GX204 (Complaint Counsel) at 00:12; *see also e.g.*, GX200, GX204, and GX206).

Response to Finding No. 182:

The Proposed Finding is incorrect, incomplete, and misleading. It wrongly states that the voiceover informing consumers “That’s right, TurboTax Free Edition is free. See details at turbotax.com” occurs at 0:12; however, it begins at 0:10. (GX204 (FTC)). Additionally, it wrongly refers to the written language in the ad as a “disclaimer” and ignores other disclosures in the ad. GX204 also includes a verbal disclosure informing consumers that the free offer was for the “TurboTax Free Edition” SKU. (GX204 (FTC); *see* CCF ¶181; Response to CCF ¶181). Further, the Proposed Finding fails to recognize that by inviting consumers to “[s]ee if [they] qualify at turbotax.com,” all content on the TurboTax website—including detailed information about qualifications—was “integrated” into the ad, and therefore all disclosures on the website are incorporated into the ad. (PFF ¶328; CCF ¶455). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

Moreover, the Proposed Finding does not support an inference that the ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The ad informed consumers in writing that the free offer was for a specific TurboTax SKU, “Free Edition”; that the free offer had qualifications based on the complexity of a consumer’s tax return, by stating “for simple U.S. returns only”; and that consumers could learn more about the qualifications and “[s]ee if [they] qualify at turbotax.com.” (GX204 (FTC)); PFF ¶244). Complaint Counsel offered no evidence that the written disclosures were not visible to consumers (PFF ¶230), nor could they given the

prominence of those disclosures and the benchmarking analysis showing that the disclosures were consistent with those in comparable ads (PFF ¶¶232-241). The ad also informed consumers in spoken narrative that the free offer was for a specific TurboTax product, referencing “TurboTax Free Edition.” (GX204 (FTC)). Complaint Counsel offered no evidence these words could not be heard by consumers. (PFF ¶231).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make the claims that Complaint Counsel allege. Instead, the undisputed testimony from Intuit’s executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (See PFF ¶¶167-177, 190, 192-202, 405, 852, 857, 860, 870).

The Proposed Finding also does not support an inference that the ad, nor GX200, GX204, and GX206, were likely to mislead reasonable consumers. Complaint Counsel offered no evidence that any of these ads were likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. The evidence establishes that the disclosures in GX204 ensured that reasonable consumers understood that there were qualifications for the free TurboTax SKU being advertised, the nature and character of those qualifications, and where additional detail was available. (PFF ¶¶241-246, 302-330, 334). Even without those disclosures, reasonable consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

183. Intuit aired the “Dog Show” TurboTax ad on television throughout the United States at least 10,435 times on 685 television networks between November 1, 2020, and May 17, 2021. (GX342 (Complaint Counsel) ¶¶ 112-13, at CC-00006952-53; *see also* Shiller

(Complaint Counsel) Tr. 173 (“I was able to determine that this ad was aired locally and nationally.”)).

Response to Finding No. 183:

The Proposed Finding is incomplete and misleading because it is unclear which version or versions of the “Dog Show” ad it is referring to. Moreover, the Proposed Finding does not support an inference that the challenged ads were deceptive. The fact that ads aired is not evidence that the ads conveyed the claim asserted by Complaint Counsel or that reasonable consumers were likely to be deceived by the ads. To the contrary, the fact that Complaint Counsel have identified only 17 even potentially relevant consumer complaints from Tax Year 2020 (*see* CCF ¶¶677), even though the “Dog Show” ad on its own was aired at least 10,435 times on at least 685 television networks during Tax Year 2020 alone, is strong evidence that reasonable consumers were not deceived by the “Dog Show” ad or any of the other challenged advertisements that ran in Tax Year 2020 (*see* PFF ¶¶632, 637, 639, 641-647).

184. The “Dog Show” TurboTax ad appeared on television throughout the United States at least 4,559 times on at least 499 television networks between November 1, 2021, and April 18, 2022. (GX342 (Complaint Counsel) ¶¶ 144-45, at CC-00006972-73; *see also* Shiller (Complaint Counsel) Tr. 173 (“I was able to determine that this ad was aired locally and nationally.”)).

Response to Finding No. 184:

The Proposed Finding is incomplete and misleading because it is unclear which version or versions of the “Dog Show” ad it is referring to. Moreover, the Proposed Finding does not support an inference that the challenged ads were deceptive. The fact that ads aired is not evidence that the ads conveyed the claim asserted by Complaint Counsel or that reasonable consumers were likely to be deceived by the ads. To the contrary, the fact that Complaint Counsel have identified only 26 even potentially relevant consumer complaints from Tax Year 2021 (*see* CCF ¶¶677), even though the “Dog Show” ad on its own was aired at least 4,559

times on at least 499 television networks during Tax Year 2021 alone, is strong evidence that reasonable consumers were not deceived by the “Dog Show” ad or any of the other challenged advertisements that ran in Tax Year 2021 (*see* PFF ¶¶632, 637, 639, 641-647).

d. Steven/Spit Take

185. GX307 is a video recording of the 14-second “Steven/Spit Take” TurboTax ad for TY 2021. (Shiller (Complaint Counsel) Tr. 173-75; GX307 (Complaint Counsel); GX342 (Complaint Counsel) ¶ 147, at CC-00006974).

Response to Finding No. 185:

Intuit has no specific response except to note that the challenged ad aired in Tax Year 2021 and has not aired in the last year. Moreover, the binding Consent Order with the attorneys general of all 50 states and the District of Columbia already prohibits Intuit from running this ad or substantially similar ads in the future, and Intuit has disclaimed any intention of running such ads again in the future. *See* PFF ¶¶225, 810, 824. Intuit also notes that the video recording of the ad was taken from a third-party website. (*See* GX307 (FTC)).

186. The following is a transcription of the words spoken in the 14-second “Steven/Spit Take” TurboTax ad:

VOICEOVER: “Steven, did you know that a TurboTax Live expert can do your simple tax return for you?”

Steven: “Umm”

VOICEOVER: “For free. It is true. For limited time TurboTax is free for simple returns even when an expert files for you.”

(GX307 (Complaint Counsel); GX342 (Complaint Counsel) ¶ 149, at CC-00006974-75; *see also* Shiller (Complaint Counsel) Tr. 174-75).

Response to Finding No. 186:

The Proposed Finding is incomplete and misleading because it is just a snippet of the full ad that actually ran and Complaint Counsel have omitted critical information for evaluating the advertisement, including that the ad contained disclosures about qualifications. (*See* CCF

¶¶187-188; Responses to CCF ¶¶187-188). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334). The Proposed Finding fails to mention that the ad verbally informed consumers that the free offer was for “TurboTax Live” and “for a limited time.” (GX307 (FTC)). The Proposed Finding also fails to mention that the ad included a written disclosure stating “For simple tax returns only. See if you qualify at turbotax.com. Must file by 3/31 for free offer.” (GX307 (FTC)).

Moreover, the Proposed Finding does not support an inference that the ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The ad does not state anything about TurboTax being free until it immediately informed viewers that the free offer had qualifications. (PFF ¶223; *see also* PFF ¶224). The ad informed consumers in writing that the free offer was for a specific TurboTax SKU, “TurboTax Live”; that the free offer had qualifications based on the complexity of a consumer’s tax return, by stating “[f]or simple tax returns only,” that consumers could learn more about the qualifications and “[s]ee if [they] qualify at turbotax.com,” and that consumers needed to “file by 3/31 for free offer.” (GX307 (FTC); PFF ¶244). Complaint Counsel offered no evidence that the written disclosures were not visible (PFF ¶230), nor could they given the prominence of those disclosures and the benchmarking analysis showing that the disclosures were consistent with those in comparable ads (PFF ¶¶232-241). The ad also informed consumers in spoken narrative that the free offer was for a specific TurboTax product, referencing “TurboTax Live.” (GX307 (FTC)). Complaint Counsel offered no evidence these words could not be heard by consumers. (PFF ¶231).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make the claims that Complaint Counsel allege. Instead, the undisputed testimony from Intuit's executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (See PFF ¶¶167-177, 190, 192-202, 405, 852, 857, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel offered no evidence that the ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the disclosures in the ad ensured that reasonable consumers understood that there were qualifications for the free TurboTax offer being advertised, the nature and character of those qualifications, and where additional detail was available. (PFF ¶¶241-246, 302-330, 334). Even without those disclosures, reasonable consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

187. Wording in the middle of the screen shown at the end of the 14-second "Steven/Spit Take" TurboTax ad reads, "Intuit TurboTax Live. File FREE, even when an expert files for you." (GX307 (Complaint Counsel) at 00:09; GX308 (Complaint Counsel) at CC-00006641).

Response to Finding No. 187:

The Proposed finding is incorrect, incomplete, and misleading. It is wrong because the referenced wording does not appear at the "end" of the ad; it appears 9 seconds into the ad. (GX307 (FTC)). It is incomplete and misleading because it is just a snippet of the full ad that actually ran and Complaint Counsel have omitted critical information for evaluating the

advertisement, including that the ad contained disclosures about qualifications. (CCFF ¶¶186, 188; Responses to CCFF ¶¶186, 188). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334). The Proposed Finding fails to mention that the ad verbally informed consumers that the free offer was for “TurboTax Live” and “for a limited time.” (GX307 (FTC)). The Proposed Finding also fails to mention that the ad included a written disclosure stating “For simple tax returns only. See if you qualify at turbotax.com. Must file by 3/31 for free offer.” (GX307 (FTC)).

Moreover, the Proposed Finding does not support an inference that the ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The ad does not state anything about TurboTax being free until it immediately informed viewers that the free offer had qualifications. (PFF ¶223; *see also* PFF ¶224). The ad informed consumers in writing that the free offer was for a specific TurboTax SKU, “TurboTax Live”; that the free offer had qualifications based on the complexity of a consumer’s tax return, by stating “[f]or simple tax returns only,” that consumers could learn more about the qualifications and “[s]ee if [they] qualify at turbotax.com,” and that consumers needed to “file by 3/31 for free offer.” (GX307 (FTC); PFF ¶244). Complaint Counsel offered no evidence that the written disclosures were not visible (PFF ¶230), nor could they given the prominence of those disclosures and the benchmarking analysis showing that the disclosures were consistent with those in comparable ads (PFF ¶¶232-241). The ad also informed consumers in spoken narrative that the free offer was for a specific TurboTax product, referencing “TurboTax Live.” (GX307 (FTC)). Complaint Counsel offered no evidence these words could not be heard by consumers. (PFF ¶231).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make the claims that Complaint Counsel allege. Instead, the undisputed testimony from Intuit's executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (See PFF ¶¶167-177, 190, 192-202, 405, 852, 857, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel offered no evidence that the ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the disclosures in the ad ensured that reasonable consumers understood that there were qualifications for the free TurboTax offer being advertised, the nature and character of those qualifications, and where additional detail was available. (PFF ¶¶241-246, 302-330, 334). Even without those disclosures, reasonable consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

188. The small-font disclaimer at the bottom of the screen shown at the end of the 14-second "Steven/Spit Take" TurboTax ad reads, "For simple tax returns only. See if you qualify at turbotax.com. Must file by 3/31 for free offer. Offer subject to change." (GX307 (Complaint Counsel) at 00:09; GX308 (Complaint Counsel) at CC-00006641).

Response to Finding No. 188:

The Proposed Finding is incomplete and misleading because it wrongly refers to language in the ad as a "disclaimer" and ignores other disclosures in the ad. GX307 also includes a verbal disclosure informing consumers that the free offer was "for a limited time" and for the "TurboTax Live" SKU. (GX307 (FTC); CCFE ¶186; Response to CCFE ¶186). Further,

the Proposed Finding fails to recognize that by inviting consumers to “[s]ee if [they] qualify at turbotax.com,” all content on the TurboTax website—including detailed information about qualifications—was “integrated” into the ad, and therefore all disclosures on the website are incorporated into the ad. (PFF ¶328; CCF ¶455). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

Moreover, the Proposed Finding does not support an inference that the ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The ad informed consumers in writing that the free offer was for a specific TurboTax SKU, “TurboTax Live”; that the free offer had qualifications based on the complexity of a consumer’s tax return, by stating “[f]or simple tax returns only,” that consumers could learn more about the qualifications and “[s]ee if [they] qualify at turbotax.com,” and that consumers needed to “file by 3/31 for free offer.” (GX307 (FTC); PFF ¶244). Despite now asserting this language was in a “small font,” Complaint Counsel offered no evidence that the written disclosures were not visible to consumers (PFF ¶230), nor could they given the prominence of those disclosures and the benchmarking analysis showing that the disclosures were consistent with those in comparable ads (PFF ¶¶232-241). The ad also informed consumers in spoken narrative that the free offer was for a specific TurboTax product, referencing “TurboTax Live.” (GX307 (FTC)). Complaint Counsel offered no evidence these words could not be heard by consumers. (PFF ¶231).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make the claims that Complaint Counsel allege. Instead, the undisputed testimony from Intuit’s executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax

products are free or that TurboTax would be free for a consumer when that was not the case. (See PFF ¶¶167-177, 190, 192-202, 405, 852, 857, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel offered no evidence that any of these ads were likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. The evidence establishes that the disclosures in GX307 ensured that reasonable consumers understood that there were qualifications for the free TurboTax SKU being advertised, the nature and character of those qualifications, and where additional detail was available. (PFF ¶¶241-246, 302-330, 334). Even without those disclosures, reasonable consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

189. GX309 is a video recording of the 28-second “Steven/Spit Take” TurboTax ad. (GX309 (Complaint Counsel); GX342 (Complaint Counsel) ¶ 151, at CC-00006975).

Response to Finding No. 189:

Intuit has no specific response except to note that the challenged ad aired in Tax Year 2021 and has not aired in the last year. Moreover, the binding Consent Order with the attorneys general of all 50 states and the District of Columbia already prohibits Intuit from running this ad or substantially similar ads in the future, and Intuit has disclaimed any intention of running such ads again in the future. (See PFF ¶¶225, 810, 824).

190. The following is a transcription of the words spoken in the 28-second “Steven/Spit Take” TurboTax ad:

VOICEOVER: “Steven, did you know that TurboTax is free no matter how you want to file?”

Steven: “I don’t believe that.”

VOICEOVER: “It’s true. Anyone with a simple tax return can get help from an expert, for free.”

Steven: “That can’t be true.”

VOICEOVER: “It is and with TurboTax Live our experts will even do your taxes for you for free.”

Other man: “Honestly, that sounds amazing.”

VOICEOVER: “For a limited time TurboTax is free for simple returns no matter how you file.”

(GX309 (Complaint Counsel); GX342 (Complaint Counsel) ¶ 153, at CC-00006975-76).

Response to Finding No. 190:

The Proposed Finding is incomplete and misleading because it is just a snippet of the full ad that actually ran and Complaint Counsel have omitted critical information for evaluating the advertisement, including that the ad contained disclosures about qualifications. (CCFF ¶¶191-192; Responses to CCFF ¶¶191-192). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334). The Proposed Finding fails to mention the ad verbally informed consumers that the free offer was for “TurboTax Live” and “for a limited time.” (GX309 (FTC)). The Proposed Finding also fails to mention that the ad included a written disclosure stating “For simple tax returns only. See if you qualify at turbotax.com. Must file by 3/31 for free offer.” (GX309 (FTC)).

Moreover, the Proposed Finding does not support an inference that the ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The ad informed consumers in writing that the free offer was for a specific TurboTax SKU, “TurboTax Live”; that the free offer had qualifications based on the complexity of a consumer’s tax return, by stating multiple times “[f]or simple tax returns

only,” stating that consumers could learn more about the qualifications and “[s]ee if [they] qualify at turbotax.com,” and that consumers needed to “file by 2/15 for free offer.” (GX309 (FTC); PFF ¶244). Complaint Counsel offered no evidence that the written disclosures were not visible (PFF ¶230), nor could they given the prominence of those disclosures and the benchmarking analysis showing that the disclosures were consistent with those in comparable ads (PFF ¶¶232-241). The ad also informed consumers in spoken narrative that the free offer was for a specific TurboTax product, referencing “TurboTax Live.” (GX309 (FTC)). Complaint Counsel offered no evidence these words could not be heard by consumers. (PFF ¶231).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make the claims that Complaint Counsel allege. Instead, the undisputed testimony from Intuit’s executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (See PFF ¶¶167-177, 190, 192-202, 405, 852, 857, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel offered no evidence that the ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the disclosures in the ad ensured that reasonable consumers understood that there were qualifications for the free TurboTax offer being advertised, the nature and character of those qualifications, and where additional detail was available. (PFF ¶¶241-246, 302-330, 334). Even without those disclosures, reasonable consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax

returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

191. Wording in the middle of the screen shown at the end of the 28-second “Steven/Spit Take” TurboTax ad reads, “Intuit TurboTax Live.” (GX309 (Complaint Counsel) at 00:26; GX310 (Complaint Counsel) at CC-00006650).

Response to Finding No. 191:

The Proposed finding is incorrect, incomplete, and misleading. It is wrong because the referenced wording does not appear at 26-seconds, but at 24-seconds into the ad. (GX309 (FTC)). It is incomplete and misleading because it is just a snippet of the full ad that actually ran and Complaint Counsel have omitted critical information for evaluating the advertisement, including that the ad contained disclosures about qualifications. (CCFF ¶¶190, 192; Responses to CCFF ¶¶190, 192). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334). The Proposed Finding fails to mention that the ad verbally informed consumers that the free offer was for “TurboTax Live” and “for a limited time.” (GX309 (FTC)). The Proposed Finding also fails to mention that the ad included a written disclosure stating “For simple tax returns only. See if you qualify at turbotax.com. Must file by 3/31 for free offer.” (GX309 (FTC)).

Moreover, the Proposed Finding does not support an inference that the ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The ad informed consumers in writing that the free offer was for a specific TurboTax SKU, “TurboTax Live”; that the free offer had qualifications based on the complexity of a consumer’s tax return, by stating “[f]or simple tax returns only,” that consumers could learn more about the qualifications and “[s]ee if [they] qualify at turbotax.com,” and that consumers needed to “file by 2/15 for free offer.” (GX309 (FTC); PFF

¶244). Complaint Counsel offered no evidence that the written disclosures were not visible (PFF ¶230), nor could they given the prominence of those disclosures and the benchmarking analysis showing that the disclosures were consistent with those in comparable ads (PFF ¶¶232-241). The ad also informed consumers in spoken narrative that the free offer was for a specific TurboTax product, referencing “TurboTax Live.” (GX309 (FTC)). Complaint Counsel offered no evidence these words could not be heard by consumers. (PFF ¶231).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make the claims that Complaint Counsel allege. Instead, the undisputed testimony from Intuit’s executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (See PFF ¶¶167-177, 190, 192-202, 405, 852, 857, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel offered no evidence that the ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the disclosures in the ad ensured that reasonable consumers understood that there were qualifications for the free TurboTax offer being advertised, the nature and character of those qualifications, and where additional detail was available. (PFF ¶¶241-246, 302-330, 334). Even without those disclosures, reasonable consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

192. The small-font disclaimer at the bottom of the screen shown at the end of the 28-second “Steven/Spit Take” TurboTax ad reads, “For simple tax returns only. See if you qualify at

turbotax.com. Must file by 2/15 for free offer. Offer subject to change.” (GX309 (Complaint Counsel) at 00:26; GX310 (Complaint Counsel) at CC-00006650).

Response to Finding No. 192:

The Proposed Finding is incorrect, incomplete, and misleading. It is wrong because it asserts that the language informing consumers about the qualifications appears at 26 seconds into the ad, but it actually appears at 24 seconds. It is incomplete and misleading because it wrongly refers to language in the ad as a “disclaimer” and ignores other disclosures in the ad. GX309 also includes a verbal disclosure informing consumers that the free offer was for the “TurboTax Live” SKU. (GX309 (FTC); CCF ¶190; Response to CCF ¶190). Further, the Proposed Finding fails to recognize that by inviting consumers to “[s]ee if [they] qualify at turbotax.com,” all content on the TurboTax website—including detailed information about qualifications—was “integrated” into the ad, and therefore all disclosures on the website are incorporated into the ad. (PFF ¶328; CCF ¶455). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

Moreover, the Proposed Finding does not support an inference that the ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The ad informed consumers in writing that the free offer was for a specific TurboTax SKU, “TurboTax Live”; that the free offer had qualifications based on the complexity of a consumer’s tax return, by stating “for simple U.S. returns only”; and that consumers could learn more about the qualifications and “[s]ee if [they] qualify at turbotax.com.” (GX309 (FTC)); PFF ¶244). Despite now asserting this language was in a “small-font,” Complaint Counsel offered no evidence that the written disclosures were not visible to consumers (PFF ¶230), nor could they given the prominence of those disclosures and

the benchmarking analysis showing that the disclosures were consistent with those in comparable ads (PFF ¶¶232-241). The ad also informed consumers in spoken narrative that the free offer was for a specific TurboTax product, referencing “TurboTax Live.” (GX309 (FTC)).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make the claims that Complaint Counsel allege. Instead, the undisputed testimony from Intuit’s executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (See PFF ¶¶167-177, 190, 192-202, 405, 852, 857, 860, 870). Complaint Counsel offered no evidence these words could not be heard by consumers. (PFF ¶231).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel offered no evidence that any of these ads were likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. The evidence establishes that the disclosures in GX309 ensured that reasonable consumers understood that there were qualifications for the free TurboTax SKU being advertised, the nature and character of those qualifications, and where additional detail was available. (PFF ¶¶241-246, 302-330, 334). Even without those disclosures, reasonable consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

193. The “Steven/Spit Take” TurboTax ads appeared throughout the United States at least 13,341 times on at least 637 television networks between November 1, 2021, and April 18, 2022. (GX342 (Complaint Counsel) ¶¶ 154-55, at CC-00006976-77; *see also* Shiller (Complaint Counsel) Tr. 175 (“Based on Kantar Media, I was able to determine that this ad was aired nationally and locally.”)).

Response to Finding No. 193:

The Proposed Finding is incomplete and misleading because it is unclear which version or versions of the “Steven/Spit Take” ad it is referring to. Moreover, the Proposed Finding does not support an inference that the challenged ads were deceptive. The fact that ads aired is not evidence that the ads conveyed the claim asserted by Complaint Counsel or that reasonable consumers were likely to be deceived by the ads. To the contrary, the fact that Complaint Counsel have identified only 26 even potentially relevant consumer complaints from Tax Year 2021 (*see* CCF ¶¶677), even though the “Steven/Spit Take” ad on its own was aired at least 13,341 times on at least 637 television networks during Tax Year 2021 alone, is strong evidence that reasonable consumers were not deceived by the “Steven/Spit Take” ad or any of the other challenged advertisements that ran in Tax Year 2021 (*see* PFF ¶¶632, 637, 639, 641-647).

194. In addition, the 14-second “Steven/Spit Take” TurboTax ad (GX307) ran during the live broadcast of the Oscars on March 27, 2022. (GX312 (Complaint Counsel) ¶ 34, at CC-00006686-87).

Response to Finding No. 194:

The Proposed Finding is incomplete and misleading because it fails to explain why Intuit aired the ad during the 2022 Oscars. Intuit did so to target consumers likely to have simple tax returns and who would therefore qualify for the free offer with the message that TurboTax Live is available for free to consumers with simple tax returns for a limited time. (Johnson (Intuit) Tr. 654-655; PFF ¶¶191-192, 196). Consumers with simple tax returns are “overrepresented” in audiences for “big moment” events like the Oscars. (Johnson (Intuit) Tr. 654-655; *see also* Ryan (Intuit) Tr. 692-693). Thus, airing the ad during the Oscars allowed Intuit to inform taxpayers with simple tax returns that they could file for free using TurboTax Free Edition. (PFF ¶191; Johnson (Intuit) Tr. 654-655). While it is undoubtedly true that some taxpayers without simple returns watch the Oscars, the ad stated clearly and unequivocally that only a specific TurboTax

SKU would be free (and that TurboTax SKU was, in fact, free), that the SKU was for simple tax returns *only*, and that details about those qualifications were available at the TurboTax website.

C. TurboTax Radio Ads

195. In TY 2020 and 2021, Intuit marketed TurboTax Free Edition on the radio. (Respondent Intuit Inc.'s Pretrial Brief at 23 (filed Mar. 17, 2023)).

Response to Finding No. 195:

Intuit has no specific response except to note that TurboTax Free Edition is free. (PFF ¶¶69).

196. GX627 is an audio recording of a radio ad used by Intuit to market TurboTax Free Edition on the radio in TY2020. (GX627 (Intuit); Respondent Intuit Inc.'s Pretrial Brief at 23 (filed Mar. 17, 2023)).

Response to Finding No. 196:

Intuit has no specific response except to note that TurboTax Free Edition is free. (PFF ¶¶69).

197. GX627 features a jingle where every word sung is “free.” (GX627 (Intuit)).

Response to Finding No. 197:

The Proposed Finding is incomplete and misleading because GX627 verbally states that the product that is “free” was the “Free Edition product only.” GX627 then goes on to state that the free offer is limited to taxpayers with “simple U.S. returns.” Listeners are then encouraged to “see details at turbotax.com.” (GX627 (Intuit)). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

Moreover, the Proposed Finding does not support an inference that the ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. To start, the repetition of the word “free” by itself is not a

claim about TurboTax at all. (PFF ¶221). The ad does not state anything about TurboTax until the end of the ad, when it informed viewers that the free offer applied to a specific TurboTax SKU that had qualifications. (GX627 (Intuit); *see also* PFF ¶294). Specifically, the ad informed consumers that the free offer was for “TurboTax Free.” (GX627 (Intuit)). As Mr. Rubin explained, “TurboTax Free” was how Intuit referred to TurboTax Free Edition. (*See* Rubin (Intuit) Tr. 1561-1562; *see also* PFF ¶228). The reference to “TurboTax Free” was thus meant to convey the specific SKU being advertised. (*See* Rubin (Intuit) Tr. 1561-1562; *see also* PFF ¶228). The ad also stated that the free offer was for the “Free Edition product only” and “For simple U.S. returns,” and that consumers could “See details at turbotax.com.” (GX627 (Intuit)). Complaint Counsel offered no evidence that these words were not audible. (PFF ¶295).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make the claims that Complaint Counsel allege. Instead, the undisputed testimony from Intuit’s executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (*See* PFF ¶¶167-177, 190, 192-202, 405, 852, 857, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel offered no evidence that the ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the disclosures in the ad ensured that reasonable consumers understood that there were qualifications for the free TurboTax SKU being advertised, the nature and character of those qualifications, and where additional detail was available. (PFF ¶¶241-246, 302-330, 334). Even without those disclosures, reasonable consumers understand that free tax-preparation offers are

qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

198. GX627 includes the following claim: “That’s right, TurboTax Free is free. Free, free free free.” (GX627 (Intuit) at 00:22).

Response to Finding No. 198:

The Proposed Finding is incomplete and misleading because it is just a snippet of the full ad that actually ran and Complaint Counsel have omitted critical information for evaluating the advertisement. (CCFF ¶¶198-199; Responses to CCFF ¶¶198-199). The ad also stated, “Free Edition product only. For simple U.S. returns. Offer subject to change. See details at turbotax.com.” (GX627 (Intuit)). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

Moreover, the Proposed Finding does not support an inference that the ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The ad informed consumers that the free offer was for “TurboTax Free.” (GX627 (Intuit)). As Mr. Rubin explained, “TurboTax Free” was how Intuit referred to TurboTax Free Edition. (*See* Rubin (Intuit) Tr. 1561-1562; *see also* PFF ¶228). The reference to “TurboTax Free” was thus meant to convey the specific SKU being advertised. (*See* Rubin (Intuit) Tr. 1561-1562; *see also* PFF ¶228). The ad also stated that the free offer was for the “Free Edition product only” and “For simple U.S. returns,” and that consumers could “See details at turbotax.com.” (GX627 (Intuit)). Complaint Counsel offered no evidence that these words were not audible. (PFF ¶295).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make the claims that Complaint Counsel allege. Instead, the undisputed testimony from Intuit's executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (See PFF ¶¶167-177, 190, 192-202, 405, 852, 857, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel offered no evidence that the ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. The evidence establishes that the disclosures in the ad ensured that reasonable consumers understood that there were qualifications for the free TurboTax SKU being advertised, the nature and character of those qualifications, and where additional detail was available. (PFF ¶¶241-246, 302-330, 334). Even without those disclosures, reasonable consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

199. GX627 includes the following disclaimer spoken at a faster rate than the rest of the radio ad: "Free Edition product only. For simple U.S. returns. Offer subject to change. See details at turbotax.com." (GX627 (Intuit) at 00:24).

Response to Finding No. 199:

The Proposed Finding is incomplete and misleading. First, it wrongly refers to language in the ad as a "disclaimer." Second, it ignores that the ad also stated that the product being advertised was "TurboTax Free." (GX627 (Intuit)). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334). Third, the

Proposed Finding misleadingly states that the disclosures were spoken at a faster rate. But as Complaint Counsel describe in Proposed Finding 197, the challenged ad is a “jingle” where most of the words are sung. (GX627 (Intuit)). It is therefore unsurprising and unremarkable that the disclosures, which were not sung, would be spoken at a different speed. (GX627 (Intuit)). Complaint Counsel did not introduce evidence that the disclosures in the ad, which include the only reference to TurboTax, were difficult to understand.

Moreover, the Proposed Finding does not support an inference that the ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The ad informed consumers that the free offer was for a specific TurboTax SKU, “Free Edition”; that the free offer had qualifications based on the complexity of a consumer’s tax return, by stating “for simple U.S. returns”; and that consumers could learn more about the qualifications by “see[ing] details at turbotax.com.” (GX627 (Intuit)). Complaint Counsel offered no evidence that these words were not audible, let alone that the speed of this language made it inaudible. (PFF ¶295).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make the claims that Complaint Counsel allege. Instead, the undisputed testimony from Intuit’s executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (See PFF ¶¶167-177, 190, 192-202, 405, 852, 857, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel offered no evidence that the ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes

that the disclosures in the ad ensured that reasonable consumers understood that there were qualifications for the free TurboTax SKU being advertised, the nature and character of those qualifications, and where additional detail was available. (PFF ¶¶241-246, 302-330, 334). Even without those disclosures, reasonable consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

200. GX630 is an audio recording of a radio ad used by Intuit to market TurboTax Free Edition on the radio in T Y 2020. (GX630 (Intuit); Respondent Intuit Inc.'s Pretrial Brief at 23 (filed Mar. 17, 2023)).

Response to Finding No. 200:

Intuit has no specific response except to note that TurboTax Free Edition is free. (PFF ¶69).

201. GX630 features a jingle where every word sung is “free.” (GX630 (Intuit)).

Response to Finding No. 201:

The Proposed Finding is incomplete and misleading because GX630 verbally states that the product that is “free” was the “Free Edition product only.” GX630 then goes on to state that the free offer is limited to taxpayers with “simple U.S. returns.” Listeners are then encouraged to “see details at turbotax.com.” (GX630 (Intuit)). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

Moreover, the Proposed Finding does not support an inference that the ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. To start, the repetition of the word “free” by itself is not a claim about TurboTax at all. (PFF ¶221). The ad does not state anything about TurboTax until

the end of the ad, when it informed viewers that the free offer applied to a specific TurboTax SKU that had qualifications. (GX630 (Intuit); *see also* PFF ¶294). Specifically, the ad informed consumers that the free offer was for “TurboTax Free,” and for the “Free Edition product only.” (GX630 (Intuit)). As Mr. Rubin explained, “TurboTax Free” was how Intuit referred to TurboTax Free Edition. (*See* Rubin (Intuit) Tr. 1561-1562; *see also* PFF ¶228). The reference to “TurboTax Free” was thus meant to convey the specific SKU being advertised. (*See* Rubin (Intuit) Tr. 1561-1562; *see also* PFF ¶228). The ad also stated that the free offer was for the “Free Edition product only” and “For simple U.S. returns,” and that consumers could “See details at turbotax.com.” (GX630 (Intuit)). Complaint Counsel offered no evidence that these words were not audible. (PFF ¶295).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make the claims that Complaint Counsel allege. Instead, the undisputed testimony from Intuit’s executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (*See* PFF ¶¶167-177, 190, 192-202, 405, 852, 857, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel offered no evidence that the ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the disclosures in the ad ensured that reasonable consumers understood that there were qualifications for the free TurboTax SKU being advertised, the nature and character of those qualifications, and where additional detail was available. (PFF ¶¶241-246, 302-330, 334). Even without those disclosures, reasonable consumers understand that free tax-preparation offers are

qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

202. GX630 includes the following claim: “That’s right, TurboTax Free is free. Free, free free free.” (GX630 (Intuit) at 00:21).

Response to Finding No. 202:

The Proposed Finding is incomplete and misleading because it is just a snippet of the full ad that actually ran and Complaint Counsel have omitted critical information for evaluating the advertisement. (CCFF ¶¶202-203; Responses to CCFF ¶¶202-203). The ad also stated, “Free Edition product only. For simple U.S. returns. Offer subject to change. See details at turbotax.com.” (GX630 (Intuit)). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

Moreover, the Proposed Finding does not support an inference that the ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The ad informed consumers that the free offer was for “TurboTax Free.” (GX630 (Intuit)). As Mr. Rubin explained, “TurboTax Free” was how Intuit referred to TurboTax Free Edition. (*See* Rubin (Intuit) Tr. 1561-1562; *see also* PFF ¶228). The reference to “TurboTax Free” was thus meant to convey the specific SKU being advertised. (*See* Rubin (Intuit) Tr. 1561-1562; *see also* PFF ¶228). The ad also stated that the free offer was for the “Free Edition product only” and “For simple U.S. returns,” and that consumers could “See details at turbotax.com.” (GX630 (Intuit)). Complaint Counsel offered no evidence that these words were not audible. (PFF ¶295).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make the claims that Complaint Counsel allege. Instead, the undisputed testimony from Intuit's executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (See PFF ¶¶167-177, 190, 192-202, 405, 852, 857, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel offered no evidence that the ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. The evidence establishes that the disclosures in the ad ensured that reasonable consumers understood that there were qualifications for the free TurboTax SKU being advertised, the nature and character of those qualifications, and where additional detail was available. (PFF ¶¶241-246, 302-330, 334). Even without those disclosures, reasonable consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

203. GX630 includes the following disclaimer spoken at a faster rate than the rest of the radio ad: "Free Edition product only. For simple U.S. returns. Offer subject to change. See details at turbotax.com." (GX630 (Intuit) at 00:24).

Response to Finding No. 203:

The Proposed Finding is incomplete and misleading. First, it wrongly refers to language in the ad as a "disclaimer." Second, it ignores that the ad also stated that the product being advertised was "TurboTax Free." (GX630 (Intuit)). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334). Third, the

Proposed Finding misleadingly states that the disclosures were spoken at a faster rate. But as Complaint Counsel describe in Proposed Finding 201, the challenged ad is a “jingle” where most of the words are sung. (GX630 (Intuit)). It is therefore unsurprising and unremarkable that the disclosures, which were not sung, would be spoken at a different speed. (GX630 (Intuit)). Complaint Counsel did not introduce evidence that the disclosures in the ad, which include the only reference to TurboTax, were difficult to understand.

Moreover, the Proposed Finding does not support an inference that the ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The ad informed consumers that the free offer was for a specific TurboTax SKU, “Free Edition”; that the free offer had qualifications based on the complexity of a consumer’s tax return, by stating “for simple U.S. returns”; and that consumers could learn more about the qualifications by “see[ing] details at turbotax.com.” (GX630 (Intuit)). Complaint Counsel offered no evidence that these words were not audible, let alone that the speed of this language made it inaudible. (PFF ¶295).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make the claims that Complaint Counsel allege. Instead, the undisputed testimony from Intuit’s executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (See PFF ¶¶167-177, 190, 192-202, 405, 852, 857, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel offered no evidence that the ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes

that the disclosures in the ad ensured that reasonable consumers understood that there were qualifications for the free TurboTax SKU being advertised, the nature and character of those qualifications, and where additional detail was available. (PFF ¶¶241-246, 302-330, 334). Even without those disclosures, reasonable consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

204. GX617 is an audio recording of a radio ad used by Intuit to market TurboTax Free Edition on the radio in T Y 2021. (GX617 (Intuit); Respondent Intuit Inc.'s Pretrial Brief at 23 (filed Mar. 17, 2023)).

Response to Finding No. 204:

Intuit has no specific response except to note that TurboTax Free Edition is free. (PFF ¶69).

205. GX617 features a jingle where every word sung is “free.” (GX617 (Intuit)).

Response to Finding No. 205:

The Proposed Finding is incomplete and misleading because GX617 verbally states that the product that is “free” was “TurboTax Free Edition.” TurboTax Free Edition *is* free. GX617 then goes on to state that the free offer is limited to taxpayers with “simple U.S. returns only.” Listeners are then encouraged to “see if [they] qualify at turbotax.com.” (GX617 (Intuit)). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

Moreover, the Proposed Finding does not support an inference that the ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. To start, the repetition of the word “free” by itself is not a

claim about TurboTax at all. (PFF ¶221). The ad does not state anything about TurboTax until the end of the ad, when it informed viewers that the free offer applied to a specific TurboTax SKU that had qualifications. (GX617 (Intuit); *see also* PFF ¶294). Specifically, the ad informed consumers that the free offer was for “TurboTax Free Edition.” (GX617 (Intuit)). The ad also stated that the free offer was for “TurboTax Free Edition” and “for simple U.S. returns only” and that consumers could “See if [they] qualify at turbotax.com.” (GX617 (Intuit)). Complaint Counsel offered no evidence that these words were not audible. (PFF ¶295).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make the claims that Complaint Counsel allege. Instead, the undisputed testimony from Intuit’s executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (*See* PFF ¶¶167-177, 190, 192-202, 405, 852, 857, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel offered no evidence that the ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the disclosures in the ad ensured that reasonable consumers understood that there were qualifications for the free TurboTax SKU being advertised, the nature and character of those qualifications, and where additional detail was available. (PFF ¶¶241-246, 302-330, 334). Even without those disclosures, reasonable consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

206. GX617 includes the following claim: “That’s right, TurboTax Free Edition is free. Free, free free free.” (GX617 (Intuit) at 00:20).

Response to Finding No. 206:

The Proposed Finding is incomplete and misleading because it is just a snippet of the full ad that actually ran and Complaint Counsel have omitted critical information for evaluating the advertisement. (CCFF ¶¶206-207; Responses to CCFF ¶¶206-207). The ad also stated, “TurboTax Free Edition is for simple U.S. returns only. See if you qualify at turbotax.com. Offer subject to change.” (GX617 (Intuit)). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

Moreover, the Proposed Finding does not support an inference that the ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The ad informed consumers that the free offer was for “TurboTax Free Edition.” (GX617 (Intuit)). The ad also stated that the free offer was for “TurboTax Free Edition” and “for simple U.S. returns only” and that consumers could “See if [they] qualify at turbotax.com.” (GX617 (Intuit)). Complaint Counsel offered no evidence that these words were not audible. (PFF ¶295).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make the claims that Complaint Counsel allege. Instead, the undisputed testimony from Intuit’s executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (See PFF ¶¶167-177, 190, 192-202, 405, 852, 857, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel offered no evidence that the ad was likely to mislead

reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. The evidence establishes that the disclosures in the ad ensured that reasonable consumers understood that there were qualifications for the free TurboTax SKU being advertised, the nature and character of those qualifications, and where additional detail was available. (PFF ¶¶241-246, 302-330, 334). Even without those disclosures, reasonable consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

207. GX617 includes the following disclaimer spoken at a faster rate than the rest of the radio ad: “TurboTax Free Edition is for simple U.S. returns only. See if you qualify at turbotax.com. Offer subject to change.” (GX617 (Intuit) at 00:24).

Response to Finding No. 207:

The Proposed Finding is incomplete and misleading. First, it wrongly refers to language in the ad as a “disclaimer.” Second, the Proposed Finding misleadingly states that the disclosures were spoken at a faster rate. But as Complaint Counsel describe in Proposed Finding 205, the challenged ad is a “jingle” where most of the words are sung. (GX617 (Intuit)). It is therefore unsurprising and unremarkable that the disclosures, which were not sung, would be spoken at a different speed. (GX617 (Intuit)). Complaint Counsel did not introduce evidence that the disclosures in the ad, which include the only reference to TurboTax, were difficult to understand.

Moreover, the Proposed Finding does not support an inference that the ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The ad informed consumers that the free offer was for a specific TurboTax SKU, “Free Edition”; that the free offer had qualifications based on the

complexity of a consumer's tax return, by stating "for simple U.S. returns only"; and that consumers could learn more and "see if [they] qualify at turbotax.com." (GX617 (Intuit)). Complaint Counsel offered no evidence that these words were not audible, let alone that the speed of this language made it inaudible. (PFF ¶295).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make the claims that Complaint Counsel allege. Instead, the undisputed testimony from Intuit's executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (See PFF ¶¶167-177, 190, 192-202, 405, 852, 857, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel offered no evidence that the ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the disclosures in the ad ensured that reasonable consumers understood that there were qualifications for the free TurboTax SKU being advertised, the nature and character of those qualifications, and where additional detail was available. (PFF ¶¶241-246, 302-330, 334). Even without those disclosures, reasonable consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

208. GX618 is an audio recording of a radio ad used by Intuit to market TurboTax Free Edition on the radio in T Y 2021. (GX618 (Intuit); Respondent Intuit Inc.'s Pretrial Brief at 23 (filed Mar. 17, 2023)).

Response to Finding No. 208:

Intuit has no specific response except to note that TurboTax Free Edition is free. (PFF ¶69).

209. GX618 features a jingle where every word sung is “free.” (GX618 (Intuit)).

Response to Finding No. 209:

The Proposed Finding is incomplete and misleading because GX618 verbally states that the product that is “free” was “TurboTax Free Edition.” TurboTax Free Edition *is* free. GX618 then goes on to state that the free offer is limited to taxpayers with “simple U.S. returns only.” Listeners are then encouraged to “see if [they] qualify at turbotax.com.” (GX618 (Intuit)). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

Moreover, the Proposed Finding does not support an inference that the ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. To start, the repetition of the word “free” by itself is not a claim about TurboTax at all. (PFF ¶221). The ad does not state anything about TurboTax until the end of the ad, when it informed viewers that the free offer applied to a specific TurboTax SKU that had qualifications. (GX618 (Intuit); *see also* PFF ¶294). Specifically, the ad informed consumers that the free offer was for “TurboTax Free Edition.” (GX618 (Intuit)). The ad also stated that the free offer was for “TurboTax Free Edition” and “for simple U.S. returns only” and that consumers could “See if [they] qualify at turbotax.com.” (GX618 (Intuit)). Complaint Counsel offered no evidence that these words were not audible. (PFF ¶295).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make the claims that Complaint Counsel allege. Instead, the undisputed testimony from Intuit’s

executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (See PFF ¶¶167-177, 190, 192-202, 405, 852, 857, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel offered no evidence that the ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the disclosures in the ad ensured that reasonable consumers understood that there were qualifications for the free TurboTax SKU being advertised, the nature and character of those qualifications, and where additional detail was available. (PFF ¶¶241-246, 302-330, 334). Even without those disclosures, reasonable consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

210. GX618 includes the following claim: “That’s right, TurboTax Free Edition is free. Free, free free free.” (GX618 (Intuit) at 00:19).

Response to Finding No. 210:

The Proposed Finding is incomplete and misleading because it is just a snippet of the full ad that actually ran and Complaint Counsel have omitted critical information for evaluating the advertisement. (CCFF ¶¶210-211; Responses to CCFF ¶¶210-211). The ad also stated, “TurboTax Free Edition is for simple U.S. returns only. See if you qualify at turbotax.com. Offer subject to change.” (GX618 (Intuit)). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

Moreover, the Proposed Finding does not support an inference that the ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The ad informed consumers that the free offer was for “TurboTax Free Edition.” (GX618 (Intuit)). The ad also stated that the free offer was for “TurboTax Free Edition” and “for simple U.S. returns only” and that consumers could “See if [they] qualify at turbotax.com.” (GX618 (Intuit)). Complaint Counsel offered no evidence that these words were not audible. (PFF ¶295).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make the claims that Complaint Counsel allege. Instead, the undisputed testimony from Intuit’s executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (See PFF ¶¶167-177, 190, 192-202, 405, 852, 857, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel offered no evidence that the ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. The evidence establishes that the disclosures in the ad ensured that reasonable consumers understood that there were qualifications for the free TurboTax SKU being advertised, the nature and character of those qualifications, and where additional detail was available. (PFF ¶¶241-246, 302-330, 334). Even without those disclosures, reasonable consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

211. GX618 includes the following disclaimer spoken at a faster rate than the rest of the radio ad: “TurboTax Free Edition is for simple U.S. returns only. See if you qualify at turbotax.com. Offer subject to change.” (GX618 (Intuit) at 00:24).

Response to Finding No. 211:

The Proposed Finding is incomplete and misleading. First, it wrongly refers to language in the ad as a “disclaimer.” Second, the Proposed Finding misleadingly states that the disclosures were spoken at a faster rate. But as Complaint Counsel describe in Proposed Finding 208, the challenged ad is a “jingle” where most of the words are sung. (GX618 (Intuit)). It is therefore unsurprising and unremarkable that the disclosures, which were not sung, would be spoken at a different speed. (GX618 (Intuit)). Complaint Counsel did not introduce evidence that the disclosures in the ad, which include the only reference to TurboTax, were difficult to understand.

Moreover, the Proposed Finding does not support an inference that the ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The ad informed consumers that the free offer was for a specific TurboTax SKU, “Free Edition”; that the free offer had qualifications based on the complexity of a consumer’s tax return, by stating “for simple U.S. returns only”; and that consumers could learn more and “see if [they] qualify at turbotax.com.” (GX618 (Intuit)). Complaint Counsel offered no evidence that these words were not audible, let alone that the speed of this language made it inaudible. (PFF ¶¶295).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make the claims that Complaint Counsel allege. Instead, the undisputed testimony from Intuit’s executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (See PFF ¶¶167-177, 190, 192-202, 405, 852, 857, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel offered no evidence that the ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the disclosures in the ad ensured that reasonable consumers understood that there were qualifications for the free TurboTax SKU being advertised, the nature and character of those qualifications, and where additional detail was available. (PFF ¶¶241-246, 302-330, 334). Even without those disclosures, reasonable consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).


D. Social Media and Online Ads

1. Social Media and Online Ads TY 2020


212. The following ad was active on Facebook on February 11, 2021:

About the Ad

Multiple versions of this ad 5 of 6

 **TurboTax**
Sponsored
ID: 405270220571954


Get your taxes done right. Pay \$0 to file Fed and State with TurboTax. Simple tax returns only.



APPS.APPLE.COM
Get the app
America's #1 Tax Prep Provider - over 40 million returns were prepared last year with TurboTax. Why Wait? With... [Install Now](#)

About the Page

[See Ads](#)

 **TurboTax**
@turbotax
757,244 likes · Product/Service
@turbotax
22,923 followers

More info
We help you get your taxes done right. Join us for tax tips & news that will help you keep more of your money. Need help? We're here Monday - Friday 5am-5pm (PST)

(GX342 (Complaint Counsel) ¶ 114, at CC-00006954; GX173 (Complaint Counsel); *see also* Shiller (Complaint Counsel) Tr. 189-90).

Response to Finding No. 212:

The Proposed Finding is incomplete because it fails to recognize that consumers clicking on the advertisement would be taken directly to the landing page on the TurboTax website for TurboTax Free Edition, where they would see detailed information about that SKU's qualifications. (PFF ¶253; Rubin (Intuit) Tr. 1563-1564). Indeed, Complaint Counsel and their witnesses recognized that the TurboTax website repeatedly disclosed the qualifications of free TurboTax offers and provided detailed information about those qualifications. (PFF ¶¶369-370). For example, Complaint Counsel's own 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 the free TurboTax offers. (PFF ¶790). Reasonable consumers understood that display ads such as GX173 link to a website when clicked (here, the TurboTax website) that includes more information about the advertised free offer, and by linking directly to the TurboTax website, the advertisement incorporated the detailed information on the TurboTax website. (PFF ¶254; *see also* CCF ¶455 (“The TurboTax website is ... integrated into TurboTax’s free advertising.”)). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

Moreover, the Proposed Finding does not support an inference that the challenged ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The advertisement includes a “TurboTax Free Edition” logo and states prominently, “Simple tax returns only.” The “Simple tax returns only” qualification also appears in the text above the advertisement. (GX173 (Intuit)). By identifying the specific TurboTax SKU being advertised, the ad informed consumers that the offer does not apply to all TurboTax products. (*See* PFF ¶¶317, 321). And by stating that the offer was available for “Simple tax returns only,” the ad informed consumers that the free offer was not available to everyone, and that eligibility was contingent on the complexity of the consumer’s tax returns. (PFF ¶322; *see also* PFF ¶¶130-145). Complaint Counsel have offered no evidence that *all* components of the ad were not visible to consumers (*see* PFF ¶255), nor could they given the prominence of that content and the benchmarking analysis showing that the disclosures were comparable to disclosures in other companies’ ads (*see* PFF ¶¶257-259).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel assert were conveyed; instead, the undisputed

testimony from Intuit’s executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (*See* PFF ¶¶167-177, 190, 192-202, 405, 852, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel have not offered any evidence that this ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the qualifications included in the ad would prevent consumers from being misled by the ad. (*See* PFF ¶¶260-264, 302-322, 328-330, 334). Even without those disclosures, consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

213. A version of the “Dance Workout” ad was also active on Facebook on February 11, 2021, as indicated by the screenshot below:

About the Ad

TurboTax
Sponsored
ID: 103830797381930079

About the Page [See Ads](#)

TurboTax
@turbotax
757,251 likes • Product/Service
@turbotax
22,924 followers

More info
We help you get your taxes done right. Join us for tax tips & news that will help you keep more of your money. Need help? We're here Monday - Friday 5am-5pm (PST)

TURBOTAX.INTUIT.COM
Maximum refund, guaranteed
Start for free now

Download

(GX342 (Complaint Counsel) ¶ 116, at CC-00006955; GX174 (Complaint Counsel); GX174-A (Complaint Counsel)).

Response to Finding No. 213:

The Proposed Finding is incomplete and misleading because it is just a snippet of the full display video ad that actually ran and Complaint Counsel have omitted critical information for evaluating the advertisement. (GX174-A (Intuit)). Consumers did not view the challenged advertisement as a single, static image. Not captured in the Proposed Finding is the voiceover included in GX174-A stating that the ad was for “TurboTax Free Edition.” (GX174-A (Intuit)). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

The Proposed Finding is also incomplete because it fails to recognize that consumers clicking on the advertisement would be taken directly to the landing page on the TurboTax website for TurboTax Free Edition, where they would see detailed information about the SKU’s qualifications. (PFF ¶253; Rubin (Intuit) Tr. 1563-1564). Indeed, Complaint Counsel and their

witnesses recognized that the TurboTax website repeatedly disclosed the qualifications of free TurboTax offers and provided detailed information about those qualifications. (PFF ¶¶369-370). For example, Complaint Counsel’s own 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 the free TurboTax offers. (PFF ¶790). Reasonable consumers understood that display ads such as GX174 link to a website when clicked (here, the TurboTax website) that includes more information about the advertised free offer, and by linking directly to the TurboTax website, the advertisement incorporated the detailed information on the TurboTax website. (PFF ¶254; *see also* CCF ¶455 (“The TurboTax website is ... integrated into TurboTax’s free advertising.”)).

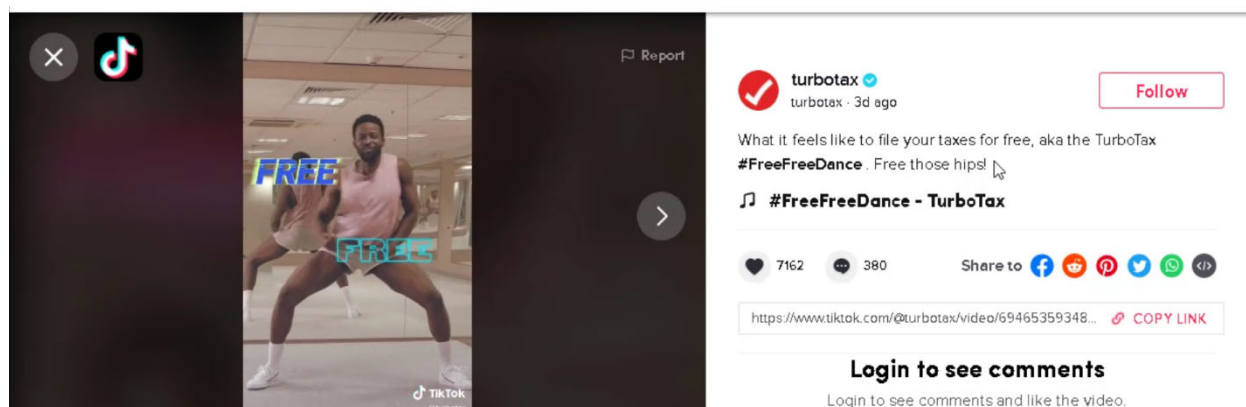
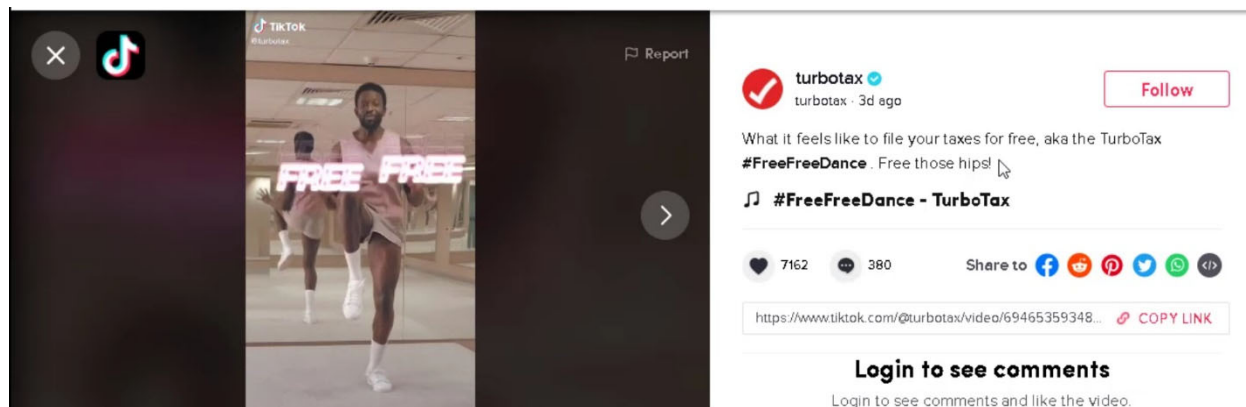
Moreover, the Proposed Finding does not support an inference that the challenged ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The advertisement includes a TurboTax Free Edition logo and states that “TurboTax Free Edition is for simple U.S. returns only” and advises consumers to “See if you qualify at turbotax.com.” (GX174 (Intuit); GX174-A (Intuit)). The ad also includes a voiceover stating that the ad was for “TurboTax Free Edition.” (GX174 (Intuit); GX174-A (Intuit)). By identifying the specific TurboTax SKU being advertised, the ad informed consumers that the offer does not apply to all TurboTax products. (*See* PFF ¶¶317, 321). Likewise, by stating that “TurboTax Free Edition is for simple U.S. returns only,” the ad informed consumers that the free offer was not available to everyone, and that eligibility was contingent on the complexity of the consumer’s tax returns. (PFF ¶322; *see also* PFF ¶¶130-145). And by stating “see if you qualify,” the ad again told consumers that not everyone would qualify and where to find additional information about the offer’s qualifications. (*See* PFF

¶¶323-325). Complaint Counsel have offered no evidence that *all* components of the ad were not visible or audible to consumers (*see* PFF ¶¶255-256), nor could they given the prominence of that content and the benchmarking analysis showing that the disclosures were comparable to disclosures in other companies' ads (*see* PFF ¶¶257-259).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel assert were conveyed; instead, the undisputed testimony from Intuit's executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (*See* PFF ¶¶167-177, 190, 192-202, 405, 852, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel have not offered any evidence that this ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the qualifications included in the ad would prevent consumers from being misled by the ad. (*See* PFF ¶¶260-264, 302-322, 328-330, 334). Even without those disclosures, consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

214. A TurboTax ad was active on TikTok on January 11, 2021, as indicated by the screenshots below:



(GX342 (Complaint Counsel) ¶ 117, at CC-00006955-56; GX175 (Complaint Counsel); GX175-A (Complaint Counsel); GX176 (Complaint Counsel)).

Response to Finding No. 214:

The Proposed Finding is misleading. Intuit does not typically promote “TurboTax.” Intuit typically advertises for specific TurboTax products, known as SKUs. (GX156 (Ryan (Intuit) IHT) at 107-134; Ryan (Intuit) Tr. 691; Johnson (Intuit) Tr. 573-574; PFF ¶¶161, 171, 173, 178). In this case, Complaint Counsel have challenged a small percentage of the advertisements Intuit ran during the relevant period (PFF ¶¶205, 214, 247, 265, 280, 293); the ads Complaint Counsel challenge were not for “TurboTax” but for TurboTax’s free SKUs, including TurboTax Free Edition and TurboTax Live Basic (PFF ¶¶205-301), both of which are completely free (PFF ¶¶69, 109-112). None of the challenged ads claim—expressly or

impliedly—that all TurboTax SKUs are free. (PFF ¶¶210-211, 242-244, 260-262, 273-275, 288-290, 297-299).

The Proposed Finding is also incomplete and misleading because it is just a snippet of the full display video ad that actually ran and Complaint Counsel have omitted critical information for evaluating the advertisement. (GX175-A (Intuit)). Consumers did not view the challenged advertisement as a single, static image. Not captured in the Proposed Finding is the end card displaying the TurboTax Free Edition logo and providing qualifications on the free offer, including that “TurboTax Free Edition is for simple U.S. returns only” and that consumers could “See if [they] qualify at turbotax.com.” (GX175-A (Intuit)). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

The Proposed Finding is also incomplete because it fails to recognize that consumers clicking on the advertisement would be taken directly to the landing page on the TurboTax website for TurboTax Free Edition, where they would see detailed information about the SKU’s qualifications. (PFF ¶253; Rubin (Intuit) Tr. 1563-1564). Indeed, Complaint Counsel and their witnesses recognized that the TurboTax website repeatedly disclosed the qualifications of free TurboTax offers and provided detailed information about those qualifications. (PFF ¶¶369-370). For example, Complaint Counsel’s own 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 the free TurboTax offers. (PFF ¶790). Reasonable consumers understood that display ads such as GX175 link to a website when clicked (here, the TurboTax website) that includes more information about the advertised free offer, and by linking directly to the TurboTax website, the advertisement incorporated the detailed information on the

TurboTax website. (PFF ¶254; *see also* CCF ¶455 (“The TurboTax website is ... integrated into TurboTax’s free advertising.”)).

Moreover, the Proposed Finding does not support an inference that the challenged ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. As noted, the ad displayed the TurboTax Free Edition logo and stated that “TurboTax Free Edition is for simple U.S. returns only” and that consumers could “See if [they] qualify at turbotax.com.” (GX175-A (Intuit)). By identifying the specific TurboTax SKU being advertised, the ad informed consumers that the offer does not apply to all TurboTax products. (*See* PFF ¶¶317, 321). Likewise, by stating that “TurboTax Free Edition is for simple U.S. returns only,” the ad informed consumers that the free offer was not available to everyone, and that eligibility was contingent on the complexity of the consumer’s tax returns. (PFF ¶322; *see also* PFF ¶¶130-145). And by stating “see if you qualify,” the ad again told consumers that not everyone would qualify and where to find additional information about the offer’s qualifications. (*See* PFF ¶¶323-325). Complaint Counsel have offered no evidence that *all* components of the ad were not visible to consumers (*see* PFF ¶255), nor could they given the prominence of that content and the benchmarking analysis showing that the disclosures were comparable to disclosures in other companies’ ads (*see* PFF ¶¶257-259).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel assert were conveyed. Instead, the undisputed testimony from Intuit’s executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (*See* PFF ¶¶167-177, 190, 192-202, 405, 852, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel have not offered any evidence that this ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the qualifications included in the ad would prevent consumers from being misled by the ad. (See PFF ¶¶260-264, 302-322, 328-330, 334). Even without those disclosures, consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

215. GX505, which Intuit produced bearing Bates number INTUIT-FTC-PART3-000000025 and with the original file name TT-TY20-311_TTLiveBasic_OfferControl_1200x627.jpg, is an online TurboTax ad for TY 2020 that, according to Intuit's data at GX434, received [REDACTED]. (GX505 (Intuit); GX434 (Intuit); GX Summary 002 (Complaint Counsel) at 'Summary-Online_Ads' row 141; Baburek (Complaint Counsel) Tr. 318-23).

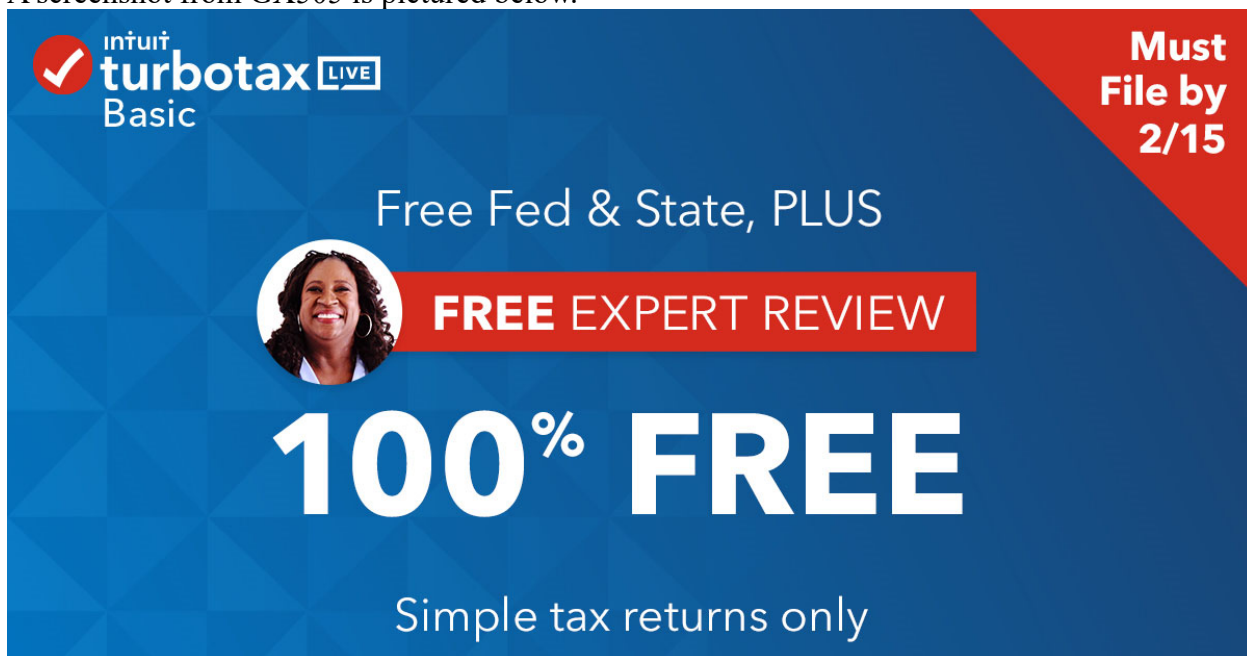
Response to Finding No. 215:

The Proposed Finding is misleading because GX505 is not an "online TurboTax ad." It is a display advertisement for a specific TurboTax SKU, TurboTax Live Basic. (GX505 (Intuit)).

Intuit otherwise has no specific response except to note that the number of impressions or clicks an ad received is not evidence that the ad conveyed any of the claims asserted by Complaint Counsel, that reasonable consumers were likely to be deceived, or that the claims were material to reasonable consumers. The dissemination data offered in the Proposed Finding illustrates that reasonable consumers were *unlikely* to be deceived. That Complaint Counsel have identified only 17 even potentially relevant consumer complaints from Tax Year 2020 (see CCF ¶677), even though GX505 on its own received [REDACTED]

█ that year, is strong evidence that reasonable consumers were not deceived by GX505 or any of the other challenged advertisements that ran in Tax Year 2020 (see PFF ¶¶632, 637, 639, 641-647).

216. A screenshot from GX505 is pictured below.



(GX505 (Intuit)).

Response to Finding No. 216:

The Proposed Finding is incomplete because it fails to recognize that consumers clicking on the advertisement would be taken directly to the landing page on the TurboTax website for the free TurboTax Live Basic offer, where they would see detailed information about the free offer’s qualifications. (PFF ¶¶253; Rubin (Intuit) Tr. 1563-1564). Indeed, Complaint Counsel and their witnesses recognized that the TurboTax website repeatedly disclosed the qualifications of free TurboTax offers and provided detailed information about those qualifications. (PFF ¶¶369-370). For example, Complaint Counsel’s own 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 the free TurboTax offers. (PFF ¶790). Reasonable

consumers understood that display ads such as GX505 link to a website when clicked (here, the TurboTax website) that includes more information about the advertised free offer, and by linking directly to the TurboTax website, the advertisement incorporated the detailed information on the TurboTax website. (PFF ¶254; *see also* CCF ¶455 (“The TurboTax website is ... integrated into TurboTax’s free advertising.”)). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

Moreover, the Proposed Finding does not support an inference that the challenged ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The advertisement includes a “TurboTax Live Basic” logo and states prominently, “Simple tax returns only.” (GX505 (Intuit)). By identifying the specific TurboTax SKU being advertised, the ad informed consumers that the offer does not apply to all TurboTax products. (*See* PFF ¶¶317, 321). And by stating that the offer was available for “Simple tax returns only,” the ad informed consumers that the free offer was not available to everyone, and that eligibility was contingent on the complexity of the consumer’s tax returns. (PFF ¶322; *see also* PFF ¶¶130-145). Complaint Counsel have offered no evidence that *all* components of the ad were not visible to consumers (*see* PFF ¶255), nor could they given the prominence of that content and the benchmarking analysis showing that the disclosures were comparable to disclosures in other companies’ ads (*see* PFF ¶¶257-259).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel assert were conveyed. Instead, the undisputed testimony from Intuit’s executives establishes that Intuit did not intend for any of the ads to claim

that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (See PFF ¶¶167-177, 190, 192-202, 405, 852, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel have not offered any evidence that this ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the qualifications included in the ad would prevent consumers from being misled by the ad. (See PFF ¶¶260-264, 302-322, 328-330, 334). Even without those disclosures, consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

217. GX506, which Intuit produced bearing Bates number INTUIT-FTC-PART3-000000029 and with the original file name TY20-149_Display_FreeRearrange_App_300x50.psd, is an online TurboTax ad for TY 2020 that, according to Intuit's data at GX434, [REDACTED]. (GX506 (Intuit); GX434 (Intuit); GX Summary 002 (Complaint Counsel) at 'Summary-Online_Ads' row 61; Baburek (Complaint Counsel) Tr. 318–23).

Response to Finding No. 217:

The Proposed Finding is misleading because GX506 is not an “online TurboTax ad.” It is a display advertisement for a specific TurboTax SKU, TurboTax Free Edition. (GX506 (Intuit)).

Intuit otherwise has no specific response except to note that the number of impressions or clicks an ad received is not evidence that the ad conveyed any of the claims asserted by Complaint Counsel, that reasonable consumers were likely to be deceived, or that the claims were material to reasonable consumers. The dissemination data offered in the Proposed Finding illustrates that reasonable consumers were *unlikely* to be deceived. That Complaint Counsel

have identified only 17 even potentially relevant consumer complaints from Tax Year 2020 (*see* CCF ¶677), even though GX506 on its own received [REDACTED] [REDACTED] that year, is strong evidence that reasonable consumers were not deceived by GX506 or any of the other challenged advertisements that ran in Tax Year 2020 (*see* PFF ¶¶632, 637, 639, 641-647).

218. A screenshot from GX506 is pictured below.



(GX506 (Intuit)).

Response to Finding No. 218:

The Proposed Finding is incomplete because it fails to recognize that consumers clicking on the advertisement would be taken directly to the landing page on the TurboTax website for TurboTax Free Edition, where they would see detailed information about the free offer’s qualifications. (PFF ¶253; Rubin (Intuit) Tr. 1563-1564). Indeed, Complaint Counsel and their witnesses recognized that the TurboTax website repeatedly disclosed the qualifications of free TurboTax offers and provided detailed information about those qualifications. (PFF ¶¶369-370). For example, Complaint Counsel’s own 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 the free TurboTax offers. (PFF ¶790). Reasonable consumers understood that display ads such as GX506 link to a website when clicked (here, the TurboTax website) that includes more information about the advertised free offer, and by linking directly to the TurboTax website, the advertisement incorporated the detailed information on the TurboTax website. (PFF ¶254; *see also* CCF ¶455 (“The TurboTax website is ... integrated into TurboTax’s free advertising.”)). In determining the claims conveyed by an advertisement

and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

Moreover, the Proposed Finding does not support an inference that the challenged ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The advertisement includes a TurboTax Free Edition logo and states prominently, “Simple tax returns only.” (GX506 (Intuit)). By identifying the specific TurboTax SKU being advertised, the ad informed consumers that the offer does not apply to all TurboTax products. (See PFF ¶¶317, 321). And by stating that the offer was available for “Simple tax returns only,” the ad informed consumers that the free offer was not available to everyone, and that eligibility was contingent on the complexity of the consumer’s tax returns. (PFF ¶322; *see also* PFF ¶¶130-145). Complaint Counsel have offered no evidence that *all* components of the ad were not visible to consumers (*see* PFF ¶255), nor could they given the prominence of that content and the benchmarking analysis showing that the disclosures were comparable to disclosures in other companies’ ads (*see* PFF ¶¶257-259).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel assert were conveyed. Instead, the undisputed testimony from Intuit’s executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (See PFF ¶¶167-177, 190, 192-202, 405, 852, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel have not offered any evidence that this ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence

establishes that the qualifications included in the ad would prevent consumers from being misled by the ad. (See PFF ¶¶260-264, 302-322, 328-330, 334). Even without those disclosures, consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

219. GX507, which Intuit produced bearing Bates number INTUIT-FTC-PART3-000000030 and with the original file name TY20-150_Display_SpinningZeros_App_300x50.psd, is an online TurboTax ad for TY 2020 that, according to Intuit's data at GX434, [REDACTED] (GX507 (Intuit); GX434 (Intuit); GX Summary 002 (Complaint Counsel) at 'Summary-Online_Ads' row 62; Baburek (Complaint Counsel) Tr. 318-23).

Response to Finding No. 219:

The Proposed Finding is misleading because GX507 is not an "online TurboTax ad." It is a display advertisement for a specific TurboTax SKU, TurboTax Free Edition. (GX507 (Intuit)).

Intuit otherwise has no specific response except to note that the number of impressions or clicks an ad received is not evidence that the ad conveyed any of the claims asserted by Complaint Counsel, that reasonable consumers were likely to be deceived, or that the claims were material to reasonable consumers. The dissemination data offered in the Proposed Finding illustrates that reasonable consumers were *unlikely* to be deceived. That Complaint Counsel have identified only 17 even potentially relevant consumer complaints from Tax Year 2020 (see CCF ¶677), even though GX507 on its own received [REDACTED] [REDACTED] that year, is strong evidence that reasonable consumers were not deceived by GX507 or any of the other challenged advertisements that ran in Tax Year 2020 (see PFF ¶¶632, 637, 639, 641-647).

220. A screenshot from GX507 is pictured below.



(GX507 (Intuit)).

Response to Finding No. 220:

The Proposed Finding is incomplete because it fails to recognize that consumers clicking on the advertisement would be taken directly to the landing page on the TurboTax website for TurboTax Free Edition, where they would see detailed information about the free offer's qualifications. (PFF ¶253; Rubin (Intuit) Tr. 1563-1564). Indeed, Complaint Counsel and their witnesses recognized that the TurboTax website repeatedly disclosed the qualifications of free TurboTax offers and provided detailed information about those qualifications. (PFF ¶¶369-370). For example, Complaint Counsel's own 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 the free TurboTax offers. (PFF ¶790). Reasonable consumers understood that display ads such as GX507 link to a website when clicked (here, the TurboTax website) that includes more information about the advertised free offer, and by linking directly to the TurboTax website, the advertisement incorporated the detailed information on the TurboTax website. (PFF ¶254; *see also* CCF ¶455 ("The TurboTax website is ... integrated into TurboTax's free advertising.")). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

Moreover, the Proposed Finding does not support an inference that the challenged ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The advertisement includes a TurboTax

Free Edition logo and states prominently, “Simple tax returns only.” (GX507 (Intuit)). Indeed, the “Simple tax returns only” text is the same size as the other text in the ad. By identifying the specific TurboTax SKU being advertised, the ad informed consumers that the offer does not apply to all TurboTax products. (See PFF ¶¶317, 321). And by stating that the offer was available for “Simple tax returns only,” the ad informed consumers that the free offer was not available to everyone, and that eligibility was contingent on the complexity of the consumer’s tax returns. (PFF ¶322; *see also* PFF ¶¶130-145). Complaint Counsel have offered no evidence that *all* components of the ad were not visible to consumers (*see* PFF ¶255), nor could they given the prominence of that content and the benchmarking analysis showing that the disclosures were comparable to disclosures in other companies’ ads (*see* PFF ¶¶257-259).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel assert were conveyed. Instead, the undisputed testimony from Intuit’s executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (See PFF ¶¶167-177, 190, 192-202, 405, 852, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel have not offered any evidence that this ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the qualifications included in the ad would prevent consumers from being misled by the ad. (See PFF ¶¶260-264, 302-322, 328-330, 334). Even without those disclosures, consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information

about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

221. GX508, which Intuit produced bearing Bates number INTUIT-FTC-PART3-000000031 and with the original file name TY20-283_FREE_MariahTablet_LatinX_1200x627.jpg, is an online TurboTax ad for TY 2020 that, according to Intuit's data at GX434, [REDACTED] [REDACTED]. (GX508 (Intuit); GX434 (Intuit); GX Summary 002 (Complaint Counsel) at 'Summary-Online_Ads' row 128, row 129; Baburek (Complaint Counsel) Tr. 318-23).

Response to Finding No. 221:

The Proposed Finding is misleading because GX508 is not an "online TurboTax ad." It is a display advertisement for a specific TurboTax SKU, TurboTax Free Edition. (GX508 (Intuit)).

Intuit otherwise has no specific response except to note that the number of impressions or clicks an ad received is not evidence that the ad conveyed any of the claims asserted by Complaint Counsel, that reasonable consumers were likely to be deceived, or that the claims were material to reasonable consumers. The dissemination data offered in the Proposed Finding illustrates that reasonable consumers were *unlikely* to be deceived. That Complaint Counsel have identified only 17 even potentially relevant consumer complaints from Tax Year 2020 (*see* CCF ¶677), even though GX508 on its own received [REDACTED] [REDACTED] that year, is strong evidence that reasonable consumers were not deceived by GX508 or any of the other challenged advertisements that ran in Tax Year 2020 (*see* PFF ¶¶632, 637, 639, 641-647).

222. A screenshot from GX508 is pictured below.



(GX508 (Intuit)).

Response to Finding No. 222:

The Proposed Finding is incomplete because it fails to recognize that consumers clicking on the advertisement would be taken directly to the landing page on the TurboTax website for TurboTax Free Edition, where they would see detailed information about that SKU's qualifications. (PFF ¶253; Rubin (Intuit) Tr. 1563-1564). Indeed, Complaint Counsel and their witnesses recognized that the TurboTax website repeatedly disclosed the qualifications of free TurboTax offers and provided detailed information about those qualifications. (PFF ¶¶369-370). For example, Complaint Counsel's own 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 the free TurboTax offers. (PFF ¶790). Reasonable consumers understood that display ads such as GX508 link to a website when clicked (here, the TurboTax website) that includes more information about the advertised free offer, and by linking directly to the TurboTax website, the advertisement incorporated the detailed information on the

TurboTax website. (PFF ¶254; *see also* CCF ¶455 (“The TurboTax website is ... integrated into TurboTax’s free advertising.”)). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

Moreover, the Proposed Finding does not support an inference that the challenged ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The advertisement includes a TurboTax Free Edition logo and states prominently, “Simple tax returns only.” (GX508 (Intuit)). By identifying the specific TurboTax SKU being advertised, the ad informed consumers that the offer does not apply to all TurboTax products. (*See* PFF ¶¶317, 321). And by stating that the offer was available for “Simple tax returns only,” the ad informed consumers that the free offer was not available to everyone, and that eligibility was contingent on the complexity of the consumer’s tax returns. (PFF ¶322; *see also* PFF ¶¶130-145). Complaint Counsel have offered no evidence that *all* components of the ad were not visible to consumers (*see* PFF ¶255), nor could they given the prominence of that content and the benchmarking analysis showing that the disclosures were comparable to disclosures in other companies’ ads (*see* PFF ¶¶257-259).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel assert were conveyed. Instead, the undisputed testimony from Intuit’s executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (*See* PFF ¶¶167-177, 190, 192-202, 405, 852, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel have not offered any evidence that this ad was likely

to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the qualifications included in the ad would prevent consumers from being misled by the ad. (See PFF ¶¶260-264, 302-322, 328-330, 334). Even without those disclosures, consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

223. GX509, which Intuit produced bearing Bates number INTUIT-FTC-PART3-000000034 and with the original file name TT_TY20-170_Free_NeonArt_SnapAd_9_16.mp4, is an online TurboTax ad for TY 2020 that, according to Intuit's data at GX434, [REDACTED]. (GX509 (Intuit); GX434 (Intuit); GX Summary 002 (Complaint Counsel) at 'Summary-Online_Ads' row 81; Baburek (Complaint Counsel) Tr. 318–23).

Response to Finding No. 223:

The Proposed Finding is misleading because GX509 is not an “online TurboTax ad.” It is a display advertisement for a specific TurboTax SKU, TurboTax Free Edition. (GX509 (Intuit)).

Intuit otherwise has no specific response except to note that the number of impressions or clicks an ad received is not evidence that the ad conveyed any of the claims asserted by Complaint Counsel, that reasonable consumers were likely to be deceived, or that the claims were material to reasonable consumers. The dissemination data offered in the Proposed Finding illustrates that reasonable consumers were *unlikely* to be deceived. That Complaint Counsel have identified only 17 even potentially relevant consumer complaints from Tax Year 2020 (see CCF ¶677), even though GX509 on its own received [REDACTED] [REDACTED] that year, is strong evidence that reasonable consumers were not deceived by GX509 or

any of the other challenged advertisements that ran in Tax Year 2020 (*see* PFF ¶¶632, 637, 639, 641-647).

224. A screenshot from GX509 is pictured below.



(GX509 (Intuit)).

Response to Finding No. 224:

The Proposed Finding is incomplete and misleading because it is just a snippet of the full display video ad that actually ran and Complaint Counsel have omitted critical information for evaluating the advertisement. (GX509 (Intuit)). Consumers did not view the challenged advertisement as a single, static image. Not captured in the Proposed Finding is the fact that the TurboTax Free Edition logo appears on screen throughout the ad, or that the logo and the “[s]imple tax returns only” qualification are the only text that does not flash on and off during the ad. (GX509 (Intuit)). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

The Proposed Finding is also incomplete because it fails to recognize that consumers clicking on the advertisement would be taken directly to the app store on their phone where they could download the TurboTax app, where they would see detailed information about Free Edition's qualifications. (*See* PFF ¶253; Johnson (Intuit) Tr. 583; Rubin (Intuit) Tr. 1563-1564). Indeed, Complaint Counsel and their witnesses recognized that the TurboTax website repeatedly disclosed the qualifications of free TurboTax offers and provided detailed information about those qualifications, and the same information is available through the TurboTax app. (PFF ¶¶369-370; GX439 (Ryan (Intuit) Decl.) ¶29). For example, Complaint Counsel's own 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 the free TurboTax offers. (PFF ¶790). Reasonable consumers understood that display ads such as GX509 link to a website or app when clicked (here, the TurboTax app) that includes more information about the advertised free offer, and by linking to the TurboTax app, the advertisement incorporated the detailed information available through the app. (PFF ¶254; *see also* CCFF ¶455 ("The TurboTax website is ... integrated into TurboTax's free advertising.")).

Moreover, the Proposed Finding does not support an inference that the challenged ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The advertisement includes a TurboTax Free Edition logo and states prominently, "Simple tax returns only." (GX509 (Intuit)). By identifying the specific TurboTax SKU being advertised, the ad informed consumers that the offer does not apply to all TurboTax products. (*See* PFF ¶¶317, 321). And by stating that the offer was available for "Simple tax returns only," the ad informed consumers that the free offer was not available to everyone, and that eligibility was contingent on the complexity of the

consumer's tax returns. (PFF ¶¶322; *see also* PFF ¶¶130-145). Complaint Counsel have offered no evidence that *all* components of the ad were not visible to consumers (*see* PFF ¶255), nor could they given the prominence of that content and the benchmarking analysis showing that the disclosures were comparable to disclosures in other companies' ads (*see* PFF ¶¶257-259).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel assert were conveyed. Instead, the undisputed testimony from Intuit's executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (*See* PFF ¶¶167-177, 190, 192-202, 405, 852, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel have not offered any evidence that this ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the qualifications included in the ad would prevent consumers from being misled by the ad. (*See* PFF ¶¶260-264, 302-322, 328-330, 334). Even without those disclosures, consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

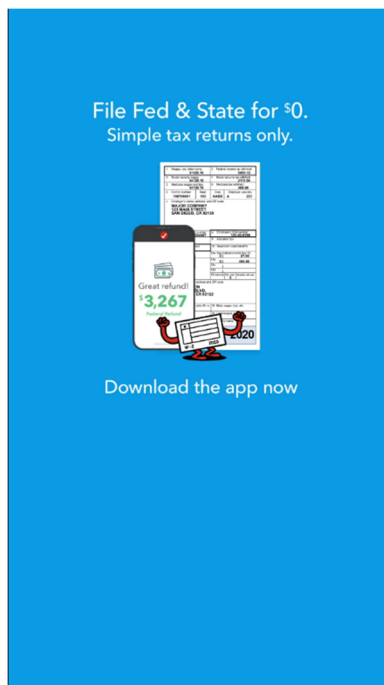
225. GX510, which Intuit produced bearing Bates number INTUIT-FTC-PART3-000000037 and with the original file name TT_TY20-178_Free_W-2Guys_TikTok_9_16.mp4, is an online TurboTax ad for TY 2020 that, according to Intuit's data at GX434, [REDACTED] (GX510 (Intuit); GX434 (Intuit); GX Summary 002 (Complaint Counsel) at 'Summary-Online_Ads' row 90; Baburek (Complaint Counsel) Tr. 318-23).

Response to Finding No. 225:

The Proposed Finding is misleading because GX510 is not an “online TurboTax ad.” (GX510 (Intuit)). It is a display advertisement directing consumers to the TurboTax app (GX160 (Rubin (Intuit) IHT) at 52-53), where they would see detailed information about all TurboTax SKUs, including the qualifications for free TurboTax SKUs (PFF ¶¶369-370; GX439 (Ryan (Intuit) Decl.) ¶29)).

Intuit otherwise has no specific response except to note that the number of impressions or clicks an ad received is not evidence that the ad conveyed any of the claims asserted by Complaint Counsel, that reasonable consumers were likely to be deceived, or that the claims were material to reasonable consumers. The dissemination data offered in the Proposed Finding illustrates that reasonable consumers were *unlikely* to be deceived. That Complaint Counsel have identified only 17 even potentially relevant consumer complaints from Tax Year 2020 (*see* CCF ¶677), even though GX510 on its own received [REDACTED] [REDACTED] that year, is strong evidence that reasonable consumers were not deceived by GX510 or any of the other challenged advertisements that ran in Tax Year 2020 (*see* PFF ¶¶632, 637, 639, 641-647).

226. A screenshot from GX510 is pictured below.



(GX510 (Intuit)).

Response to Finding No. 226:

The Proposed Finding is incomplete and misleading because it is just a snippet of the full display video ad that actually ran and Complaint Counsel have omitted critical information for evaluating the advertisement. (GX510 (Intuit)). Consumers did not view the challenged advertisement as a single, static image. Not captured in the Proposed Finding is the voiceover at the beginning of the advertisement stating, "Simple tax returns only." (GX510 (Intuit)). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

The Proposed Finding is also incomplete because it fails to recognize that consumers clicking on the advertisement would be taken directly to the app store on their phone where they could download the TurboTax app, where they would see detailed information about Free Edition's qualifications. (See PFF ¶253; Johnson (Intuit) Tr. 583; Rubin (Intuit) Tr. 1563-1564).

Indeed, Complaint Counsel and their witnesses recognized that the TurboTax website repeatedly disclosed the qualifications of free TurboTax offers and provided detailed information about those qualifications, and the same information is available through the TurboTax app. (PFF ¶¶369-370; GX439 (Ryan (Intuit) Decl.) ¶29)). For example, Complaint Counsel’s own 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 the free TurboTax offers. (PFF ¶790). Reasonable consumers understood that display ads such as GX510 link to a website or app when clicked (here, the TurboTax app) that includes more information about the advertised free offer, and by linking to the TurboTax app, the advertisement incorporated the detailed information available through the app. (PFF ¶254; *see also* CCF ¶455 (“The TurboTax website is ... integrated into TurboTax’s free advertising.”)).

Moreover, the Proposed Finding does not support an inference that the challenged ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The advertisement states in writing and in a voiceover that the offer is limited to “simple tax returns only.” (GX510 (Intuit)). By stating that the offer was available for “Simple tax returns only,” the ad informed consumers that the free offer was not available to everyone, and that eligibility was contingent on the complexity of the consumer’s tax returns. (PFF ¶322; *see also* PFF ¶¶130-145). Complaint Counsel have offered no evidence that *all* components of the ad were not visible or audible to consumers (*see* PFF ¶¶255-256), nor could they given the prominence of that content and the benchmarking analysis showing that the disclosures were comparable to disclosures in other companies’ ads (*see* PFF ¶¶257-259).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel assert were conveyed. Instead, the undisputed testimony from Intuit's executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (See PFF ¶¶167-177, 190, 192-202, 405, 852, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel have not offered any evidence that this ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the qualifications included in the ad would prevent consumers from being misled by the ad. (See PFF ¶¶260-264, 302-322, 328-330, 334). Even without those disclosures, consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website or through the TurboTax app. (PFF ¶¶470-527).

227. GX511, which Intuit produced bearing Bates number INTUIT-FTC-PART3-000000038 and with the original file name TT_TY20-155_Free_W-2Magnify_Video_FB_App_9_16.mp4, is an online TurboTax ad for TY 2020 that, according to Intuit's data at GX434, [REDACTED]. (GX511 (Intuit); GX434 (Intuit); GX Summary 002 (Complaint Counsel) at 'Summary-Online_Ads' row 69, row 70; Baburek (Complaint Counsel) Tr. 318-23).

Response to Finding No. 227:

The Proposed Finding is misleading because GX511 is not an "online TurboTax ad." It is a display advertisement for a specific TurboTax SKU, TurboTax Free Edition. (GX511 (Intuit)).

Intuit otherwise has no specific response except to note that the number of impressions or clicks an ad received is not evidence that the ad conveyed any of the claims asserted by

Complaint Counsel, that reasonable consumers were likely to be deceived, or that the claims were material to reasonable consumers. The dissemination data offered in the Proposed Finding illustrates that reasonable consumers were *unlikely* to be deceived. That Complaint Counsel have identified only 17 even potentially relevant consumer complaints from Tax Year 2020 (*see* CCF ¶¶677), even though GX511 on its own received [REDACTED] [REDACTED] that year, is strong evidence that reasonable consumers were not deceived by GX511 or any of the other challenged advertisements that ran in Tax Year 2020 (*see* PFF ¶¶632, 637, 639, 641-647).

228. A screenshot from GX511 is pictured below.

The screenshot shows an advertisement for Intuit TurboTax Free Edition. The main text reads: "File Fed & State for \$0. Simple tax returns only." Below this, there is a smartphone displaying a "Great refund! \$3,267 Federal Refund" and a tax return document. The tax return document is a 2020 Form 1040 for MAJOR COMPANY, 123 MAIN STREET, SAN DIEGO, CA 92130. The document shows various tax fields and a total tax of \$0.00. The bottom of the ad says "Download the app now."

(GX511 (Intuit)).

Response to Finding No. 228:

The Proposed Finding is incomplete and misleading because it is just a snippet of the full display video ad that actually ran and Complaint Counsel have omitted critical information for

evaluating the advertisement. (GX511 (Intuit)). Consumers did not view the challenged advertisement as a single, static image. Not captured in the Proposed Finding is the voiceover at the beginning of the advertisement stating, “Simple tax returns only,” or the fact that the TurboTax Free Edition logo appeared on screen throughout the ad and thus that the free offer was always presented in conjunction with that qualifying statement. (GX511 (Intuit)). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

The Proposed Finding is also incomplete because it fails to recognize that consumers clicking on the advertisement would be taken directly to the app store on their phone where they could download the TurboTax app, where they would see detailed information about the free offer’s qualifications. (See PFF ¶253; Johnson (Intuit) Tr. 583; Rubin (Intuit) Tr. 1563-1564). Indeed, Complaint Counsel and their witnesses recognized that the TurboTax website repeatedly disclosed the qualifications of free TurboTax offers and provided detailed information about those qualifications, and the same information is available through the TurboTax app. (PFF ¶¶369-370; GX439 (Ryan (Intuit) Decl.) ¶29)). For example, Complaint Counsel’s own 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 the free TurboTax offers. (PFF ¶790). Reasonable consumers understood that display ads such as GX511 link to a website or app when clicked (here, the TurboTax app) that includes more information about the advertised free offer, and by linking to the TurboTax app, the advertisement incorporated the detailed information available through the app. (PFF ¶254; see also CCF ¶455 (“The TurboTax website is ... integrated into TurboTax’s free advertising.”)).

Moreover, the Proposed Finding does not support an inference that the challenged ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The advertisement includes a TurboTax Free Edition logo and states prominently, “Simple tax returns only.” (GX511 (Intuit)). The ad also includes a voiceover at the beginning of the advertisement stating, “Simple tax returns only.” (GX511 (Intuit)). By identifying the specific TurboTax SKU being advertised, the ad informed consumers that the offer does not apply to all TurboTax products. (*See* PFF ¶¶317, 321). And by stating that the offer was available for “Simple tax returns only,” the ad informed consumers that the free offer was not available to everyone, and that eligibility was contingent on the complexity of the consumer’s tax returns. (PFF ¶322; *see also* PFF ¶¶130-145). Complaint Counsel have offered no evidence that *all* components of the ad were not visible or audible to consumers (*see* PFF ¶¶255-256), nor could they given the prominence of that content and the benchmarking analysis showing that the disclosures were comparable to disclosures in other companies’ ads (*see* PFF ¶¶257-259).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel assert were conveyed. Instead, the undisputed testimony from Intuit’s executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (*See* PFF ¶¶167-177, 190, 192-202, 405, 852, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel have not offered any evidence that this ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence

establishes that the qualifications included in the ad would prevent consumers from being misled by the ad. (*See* PFF ¶¶260-264, 302-322, 328-330, 334). Even without those disclosures, consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

229. GX512, which Intuit produced bearing Bates number INTUIT-FTC-PART3-000000041 and with the original file name TT_TY20-263_Free_W-2Magnify_Video_YT-6sec_Web_16_9.mp4, is an online TurboTax ad for TY 2020 that, according to Intuit's data at GX434, [REDACTED] (GX512 (Intuit); GX434 (Intuit); GX Summary 002 (Complaint Counsel) at 'Summary-Online_Ads' row 115, row 116; Baburek (Complaint Counsel) Tr. 318–23).

Response to Finding No. 229:

The Proposed Finding is misleading because GX512 is not an “online TurboTax ad.” It is a display advertisement for a specific TurboTax SKU, TurboTax Free Edition. (GX512 (Intuit)).

Intuit otherwise has no specific response except to note that the number of impressions or clicks an ad received is not evidence that the ad conveyed any of the claims asserted by Complaint Counsel, that reasonable consumers were likely to be deceived, or that the claims were material to reasonable consumers. The dissemination data offered in the Proposed Finding illustrates that reasonable consumers were *unlikely* to be deceived. That Complaint Counsel have identified only 17 even potentially relevant consumer complaints from Tax Year 2020 (*see* CCF ¶677), even though GX512 on its own received [REDACTED] that year, is strong evidence that reasonable consumers were not deceived by GX512 or any of the other challenged advertisements that ran in Tax Year 2020 (*see* PFF ¶¶632, 637, 639, 641-647).

230. A screenshot from GX512 is pictured below.

The advertisement features a blue background. On the left, a smartphone displays a green checkmark at the top, a wallet icon, and the text 'Great refund! \$3,267 Federal Refund'. To the right of the phone is a snippet of a 2020 tax form. The form includes the following data:

| | | | |
|--|--------------------------------|-------|-------------------|
| 1 Wages, tips, other comp. | 2 Federal income tax withheld | | |
| 3128.10 | 8400.12 | | |
| 3 Social security wages | 4 Social security tax withheld | | |
| 3428.10 | 215.94 | | |
| 5 Medicare wages and tips | 6 Medicare tax withheld | | |
| 3428.10 | 494.86 | | |
| d Control number | Dist. | Corp. | Employer use only |
| 198708981 | 100 | AABB | A 223 |
| c Employer's name, address, and ZIP code | | | |
| MAJOR COMPANY | | | |
| 123 MAIN STREET | | | |
| SAN DIEGO, CA 92130 | | | |
| 7 Taxpayer's SSN | 8 Employer's SSN | | |
| 234567 | 123-45-6789 | | |
| 9 Allocated tips | 10 Dependent care benefits | | |
| | | | |
| 12a See instructions for line 12 | | | |
| C | 27.00 | | |
| 12b | D | | |
| | 494.86 | | |
| 12c | | | |
| 12d | | | |
| 13 State (file only) (See instructions) | | | |
| | X | | |
| address and ZIP code | | | |
| ON | | | |
| BLVD. | | | |
| CA 92122 | | | |
| state ID no. | 16 State wages, tips, etc. | | |
| | | | |
| | 18 Local wages, tips, etc. | | |
| | | | |
| | 20 Locality name | | |
| | | | |
| Federal Filing Copy | | | |
| Wage and Tax | | | |
| Statement | | | |
| 2020 | | | |

On the right side of the advertisement, the text reads: 'File Fed & State for \$0. Simple tax returns only.' The Intuit TurboTax Free Edition logo is located in the bottom right corner.

(GX512 (Intuit)).

Response to Finding No. 230:

The Proposed Finding is incomplete and misleading because it is just a snippet of the full display video ad that actually ran and Complaint Counsel have omitted critical information for evaluating the advertisement. (GX512 (Intuit)). Consumers did not view the challenged advertisement as a single, static image. Not captured in the Proposed Finding is the voiceover at the beginning of the advertisement stating, “Simple tax returns only,” or the fact that the TurboTax Free Edition logo appeared on screen throughout the ad. (GX512 (Intuit)). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

The Proposed Finding is also incomplete because it fails to recognize that consumers clicking on the advertisement would be taken directly to the app store on their phone where they could download the TurboTax app, where they would see detailed information about the free offer’s qualifications. (See PFF ¶253; Johnson (Intuit) Tr. 583; Rubin (Intuit) Tr. 1563-1564).

Indeed, Complaint Counsel and their witnesses recognized that the TurboTax website repeatedly disclosed the qualifications of free TurboTax offers and provided detailed information about those qualifications, and the same information is available through the TurboTax app. (PFF ¶¶369-370; GX439 (Ryan (Intuit) Decl.) ¶29)). For example, Complaint Counsel’s own 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 the free TurboTax offers. (PFF ¶790). Reasonable consumers understood that display ads such as GX512 link to a website or app when clicked (here, the TurboTax app) that includes more information about the advertised free offer, and by linking to the TurboTax app, the advertisement incorporated the detailed information available through the app. (PFF ¶254; *see also* CCF ¶455 (“The TurboTax website is ... integrated into TurboTax’s free advertising.”)).

Moreover, the Proposed Finding does not support an inference that the challenged ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The advertisement includes a TurboTax Free Edition logo and states prominently, “Simple tax returns only.” (GX512 (Intuit)). The ad also includes a voiceover at the beginning of the advertisement stating, “Simple tax returns only.” (GX512 (Intuit)). By identifying the specific TurboTax SKU being advertised, the ad informed consumers that the offer does not apply to all TurboTax products. (*See* PFF ¶¶317, 321). And by stating that the offer was available for “Simple tax returns only,” the ad informed consumers that the free offer was not available to everyone, and that eligibility was contingent on the complexity of the consumer’s tax returns. (PFF ¶322; *see also* PFF ¶¶130-145). Complaint Counsel have offered no evidence that *all* components of the ad were not visible or audible to consumers (*see* PFF ¶¶255-256), nor could they given the prominence of that content and the

benchmarking analysis showing that the disclosures were comparable to disclosures in other companies' ads (*see* PFF ¶¶257-259).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel assert were conveyed. Instead, the undisputed testimony from Intuit's executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (*See* PFF ¶¶167-177, 190, 192-202, 405, 852, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel have not offered any evidence that this ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the qualifications included in the ad would prevent consumers from being misled by the ad. (*See* PFF ¶¶260-264, 302-322, 328-330, 334). Even without those disclosures, consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).


231. GX513, which Intuit produced bearing Bates number INTUIT-FTC-PART3-000000044 and with the original file name TT_TY20-157_Free_W-2Scan_Video_FB_App_1_1.mp4, is an online TurboTax ad for TY 2020 that, according to Intuit's data at GX434, [REDACTED] (GX513 (Intuit); GX434 (Intuit); GX Summary 002 (Complaint Counsel) at 'Summary-Online_Ads' row 71, row 72; Baburek (Complaint Counsel) Tr. 318-23).

Response to Finding No. 231:

The Proposed Finding is misleading because GX513 is not an "online TurboTax ad." It is a display advertisement for a specific TurboTax SKU, TurboTax Free Edition. (GX513 (Intuit)).

Intuit otherwise has no specific response except to note that the number of impressions or clicks an ad received is not evidence that the ad conveyed any of the claims asserted by Complaint Counsel, that reasonable consumers were likely to be deceived, or that the claims were material to reasonable consumers. The dissemination data offered in the Proposed Finding illustrates that reasonable consumers were *unlikely* to be deceived. That Complaint Counsel have identified only 17 even potentially relevant consumer complaints from Tax Year 2020 (*see* CCF ¶677), even though GX513 on its own received [REDACTED] [REDACTED] that year, is strong evidence that reasonable consumers were not deceived by GX513 or any of the other challenged advertisements that ran in Tax Year 2020 (*see* PFF ¶¶632, 637, 639, 641-647).

232. Screenshots from GX513 are pictured below.




FREE


— guaranteed —

\$0 Fed **\$0** State **\$0** To File

Simple tax returns only



File Fed & State for \$0.
Simple tax returns only.



Download the app now.

(GX513 (Intuit)).

Response to Finding No. 232:

The Proposed Finding is incomplete and misleading because it is just a snippet of the full display video ad that actually ran and Complaint Counsel have omitted critical information for evaluating the advertisement. (GX513 (Intuit)). Consumers did not view the challenged advertisement as a single, static image. Not captured in the Proposed Finding is the voiceover at the beginning of the advertisement stating, “Simple tax returns only,” or the fact that the TurboTax Free Edition logo appeared on screen throughout the ad. (GX513 (Intuit)). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

The Proposed Finding is also incomplete because it fails to recognize that consumers clicking on the advertisement would be taken directly to the app store on their phone where they could download the TurboTax app, where they would see detailed information about the free offer’s qualifications. (See PFF ¶253; Johnson (Intuit) Tr. 583; Rubin (Intuit) Tr. 1563-1564). Indeed, Complaint Counsel and their witnesses recognized that the TurboTax website repeatedly disclosed the qualifications of free TurboTax offers and provided detailed information about those qualifications, and the same information is available through the TurboTax app. (PFF ¶¶369-370; GX439 (Ryan (Intuit) Decl.) ¶29)). For example, Complaint Counsel’s own 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 the free TurboTax offers. (PFF ¶790). Reasonable consumers understood that display ads such as GX513 link to a website or app when clicked (here, the TurboTax app) that includes more information about the advertised free offer, and by linking to the TurboTax app, the

advertisement incorporated the detailed information available through the app. (PFF ¶254; *see also* CCF ¶455 (“The TurboTax website is ... integrated into TurboTax’s free advertising.”)).

Moreover, the Proposed Finding does not support an inference that the challenged ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The advertisement includes a TurboTax Free Edition logo and states prominently, “Simple tax returns only.” (GX513 (Intuit)). The ad also includes a voiceover at the beginning of the advertisement stating, “Simple tax returns only.” (GX513 (Intuit)). By identifying the specific TurboTax SKU being advertised, the ad informed consumers that the offer does not apply to all TurboTax products. (*See* PFF ¶¶317, 321). And by stating that the offer was available for “Simple tax returns only,” the ad informed consumers that the free offer was not available to everyone, and that eligibility was contingent on the complexity of the consumer’s tax returns. (PFF ¶322; *see also* PFF ¶¶130-145). Complaint Counsel have offered no evidence that *all* components of the ad were not visible or audible to consumers (*see* PFF ¶¶255-256), nor could they given the prominence of that content and the benchmarking analysis showing that the disclosures were comparable to disclosures in other companies’ ads (*see* PFF ¶¶257-259).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel assert were conveyed. Instead, the undisputed testimony from Intuit’s executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (*See* PFF ¶¶167-177, 190, 192-202, 405, 852, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel have not offered any evidence that this ad was likely

to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the qualifications included in the ad would prevent consumers from being misled by the ad. (See PFF ¶¶260-264, 302-322, 328-330, 334). Even without those disclosures, consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

233. GX514, which Intuit produced bearing Bates number INTUIT-FTC-PART3-000000045 and with the original file name TT_TY20-185_Free_W-2Magnify_Video_16_9.mp4, is an online TurboTax ad for TY 2020 that, according to Intuit's data at GX434, [REDACTED] (GX514 (Intuit); GX434 (Intuit); GX Summary 002 (Complaint Counsel) at 'Summary-Online_Ads' row 94; Baburek (Complaint Counsel) Tr. 318–23).

Response to Finding No. 233:

The Proposed Finding is misleading because GX514 is not an “online TurboTax ad.” It is a display advertisement for a specific TurboTax SKU, TurboTax Free Edition. (GX514 (Intuit)).

Intuit otherwise has no specific response except to note that the number of impressions or clicks an ad received is not evidence that the ad conveyed any of the claims asserted by Complaint Counsel, that reasonable consumers were likely to be deceived, or that the claims were material to reasonable consumers. The dissemination data offered in the Proposed Finding illustrates that reasonable consumers were *unlikely* to be deceived. That Complaint Counsel have identified only 17 even potentially relevant consumer complaints from Tax Year 2020 (see CCF ¶677), even though GX514 on its own received [REDACTED] that year, is strong evidence that reasonable consumers were not deceived by GX514 or any of

the other challenged advertisements that ran in Tax Year 2020 (*see* PFF ¶¶632, 637, 639, 641-647).

234. A screenshot from GX514 is pictured below.

The screenshot shows a smartphone with a red checkmark icon at the top. The screen displays a green message: "Great refund! \$3,267 Federal Refund". Behind the phone is a portion of a 2020 W-2 form. The form includes the following information:

| | | | |
|--|--------------------------------|-------|-------------------|
| 1 Wages, tips, other comp. | 2 Federal income tax withheld | | |
| 31228.10 | 5430.12 | | |
| 3 Social security wages | 4 Social security tax withheld | | |
| 34128.10 | 2115.84 | | |
| 5 Medicare wages and tips | 6 Medicare tax withheld | | |
| 34128.10 | 494.86 | | |
| d Control number | Dept. | Corp. | Employer use only |
| 198708981 | 100 | AABB | A 223 |
| c Employer's name, address, and ZIP code | | | |
| MAJOR COMPANY | | | |
| 123 MAIN STREET | | | |
| SAN DIEGO, CA 92130 | | | |
| 7 Number | 8 Employee's SSN number | | |
| 234567 | 123-45-6789 | | |
| 9 Allocated tips | 10 Dependent care benefits | | |
| | | | |
| 12a See instructions for box 12 | 12b | | |
| C | 27.00 | | |
| 12c D | 494.86 | | |
| 12d | | | |
| 13 State (Ret. plan 3rd party sick pay) | X | | |
| Address and ZIP code | | | |
| BLVD. | | | |
| CA 92122 | | | |
| 16 State wages, tips, etc. | 17 Local wages, tips, etc. | | |
| | | | |
| 18 | 20 Locality name | | |
| | | | |
| Federal Filing Copy Wage and Tax Statement | | | |
| 2020 | | | |

Text on the right side of the ad:

File Fed & State for \$0.
Simple tax returns only.
Download the app now.

intuit
turbotax
Free Edition

(GX514 (Intuit)).

Response to Finding No. 234:

The Proposed Finding is incomplete and misleading because it is just a snippet of the full display video ad that actually ran and Complaint Counsel have omitted critical information for evaluating the advertisement. (GX514 (Intuit)). Consumers did not view the challenged advertisement as a single, static image. Not captured in the Proposed Finding is the voiceover at the beginning of the advertisement stating, “Simple tax returns only,” or the fact that the TurboTax Free Edition logo appeared on screen throughout the ad. (GX514 (Intuit)). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

The Proposed Finding is also incomplete because it fails to recognize that consumers clicking on the advertisement would be taken directly to the app store on their phone where they could download the TurboTax app, where they would see detailed information about the free offer's qualifications. (See PFF ¶253; Johnson (Intuit) Tr. 583; Rubin (Intuit) Tr. 1563-1564). Indeed, Complaint Counsel and their witnesses recognized that the TurboTax website repeatedly disclosed the qualifications of free TurboTax offers and provided detailed information about those qualifications, and the same information is available through the TurboTax app. (PFF ¶¶369-370; GX439 (Ryan (Intuit) Decl.) ¶29)). For example, Complaint Counsel's own 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 the free TurboTax offers. (PFF ¶790). Reasonable consumers understood that display ads such as GX514 link to a website or app when clicked (here, the TurboTax app) that includes more information about the advertised free offer, and by linking to the TurboTax app, the advertisement incorporated the detailed information available through the app. (PFF ¶254; *see also* CCFF ¶455 ("The TurboTax website is ... integrated into TurboTax's free advertising.")).

Moreover, the Proposed Finding does not support an inference that the challenged ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The advertisement includes a TurboTax Free Edition logo and states both verbally and in writing in a similar font size as other text in the ad, "Simple tax returns only." (GX514 (Intuit)). By identifying the specific TurboTax SKU being advertised, the ad informed consumers that the offer does not apply to all TurboTax products. (See PFF ¶¶317, 321). And by stating that the offer was available for "Simple tax returns only," the ad informed consumers that the free offer was not available to everyone, and

that eligibility was contingent on the complexity of the consumer's tax returns. (PFF ¶¶322; *see also* PFF ¶¶130-145). Complaint Counsel have offered no evidence that *all* components of the ad were not visible or audible to consumers (*see* PFF ¶¶255-256), nor could they given the prominence of that content and the benchmarking analysis showing that the disclosures were comparable to disclosures in other companies' ads (*see* PFF ¶¶257-259).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel assert were conveyed. Instead, the undisputed testimony from Intuit's executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (*See* PFF ¶¶167-177, 190, 192-202, 405, 852, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel have not offered any evidence that this ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the qualifications included in the ad would prevent consumers from being misled by the ad. (*See* PFF ¶¶260-264, 302-322, 328-330, 334). Even without those disclosures, consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

235. GX515, which Intuit produced bearing Bates number INTUIT-FTC-PART3-000000046 and with the original file name TT_TY20-187_Free_W-2Scan_Video_16_9.mp4, is an online TurboTax ad for TY 2020 that, according to Intuit's data at GX434, [REDACTED] (GX515 (Intuit); GX434 (Intuit); GX Summary 002 (Complaint Counsel) at 'Summary-Online_Ads' row 96; Baburek (Complaint Counsel) Tr. 318-23).

Response to Finding No. 235:

The Proposed Finding is misleading because GX515 is not an “online TurboTax ad.” It is a display advertisement for a specific TurboTax SKU, TurboTax Free Edition. (GX515 (Intuit)).

Intuit otherwise has no specific response except to note that the number of impressions or clicks an ad received is not evidence that the ad conveyed any of the claims asserted by Complaint Counsel, that reasonable consumers were likely to be deceived, or that the claims were material to reasonable consumers. The dissemination data offered in the Proposed Finding illustrates that reasonable consumers were *unlikely* to be deceived. That Complaint Counsel have identified only 17 even potentially relevant consumer complaints from Tax Year 2020 (*see* CCFE ¶¶677), even though GX515 on its own received [REDACTED] that year, is strong evidence that reasonable consumers were not deceived by GX515 or any of the other challenged advertisements that ran in Tax Year 2020 (*see* PFF ¶¶632, 637, 639, 641-647).

236. A screenshot from GX515 is pictured below.

File Fed & State for \$0.
Simple tax returns only.

Download the app now.

intuit turboTax
Free Edition

| | | | | | |
|---|--|-----------------------------|-------------------------|------------------------------|---------|
| 1 | Wages, tips, other comp. | 31128.10 | 2 | Federal income tax withheld | 5430.12 |
| 3 | Social security wages | 34128.10 | 4 | Social security tax withheld | 2115.94 |
| 5 | Medicare wages and tips | 34128.10 | 6 | Medicare tax withheld | 494.86 |
| d | Control number | 198709881 | Dept. | 100 | Corp. |
| | | | | AABB | A |
| | | | | Employer use only | 223 |
| c | Employer's name, address, and ZIP code | | | | |
| | MAJOR COMPANY | | | | |
| | 123 MAIN STREET | | | | |
| | SAN DIEGO, CA 92130 | | | | |
| | Employee's SSN | 123-45-6789 | 8 | Allocated tips | |
| | 10 | Dependent care benefits | | | |
| | 12a | See instructions for box 12 | C | 27.00 | |
| | 12b | D | 494.86 | | |
| | 12c | | | | |
| | 13 | Stat. emp. | Ret. plan | Ind. party sick pay | |
| | | | X | | |
| | address and ZIP code | | | | |
| | BLVD. | | | | |
| | CA 92122 | | | | |
| | state ID no. | 16 | State wages, tips, etc. | | |
| | | 18 | Local wages, tips, etc. | | |
| | | 20 | Locality name | | |
| | Federal Filing Copy Wage and Tax Statement | | | | 2020 |

(GX515 (Intuit)).

Response to Finding No. 236:

The Proposed Finding is incomplete and misleading because it is just a snippet of the full display video ad that actually ran and Complaint Counsel have omitted critical information for evaluating the advertisement. (GX515 (Intuit)). Consumers did not view the challenged advertisement as a single, static image. Not captured in the Proposed Finding is the voiceover at the beginning of the advertisement stating, “Simple tax returns only,” or the fact that the TurboTax Free Edition logo appeared on screen throughout the ad. (GX515 (Intuit)). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

The Proposed Finding is also incomplete because it fails to recognize that consumers clicking on the advertisement would be taken directly to the app store on their phone where they could download the TurboTax app, where they would see detailed information about the free offer’s qualifications. (See PFF ¶253; Johnson (Intuit) Tr. 583; Rubin (Intuit) Tr. 1563-1564). Indeed, Complaint Counsel and their witnesses recognized that the TurboTax website repeatedly disclosed the qualifications of free TurboTax offers and provided detailed information about those qualifications, and the same information is available through the TurboTax app. (PFF ¶¶369-370; GX439 (Ryan (Intuit) Decl.) ¶29)). For example, Complaint Counsel’s own 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 the free TurboTax offers. (PFF ¶790). Reasonable consumers understood that display ads such as GX515 link to a website or app when clicked (here, the TurboTax app) that includes more information about the advertised free offer, and by linking to the TurboTax app, the

advertisement incorporated the detailed information available through the app. (PFF ¶254; *see also* CCF ¶455 (“The TurboTax website is ... integrated into TurboTax’s free advertising.”)).

Moreover, the Proposed Finding does not support an inference that the challenged ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The advertisement includes a TurboTax Free Edition logo and states both verbally and in writing in a similar font size as other text in the ad, “Simple tax returns only.” (GX515 (Intuit)). By identifying the specific TurboTax SKU being advertised, the ad informed consumers that the offer does not apply to all TurboTax products. (*See* PFF ¶¶317, 321). And by stating that the offer was available for “Simple tax returns only,” the ad informed consumers that the free offer was not available to everyone, and that eligibility was contingent on the complexity of the consumer’s tax returns. (PFF ¶322; *see also* PFF ¶¶130-145). Complaint Counsel have offered no evidence that *all* components of the ad were not visible or audible to consumers (*see* PFF ¶¶255-256), nor could they given the prominence of that content and the benchmarking analysis showing that the disclosures were comparable to disclosures in other companies’ ads (*see* PFF ¶¶257-259).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel assert were conveyed. Instead, the undisputed testimony from Intuit’s executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (*See* PFF ¶¶167-177, 190, 192-202, 405, 852, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel have not offered any evidence that this ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that

TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the qualifications included in the ad would prevent consumers from being misled by the ad. (See PFF ¶¶260-264, 302-322, 328-330, 334). Even without those disclosures, consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

237. GX516, which Intuit produced bearing Bates number INTUIT-FTC-PART3-000000047 and with the original file name TT_TY20-169_Free_X-Ray_SnapAd_9_16.mp4, is an online TurboTax ad for TY 2020 that, according to Intuit's data at GX434, [REDACTED] (GX516 (Intuit); GX434 (Intuit); GX Summary 002 (Complaint Counsel) at 'Summary-Online_Ads' row 79, row 80; Baburek (Complaint Counsel) Tr. 318-23).

Response to Finding No. 237:

The Proposed Finding is misleading because GX516 is not an "online TurboTax ad." It is a display advertisement for a specific TurboTax SKU, TurboTax Free Edition. (GX516 (Intuit)).

Intuit otherwise has no specific response except to note that the number of impressions or clicks an ad received is not evidence that the ad conveyed any of the claims asserted by Complaint Counsel, that reasonable consumers were likely to be deceived, or that the claims were material to reasonable consumers. The dissemination data offered in the Proposed Finding illustrates that reasonable consumers were *unlikely* to be deceived. That Complaint Counsel have identified only 17 even potentially relevant consumer complaints from Tax Year 2020 (see CCF ¶677), even though GX516 on its own received [REDACTED] [REDACTED] that year, is strong evidence that reasonable consumers were not deceived by GX516 or any of the other challenged advertisements that ran in Tax Year 2020 (see PFF ¶¶632, 637, 639, 641-647).

238. A screenshot from GX516 is pictured below.

The screenshot shows an advertisement for Intuit TurboTax Free Edition. At the top, the logo reads 'intuit turbo tax Free Edition'. Below the logo, the text says 'File Fed & State for \$0. Simple tax returns only.' In the center, there is a smartphone displaying a 'Great refund! \$3,267 Federal Refund' message. To the right of the smartphone is a snippet of a 2020 tax return form. The form includes the following information:

| | | | |
|----|---------------------------|-----|------------------------------|
| 1 | Wages, tips, other income | 2 | Federal income tax withheld |
| 3 | Social security wages | 4 | Social security tax withheld |
| 5 | Medicare wages and tips | 6 | Medicare tax withheld |
| 7 | Other income | 8 | Other taxes |
| 9 | Adjusted gross income | 10 | State and local tax |
| 11 | State and local tax | 12 | State and local tax |
| 13 | State and local tax | 14 | State and local tax |
| 15 | State and local tax | 16 | State and local tax |
| 17 | State and local tax | 18 | State and local tax |
| 19 | State and local tax | 20 | State and local tax |
| 21 | State and local tax | 22 | State and local tax |
| 23 | State and local tax | 24 | State and local tax |
| 25 | State and local tax | 26 | State and local tax |
| 27 | State and local tax | 28 | State and local tax |
| 29 | State and local tax | 30 | State and local tax |
| 31 | State and local tax | 32 | State and local tax |
| 33 | State and local tax | 34 | State and local tax |
| 35 | State and local tax | 36 | State and local tax |
| 37 | State and local tax | 38 | State and local tax |
| 39 | State and local tax | 40 | State and local tax |
| 41 | State and local tax | 42 | State and local tax |
| 43 | State and local tax | 44 | State and local tax |
| 45 | State and local tax | 46 | State and local tax |
| 47 | State and local tax | 48 | State and local tax |
| 49 | State and local tax | 50 | State and local tax |
| 51 | State and local tax | 52 | State and local tax |
| 53 | State and local tax | 54 | State and local tax |
| 55 | State and local tax | 56 | State and local tax |
| 57 | State and local tax | 58 | State and local tax |
| 59 | State and local tax | 60 | State and local tax |
| 61 | State and local tax | 62 | State and local tax |
| 63 | State and local tax | 64 | State and local tax |
| 65 | State and local tax | 66 | State and local tax |
| 67 | State and local tax | 68 | State and local tax |
| 69 | State and local tax | 70 | State and local tax |
| 71 | State and local tax | 72 | State and local tax |
| 73 | State and local tax | 74 | State and local tax |
| 75 | State and local tax | 76 | State and local tax |
| 77 | State and local tax | 78 | State and local tax |
| 79 | State and local tax | 80 | State and local tax |
| 81 | State and local tax | 82 | State and local tax |
| 83 | State and local tax | 84 | State and local tax |
| 85 | State and local tax | 86 | State and local tax |
| 87 | State and local tax | 88 | State and local tax |
| 89 | State and local tax | 90 | State and local tax |
| 91 | State and local tax | 92 | State and local tax |
| 93 | State and local tax | 94 | State and local tax |
| 95 | State and local tax | 96 | State and local tax |
| 97 | State and local tax | 98 | State and local tax |
| 99 | State and local tax | 100 | State and local tax |

At the bottom of the ad, it says 'Download the app now.'

(GX516 (Intuit)).

Response to Finding No. 238:

The Proposed Finding is incomplete and misleading because it is just a snippet of the full display video ad that actually ran and Complaint Counsel have omitted critical information for evaluating the advertisement. (GX516 (Intuit)). Consumers did not view the challenged advertisement as a single, static image. Not captured in the Proposed Finding is the voiceover at the beginning of the advertisement stating, “Simple tax returns only,” or the fact that the TurboTax Free Edition logo appeared on screen throughout the ad. (GX516 (Intuit)). In determining the claims conveyed by an advertisement and whether it was likely to mislead

reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

The Proposed Finding is also incomplete because it fails to recognize that consumers clicking on the advertisement would be taken directly to the app store on their phone where they could download the TurboTax app, where they would see detailed information about the free offer's qualifications. (See PFF ¶253; Johnson (Intuit) Tr. 583; Rubin (Intuit) Tr. 1563-1564). Indeed, Complaint Counsel and their witnesses recognized that the TurboTax website repeatedly disclosed the qualifications of free TurboTax offers and provided detailed information about those qualifications, and the same information is available through the TurboTax app. (PFF ¶¶369-370). For example, Complaint Counsel's own 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 the free TurboTax offers. (PFF ¶790). Reasonable consumers understood that display ads such as GX516 link to a website or app when clicked (here, the TurboTax app) that includes more information about the advertised free offer, and by linking to the TurboTax app, the advertisement incorporated the detailed information available through the app. (PFF ¶254; *see also* CCF ¶455 ("The TurboTax website is ... integrated into TurboTax's free advertising.")).

Moreover, the Proposed Finding does not support an inference that the challenged ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The advertisement includes a TurboTax Free Edition logo and states both verbally and in writing in a similar font size as other text in the ad, "Simple tax returns only." (GX516 (Intuit)). By identifying the specific TurboTax SKU being advertised, the ad informed consumers that the offer does not apply to all TurboTax

products. (See PFF ¶¶317, 321). And by stating that the offer was available for “Simple tax returns only,” the ad informed consumers that the free offer was not available to everyone, and that eligibility was contingent on the complexity of the consumer’s tax returns. (PFF ¶322; see also PFF ¶¶130-145). Complaint Counsel have offered no evidence that *all* components of the ad were not visible or audible to consumers (see PFF ¶¶255-256), nor could they given the prominence of that content and the benchmarking analysis showing that the disclosures were comparable to disclosures in other companies’ ads (see PFF ¶¶257-259).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel assert were conveyed. Instead, the undisputed testimony from Intuit’s executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (See PFF ¶¶167-177, 190, 192-202, 405, 852, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel have not offered any evidence that this ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the qualifications included in the ad would prevent consumers from being misled by the ad. (See PFF ¶¶260-264, 302-322, 328-330, 334). Even without those disclosures, consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

239. GX517, which Intuit produced bearing Bates number INTUIT-FTC-PART3-000000050 and with the original file name TT_TY20-264_Free_X-Ray_Video_YT-

6sec_Web_16_9.mp4, is an online TurboTax ad for TY 2020 that, according to Intuit's data at GX434, [REDACTED]. (GX517 (Intuit); GX434 (Intuit); GX Summary 002 (Complaint Counsel) at 'Summary-Online_Ads' row 117, row 118; Baburek (Complaint Counsel) Tr. 318–23).

Response to Finding No. 239:

The Proposed Finding is misleading because GX517 is not an “online TurboTax ad.” It is a display advertisement for a specific TurboTax SKU, TurboTax Free Edition. (GX517 (Intuit)).

Intuit otherwise has no specific response except to note that the number of impressions or clicks an ad received is not evidence that the ad conveyed any of the claims asserted by Complaint Counsel, that reasonable consumers were likely to be deceived, or that the claims were material to reasonable consumers. The dissemination data offered in the Proposed Finding illustrates that reasonable consumers were *unlikely* to be deceived. That Complaint Counsel have identified only 17 even potentially relevant consumer complaints from Tax Year 2020 (*see* CCF ¶677), even though GX517 on its own received [REDACTED] that year, is strong evidence that reasonable consumers were not deceived by GX517 or any of the other challenged advertisements that ran in Tax Year 2020 (*see* PFF ¶¶632, 637, 639, 641-647).

240. A screenshot from GX517 is pictured below.

The advertisement features a blue background. On the left, a smartphone displays a green checkmark at the top, followed by a stack of money icon and the text "Great refund! \$3,267 Federal Refund". Behind the phone is a 2020 Wage and Tax Statement (Form W-2) with the following visible information:

| | | | |
|---|---|------------------|----------------------------|
| 1 Wages, tips, other comp. 31128.10 | 2 Federal income tax withheld 5430.12 | | |
| 3 Social security wages 34128.10 | 4 Social security tax withheld 2115.94 | | |
| 5 Medicare wages and tips 34128.10 | 6 Medicare tax withheld 494.86 | | |
| d Control number 198709981 | Dept. 100 | Corp. AABB | Employer use only A 223 |
| c Employer's name, address, and ZIP code MAJOR COMPANY 123 MAIN STREET SAN DIEGO, CA 92130 | | | |
| 7 Social Security number 234567 | a Employee's SSA number 123-45-6789 | 8 Allocated tips | |
| 9 Retirement | 10 Dependent care benefits | | |
| 12a See instructions for box 12 CI 27.00 | | | |
| 12b DJ 494.86 | | | |
| 12c | | | |
| 12d | | | |
| 13 Stat emp Ret. gain 3rd party sick pay X | | | |
| address and ZIP code ON BLVD. CA 92122 | | | |
| state ID no. | 16 State wages, tips, etc. | | |
| | 18 Local wages, tips, etc. | | |
| | 20 Locality name | | |
| Federal Filing Copy Wage and Tax Statement | | | 2020 |

On the right side of the advertisement, the text reads: "File Fed & State for \$0. Simple tax returns only." The Intuit TurboTax Free Edition logo is located in the bottom right corner.

(GX517 (Intuit)).

Response to Finding No. 240:

The Proposed Finding is incomplete and misleading because it is just a snippet of the full display video ad that actually ran and Complaint Counsel have omitted critical information for evaluating the advertisement. (GX517 (Intuit)). Consumers did not view the challenged advertisement as a single, static image. Not captured in the Proposed Finding is the voiceover at the beginning of the advertisement stating, "Simple tax returns only," or the fact that the TurboTax Free Edition logo appeared on screen throughout the ad and thus that the free offer was always presented in conjunction with that qualifying statement. (GX517 (Intuit)). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

The Proposed Finding is also incomplete because it fails to recognize that consumers clicking on the advertisement would be taken directly to the landing page on the TurboTax

website for TurboTax Free Edition, where they would see detailed information about that SKU's qualifications. (PFF ¶253; Rubin (Intuit) Tr. 1563-1564). Indeed, Complaint Counsel and their witnesses recognized that the TurboTax website repeatedly disclosed the qualifications of free TurboTax offers and provided detailed information about those qualifications. (PFF ¶¶369-370). For example, Complaint Counsel's own 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 the free TurboTax offers. (PFF ¶790). Reasonable consumers understood that display ads such as GX517 link to a website when clicked (here, the TurboTax website) that includes more information about the advertised free offer, and by linking directly to the TurboTax website, the advertisement incorporated the detailed information on the TurboTax website. (PFF ¶254; *see also* CCF ¶455 ("The TurboTax website is ... integrated into TurboTax's free advertising.")).

Moreover, the Proposed Finding does not support an inference that the challenged ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The advertisement includes a TurboTax Free Edition logo and states both verbally and in writing in a similar font size as other text in the ad, "Simple tax returns only." (GX517 (Intuit)). By identifying the specific TurboTax SKU being advertised, the ad informed consumers that the offer does not apply to all TurboTax products. (*See* PFF ¶¶317, 321). And by stating that the offer was available for "Simple tax returns only," the ad informed consumers that the free offer was not available to everyone, and that eligibility was contingent on the complexity of the consumer's tax returns. (PFF ¶322; *see also* PFF ¶¶130-145). Complaint Counsel have offered no evidence that *all* components of the ad were not visible or audible to consumers (*see* PFF ¶¶255-256), nor could they given the

prominence of that content and the benchmarking analysis showing that the disclosures were comparable to disclosures in other companies' ads (*see* PFF ¶¶257-259).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel assert were conveyed. Instead, the undisputed testimony from Intuit's executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (*See* PFF ¶¶167-177, 190, 192-202, 405, 852, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel have not offered any evidence that this ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the qualifications included in the ad would prevent consumers from being misled by the ad. (*See* PFF ¶¶260-264, 302-322, 328-330, 334). Even without those disclosures, consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

241. GX518, which Intuit produced bearing Bates number INTUIT-FTC-PART3-000000051 and with the original file name TT_TY20-180_Free_X-Ray_TikTok_9_16.mp4, is an online TurboTax ad for TY 2020 that, according to Intuit's data at GX434, [REDACTED] (GX518 (Intuit); GX434 (Intuit); GX Summary 002 (Complaint Counsel) at 'Summary-Online_Ads' row 92; Baburek (Complaint Counsel) Tr. 318–23).

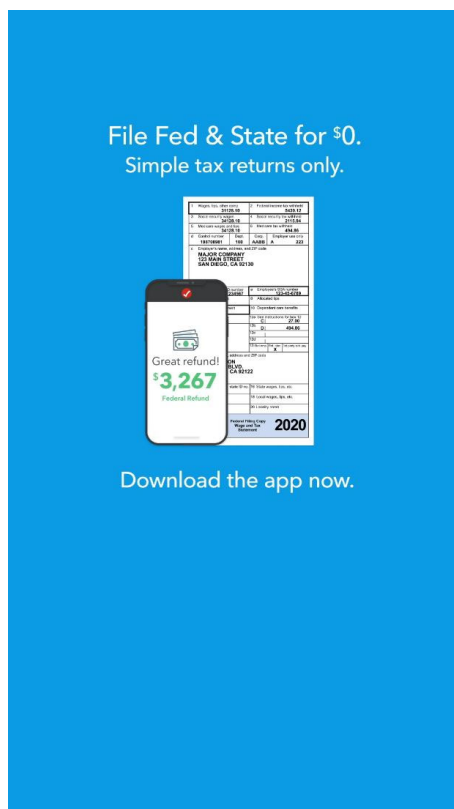
Response to Finding No. 241:

The Proposed Finding is misleading because GX518 is not an “online TurboTax ad.” (GX518 (Intuit)). It is a display advertisement directing consumers to the TurboTax app (GX160

(Rubin (Intuit) IHT) at 52-53), where they would see detailed information about all TurboTax SKUs, including the qualifications for free TurboTax SKUs (PFF ¶¶369-370; GX439 (Ryan (Intuit) Decl.) ¶29)).

Intuit otherwise has no specific response except to note that the number of impressions or clicks an ad received is not evidence that the ad conveyed any of the claims asserted by Complaint Counsel, that reasonable consumers were likely to be deceived, or that the claims were material to reasonable consumers. The dissemination data offered in the Proposed Finding illustrates that reasonable consumers were *unlikely* to be deceived. That Complaint Counsel have identified only 17 even potentially relevant consumer complaints from Tax Year 2020 (*see* CCF ¶677), even though GX518 on its own received [REDACTED] that year, is strong evidence that reasonable consumers were not deceived by GX518 or any of the other challenged advertisements that ran in Tax Year 2020 (*see* PFF ¶¶632, 637, 639, 641-647).

242. A screenshot from GX518 is pictured below.



(GX518 (Intuit)).

Response to Finding No. 242:

The Proposed Finding is incomplete and misleading because it is just a snippet of the full display video ad that actually ran and Complaint Counsel have omitted critical information for evaluating the advertisement. (GX518 (Intuit)). Consumers did not view the challenged advertisement as a single, static image. Not captured in the Proposed Finding is the voiceover at the beginning of the advertisement stating, “Simple tax returns only.” (GX518 (Intuit)). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

The Proposed Finding is also incomplete because it fails to recognize that consumers clicking on the advertisement would be taken directly to the app store on their phone where they

could download the TurboTax app, where they would see detailed information about the free offer's qualifications. (See PFF ¶253; Johnson (Intuit) Tr. 583; Rubin (Intuit) Tr. 1563-1564). Indeed, Complaint Counsel and their witnesses recognized that the TurboTax website repeatedly disclosed the qualifications of free TurboTax offers and provided detailed information about those qualifications, and the same information is available through the TurboTax app. (PFF ¶¶369-370; GX439 (Ryan (Intuit) Decl.) ¶29)). For example, Complaint Counsel's own 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 the free TurboTax offers. (PFF ¶790). Reasonable consumers understood that display ads such as GX518 link to a website or app when clicked (here, the TurboTax app) that includes more information about the advertised free offer, and by linking to the TurboTax app, the advertisement incorporated the detailed information available through the app. (PFF ¶254; *see also* CCF ¶455 ("The TurboTax website is ... integrated into TurboTax's free advertising.")).

Moreover, the Proposed Finding does not support an inference that the challenged ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The advertisement states both verbally and in writing, "Simple tax returns only." (GX518 (Intuit)). By stating that the offer was available for "Simple tax returns only" in a similar font size as other text in the ad, the ad informed consumers that the free offer was not available to everyone, and that eligibility was contingent on the complexity of the consumer's tax returns. (PFF ¶322; *see also* PFF ¶¶130-145). Complaint Counsel have offered no evidence that *all* components of the ad were not visible or audible to consumers (*see* PFF ¶¶255-256), nor could they given the prominence of that content and the

benchmarking analysis showing that the disclosures were comparable to disclosures in other companies' ads (*see* PFF ¶¶257-259).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel assert were conveyed. Instead, the undisputed testimony from Intuit's executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (*See* PFF ¶¶167-177, 190, 192-202, 405, 852, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel have not offered any evidence that this ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the qualifications included in the ad would prevent consumers from being misled by the ad. (*See* PFF ¶¶260-264, 302-322, 328-330, 334). Even without those disclosures, consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

243. GX519, which Intuit produced bearing Bates number INTUIT-FTC-PART3-000000052 and with the original file name TT_TY20-262_Free_X-Ray_Video_YT-10_Web_16_9.mp4, is an online TurboTax ad for TY 2020 that, according to Intuit's data at GX434, [REDACTED]. (GX519 (Intuit); GX434 (Intuit); GX Summary 002 (Complaint Counsel) at 'Summary-Online_Ads' row 113, row 114; Baburek (Complaint Counsel) Tr. 318–23).

Response to Finding No. 243:

The Proposed Finding is misleading because GX519 is not an “online TurboTax ad.” It is a display advertisement for a specific TurboTax SKU, TurboTax Free Edition. (GX519 (Intuit)).

Intuit otherwise has no specific response except to note that the number of impressions or clicks an ad received is not evidence that the ad conveyed any of the claims asserted by Complaint Counsel, that reasonable consumers were likely to be deceived, or that the claims were material to reasonable consumers. The dissemination data offered in the Proposed Finding illustrates that reasonable consumers were *unlikely* to be deceived. That Complaint Counsel have identified only 17 even potentially relevant consumer complaints from Tax Year 2020 (*see* CCF ¶677), even though GX519 on its own received [REDACTED] that year, is strong evidence that reasonable consumers were not deceived by GX519 or any of the other challenged advertisements that ran in Tax Year 2020 (*see* PFF ¶¶632, 637, 639, 641-647).

244. A screenshot from GX519 is pictured below.

The screenshot shows an advertisement for Intuit TurboTax. On the left, a smartphone displays a notification: "Great refund! \$3,267 Federal Refund". Behind the phone is a portion of a 2020 W-2 form. The form includes the following data points:

- 1 Wages, tips, other comp: 31,128.10
- 2 Federal income tax withheld: 5430.12
- 3 Social security wages: 34,128.10
- 4 Social security tax withheld: 2,115.94
- 5 Medicare wages and tips: 34,128.10
- 6 Medicare tax withheld: 494.86
- Control number: 198708981
- Dept.: 100
- Corp.: AABB
- Employer use only: 223
- Employer's name, address, and ZIP code: MAJOR COMPANY, 123 MAIN STREET, SAN DIEGO, CA 92130
- Employee's SSA number: 123-45-6789
- Allocated tips: 27.00
- Dependent care benefits: 494.86
- State ID no.: ON
- State wages, tips, etc.: BLVD.
- Local wages, tips, etc.: CA 92122
- Locality name: 2020

 The ad text on the right says "File Fed & State for \$0. Simple tax returns only." The Intuit TurboTax logo and "Free Edition" are in the bottom right corner.

(GX519 (Intuit)).

Response to Finding No. 244:

The Proposed Finding is incomplete and misleading because it is just a snippet of the full display video ad that actually ran and Complaint Counsel have omitted critical information for evaluating the advertisement. (GX519 (Intuit)). Consumers did not view the challenged advertisement as a single, static image. Not captured in the Proposed Finding is the voiceover at the beginning of the advertisement stating, “Simple tax returns only” or the fact that TurboTax Free Edition logo appeared on screen throughout the ad. (GX519 (Intuit)). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

The Proposed Finding is also incomplete because it fails to recognize that consumers clicking on the advertisement would be taken directly to the landing page on the TurboTax website for TurboTax Free Edition, where they would see detailed information about that SKU’s qualifications. (PFF ¶253; Rubin (Intuit) Tr. 1563-1564). Indeed, Complaint Counsel and their witnesses recognized that the TurboTax website repeatedly disclosed the qualifications of free TurboTax offers and provided detailed information about those qualifications. (PFF ¶¶369-370). For example, Complaint Counsel’s own 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 the free TurboTax offers. (PFF ¶790). Reasonable consumers understood that display ads such as GX519 link to a website when clicked (here, the TurboTax website) that includes more information about the advertised free offer, and by linking directly to the TurboTax website, the advertisement incorporated the detailed information on the TurboTax website. (PFF ¶254; *see also* CCF ¶455 (“The TurboTax website is ... integrated into TurboTax’s free advertising.”)).

Moreover, the Proposed Finding does not support an inference that the challenged ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The advertisement includes a TurboTax Free Edition logo and states both verbally and in writing in a large font size similar to other text in the ad, “Simple tax returns only.” (GX519 (Intuit)). By identifying the specific TurboTax SKU being advertised, the ad informed consumers that the offer does not apply to all TurboTax products. (See PFF ¶¶317, 321). And by stating that the offer was available for “Simple tax returns only,” the ad informed consumers that the free offer was not available to everyone, and that eligibility was contingent on the complexity of the consumer’s tax returns. (PFF ¶322; see also PFF ¶¶130-145). Complaint Counsel have offered no evidence that *all* components of the ad were not visible or audible to consumers (see PFF ¶¶255-256), nor could they given the prominence of that content and the benchmarking analysis showing that the disclosures were comparable to disclosures in other companies’ ads (see PFF ¶¶257-259).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel assert were conveyed. Instead, the undisputed testimony from Intuit’s executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (See PFF ¶¶167-177, 190, 192-202, 405, 852, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel have not offered any evidence that this ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the qualifications included in the ad would prevent consumers from being misled

by the ad. (See PFF ¶¶260-264, 302-322, 328-330, 334). Even without those disclosures, consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

245. GX520, which Intuit produced bearing Bates number INTUIT-FTC-PART3-000000055 and with the original file name TT_TY20-172_Free_Breakthrough_SnapAd_9_16.mp4, is an online TurboTax ad for TY 2020 that, according to Intuit's data at GX434, [REDACTED] (GX520 (Intuit); GX434 (Intuit); GX Summary 002 (Complaint Counsel) at 'Summary-Online_Ads' row 84, row 85; Baburek (Complaint Counsel) Tr. 318-23).

Response to Finding No. 245:

The Proposed Finding is misleading because GX520 is not an "online TurboTax ad." It is a display advertisement for a specific TurboTax SKU, TurboTax Free Edition. (GX520 (Intuit)).

Intuit otherwise has no specific response except to note that the number of impressions or clicks an ad received is not evidence that the ad conveyed any of the claims asserted by Complaint Counsel, that reasonable consumers were likely to be deceived, or that the claims were material to reasonable consumers. The dissemination data offered in the Proposed Finding illustrates that reasonable consumers were *unlikely* to be deceived. That Complaint Counsel have identified only 17 even potentially relevant consumer complaints from Tax Year 2020 (see CCF ¶677), even though GX520 on its own received [REDACTED] [REDACTED] that year, is strong evidence that reasonable consumers were not deceived by GX520 or any of the other challenged advertisements that ran in Tax Year 2020 (see PFF ¶¶632, 637, 639, 641-647).

246. A screenshot from GX520 is pictured below.



(GX520 (Intuit)).

Response to Finding No. 246:

The Proposed Finding is incomplete and misleading because it is just a snippet of the full display video ad that actually ran and Complaint Counsel have omitted critical information for evaluating the advertisement. (GX520 (Intuit)). Consumers did not view the challenged advertisement as a single, static image. The Proposed Finding does not capture the fact that “Simple tax returns only” is the first text the viewer sees, or that the TurboTax Free Edition logo appears on screen for nearly all of the ad. (GX520 (Intuit)). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

The Proposed Finding is also incomplete because it fails to recognize that consumers clicking on the advertisement would be taken directly to the app store on their phone where they could download the TurboTax app, where they would see detailed information about the free offer’s qualifications. (See PFF ¶253; Johnson (Intuit) Tr. 583; Rubin (Intuit) Tr. 1563-1564). Indeed, Complaint Counsel and their witnesses recognized that the TurboTax website repeatedly

disclosed the qualifications of free TurboTax offers and provided detailed information about those qualifications, and the same information is available through the TurboTax app. (PFF ¶¶369-370; GX439 (Ryan (Intuit) Decl.) ¶29)). For example, Complaint Counsel’s own 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 the free TurboTax offers. (PFF ¶790). Reasonable consumers understood that display ads such as GX520 link to a website or app when clicked (here, the TurboTax app) that includes more information about the advertised free offer, and by linking to the TurboTax app, the advertisement incorporated the detailed information available through the app. (PFF ¶254; *see also* CCF ¶455 (“The TurboTax website is ... integrated into TurboTax’s free advertising.”)).

Moreover, the Proposed Finding does not support an inference that the challenged ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The advertisement includes a TurboTax Free Edition logo and states prominently, “Simple tax returns only.” (GX520 (Intuit)). By identifying the specific TurboTax SKU being advertised, the ad informed consumers that the offer does not apply to all TurboTax products. (*See* PFF ¶¶317, 321). And by stating that the offer was available for “Simple tax returns only,” the ad informed consumers that the free offer was not available to everyone, and that eligibility was contingent on the complexity of the consumer’s tax returns. (PFF ¶322; *see also* PFF ¶¶130-145). Complaint Counsel have offered no evidence that *all* components of the ad were not visible to consumers (*see* PFF ¶255), nor could they given the prominence of that content and the benchmarking analysis showing that the disclosures were comparable to disclosures in other companies’ ads (*see* PFF ¶¶257-259).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel assert were conveyed. Instead, the undisputed testimony from Intuit's executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (See PFF ¶¶167-177, 190, 192-202, 405, 852, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel have not offered any evidence that this ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the qualifications included in the ad would prevent consumers from being misled by the ad. (See PFF ¶¶260-264, 302-322, 328-330, 334). Even without those disclosures, consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

247. GX521, which Intuit produced bearing Bates number INTUIT-FTC-PART3-000000056 and with the original file name TT_TY20-173_Free_FREEParade_SnapAd_9_16.mp4, is an online TurboTax ad for TY 2020 that, according to Intuit's data at GX434, [REDACTED]. (GX521 (Intuit); GX434 (Intuit); GX Summary 002 (Complaint Counsel) at 'Summary-Online_Ads' row 86, row 87; Baburek (Complaint Counsel) Tr. 318-23).

Response to Finding No. 247:

The Proposed Finding is misleading because GX521 is not an "online TurboTax ad." It is a display advertisement for a specific TurboTax SKU, TurboTax Free Edition. (GX521 (Intuit)).

Intuit otherwise has no specific response except to note that the number of impressions or clicks an ad received is not evidence that the ad conveyed any of the claims asserted by

Complaint Counsel, that reasonable consumers were likely to be deceived, or that the claims were material to reasonable consumers. The dissemination data offered in the Proposed Finding illustrates that reasonable consumers were *unlikely* to be deceived. That Complaint Counsel have identified only 17 even potentially relevant consumer complaints from Tax Year 2020 (*see* CCF ¶677), even though GX521 on its own received [REDACTED] [REDACTED] that year, is strong evidence that reasonable consumers were not deceived by GX521 or any of the other challenged advertisements that ran in Tax Year 2020 (*see* PFF ¶¶632, 637, 639, 641-647).

248. A screenshot from GX521 is pictured below.



(GX521 (Intuit)).

Response to Finding No. 248:

The Proposed Finding is incomplete and misleading because it is just a snippet of the full display video ad that actually ran and Complaint Counsel have omitted critical information for evaluating the advertisement. (GX521 (Intuit)). Consumers did not view the challenged advertisement as a single, static image. Not captured in the Proposed Finding is the fact that TurboTax Free Edition logo appeared on screen throughout the ad. (GX521 (Intuit)). In

determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

The Proposed Finding is also incomplete because it fails to recognize that consumers clicking on the advertisement would be taken directly to the app store on their phone where they could download the TurboTax app, where they would see detailed information about the free offer's qualifications. (*See* PFF ¶253; Johnson (Intuit) Tr. 583; Rubin (Intuit) Tr. 1563-1564). Indeed, Complaint Counsel and their witnesses recognized that the TurboTax website repeatedly disclosed the qualifications of free TurboTax offers and provided detailed information about those qualifications, and the same information is available through the TurboTax app. (PFF ¶¶369-370; GX439 (Ryan (Intuit) Decl.) ¶29)). For example, Complaint Counsel's own 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 the free TurboTax offers. (PFF ¶790). Reasonable consumers understood that display ads such as GX521 link to a website or app when clicked (here, the TurboTax app) that includes more information about the advertised free offer, and by linking to the TurboTax app, the advertisement incorporated the detailed information available through the app. (PFF ¶254; *see also* CCF ¶455 ("The TurboTax website is ... integrated into TurboTax's free advertising.")).

Moreover, the Proposed Finding does not support an inference that the challenged ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The advertisement includes a TurboTax Free Edition logo and states prominently in writing in a large font size, "Simple tax returns only." (GX521 (Intuit)). By identifying the specific TurboTax SKU being advertised, the ad

informed consumers that the offer does not apply to all TurboTax products. (*See* PFF ¶¶317, 321). And by stating that the offer was available for “Simple tax returns only,” the ad informed consumers that the free offer was not available to everyone, and that eligibility was contingent on the complexity of the consumer’s tax returns. (PFF ¶322; *see also* PFF ¶¶130-145). Complaint Counsel have offered no evidence that *all* components of the ad were not visible to consumers (*see* PFF ¶255), nor could they given the prominence of that content and the benchmarking analysis showing that the disclosures were comparable to disclosures in other companies’ ads (*see* PFF ¶¶257-259).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel assert were conveyed. Instead, the undisputed testimony from Intuit’s executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (*See* PFF ¶¶167-177, 190, 192-202, 405, 852, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel have not offered any evidence that this ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the qualifications included in the ad would prevent consumers from being misled by the ad. (*See* PFF ¶¶260-264, 302-322, 328-330, 334). Even without those disclosures, consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

249. GX522, which Intuit produced bearing Bates number INTUIT-FTC-PART3-000000057 and with the original file name TT_TY20-182_Free_CelebrationDance_TikTok_9_16.mp4, is an online TurboTax adT for TY 2020 that, according to Intuit's data at GX434, [REDACTED]. (GX522 (Intuit); GX434 (Intuit); GX Summary 002 (Complaint Counsel) at 'Summary-Online_Ads' row 93; Baburek (Complaint Counsel) Tr. 318–23).

Response to Finding No. 249:

The Proposed Finding is misleading because GX522 is not an “online TurboTax ad.” (GX522 (Intuit)). It is a display advertisement directing consumers to the TurboTax app (GX160 (Rubin (Intuit) IHT) at 52-53), where they would see detailed information about all TurboTax SKUs, including the qualifications for free TurboTax SKUs (PFF ¶¶369-370; GX439 (Ryan (Intuit) Decl.) ¶29)).

Intuit otherwise has no specific response except to note that the number of impressions or clicks an ad received is not evidence that the ad conveyed any of the claims asserted by Complaint Counsel, that reasonable consumers were likely to be deceived, or that the claims were material to reasonable consumers. The dissemination data offered in the Proposed Finding illustrates that reasonable consumers were *unlikely* to be deceived. That Complaint Counsel have identified only 17 even potentially relevant consumer complaints from Tax Year 2020 (*see* CCF ¶677), even though GX522 on its own received [REDACTED] that year, is strong evidence that reasonable consumers were not deceived by GX522 or any of the other challenged advertisements that ran in Tax Year 2020 (*see* PFF ¶¶632, 637, 639, 641-647).

250. Screenshots from GX522 are pictured below.



(GX522 (Intuit)).

Response to Finding No. 250:

The Proposed Finding is incomplete because it is just a snippet of the display video advertisement that actually ran. (PFF ¶364). It fails to capture the fact that “simple tax returns only” appeared on screen the entire time the ad referenced the free offer, and that the free offer was not shown for most of the ad. The Proposed Finding also does not include additional disclosures that would have been shown to consumers along with the image reproduced above. Paired with the video was text stating: “File your Fed & State taxes for FREE with TurboTax. Simple tax returns only.” (GX Summary 002 (FTC) at ‘Data-Online_Ad_Combined’ row 4291). Complaint Counsel have thus omitted critical information for evaluating the advertisement. In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

The Proposed Finding is also incomplete because it fails to recognize that consumers clicking on the advertisement would be taken directly to the app store on their phone where they could download the TurboTax app, where they would see detailed information about the free offer's qualifications. (*See* PFF ¶253; Johnson (Intuit) Tr. 583; Rubin (Intuit) Tr. 1563-1564). Indeed, Complaint Counsel and their witnesses recognized that the TurboTax website repeatedly disclosed the qualifications of free TurboTax offers and provided detailed information about those qualifications, and the same information is available through the TurboTax app. (PFF ¶¶369-370; GX439 (Ryan (Intuit) Decl.) ¶29)). For example, Complaint Counsel's own 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 the free TurboTax offers. (PFF ¶790). Reasonable consumers understood that display ads such as GX522 link to a website or app when clicked (here, the TurboTax app) that includes more information about the advertised free offer, and by linking to the TurboTax app, the advertisement incorporated the detailed information available through the app. (PFF ¶254; *see also* CCFF ¶455 ("The TurboTax website is ... integrated into TurboTax's free advertising.")).

Moreover, the Proposed Finding does not support an inference that the challenged ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The advertisement states in the same font size as the free offer that it is for "[s]imple tax returns only." (GX522 (Intuit)). By identifying the specific TurboTax SKU being advertised, the ad informed consumers that the offer does not apply to all TurboTax products. (*See* PFF ¶¶317, 321). And by stating that the offer was available for "Simple tax returns only," the ad informed consumers that the free offer was not available to everyone, and that eligibility was contingent on the complexity of the consumer's tax

returns. (PFF ¶322; *see also* PFF ¶¶130-145). Complaint Counsel have offered no evidence that *all* components of the ad were not visible to consumers (*see* PFF ¶255), nor could they given the prominence of that content and the benchmarking analysis showing that the disclosures were comparable to disclosures in other companies' ads (*see* PFF ¶¶257-259).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel assert were conveyed. Instead, the undisputed testimony from Intuit's executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (*See* PFF ¶¶167-177, 190, 192-202, 405, 852, 860, 870).

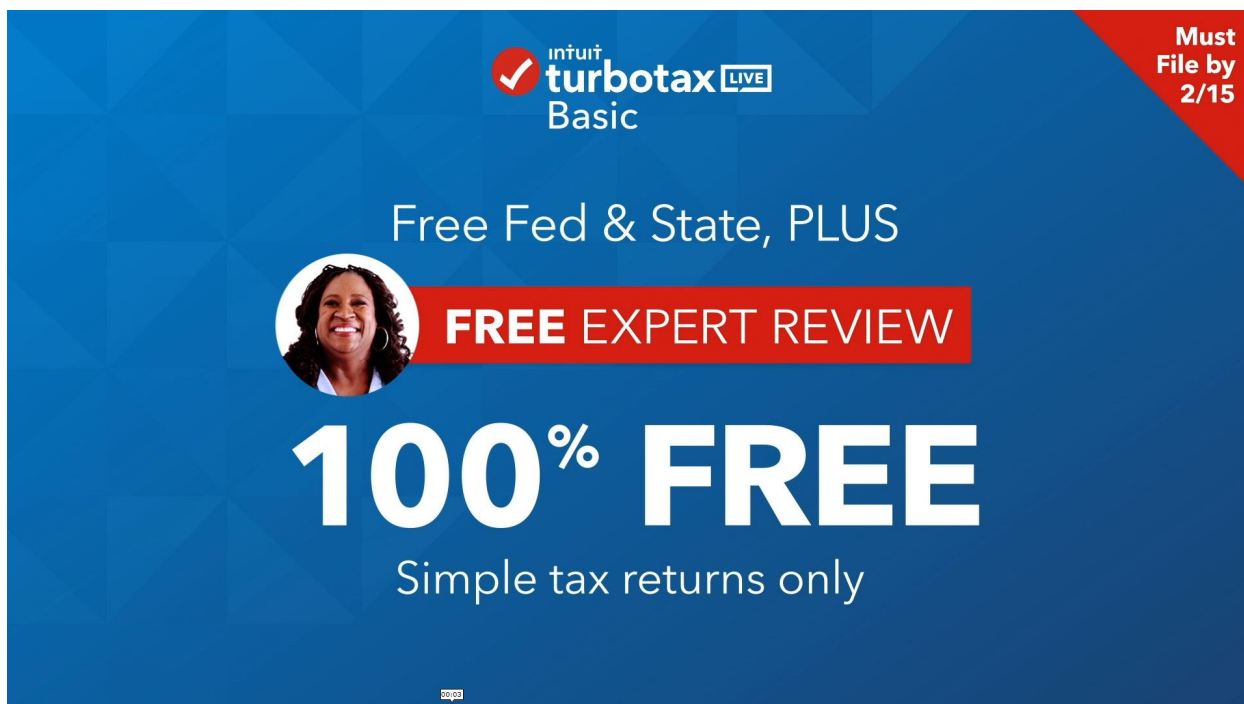
The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel have not offered any evidence that this ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the qualifications included in the ad would prevent consumers from being misled by the ad. (*See* PFF ¶¶260-264, 302-322, 328-330, 334). Even without those disclosures, consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

251. GX523, which Intuit produced bearing Bates number INTUIT-FTC-PART3-000000058 and with the original file name TT_TY20-313_TTLiveBasic_Baseline_BigFREE_16_9.mp4, is an online TurboTax ad for TY 2020 that, according to Intuit's data at GX434, [REDACTED]. (GX523 (Intuit); GX434 (Intuit); GX Summary 002 (Complaint Counsel) at 'Summary-Online_Ads' row 143; Baburek (Complaint Counsel) Tr. 318-23).

Response to Finding No. 251:

The Proposed Finding is misleading because GX523 is not an “online TurboTax ad.” It is a display advertisement for a specific TurboTax SKU, TurboTax Live Basic. (GX523 (Intuit)).

Intuit otherwise has no specific response except to note that the number of impressions or clicks an ad received is not evidence that the ad conveyed any of the claims asserted by Complaint Counsel, that reasonable consumers were likely to be deceived, or that the claims were material to reasonable consumers. The dissemination data offered in the Proposed Finding illustrates that reasonable consumers were *unlikely* to be deceived. That Complaint Counsel have identified only 17 even potentially relevant consumer complaints from Tax Year 2020 (*see* CCFE ¶¶677), even though GX523 on its own received [REDACTED] that year, is strong evidence that reasonable consumers were not deceived by GX523 or any of the other challenged advertisements that ran in Tax Year 2020 (*see* PFF ¶¶632, 637, 639, 641-647). 252. A screenshot from GX523 is pictured below.



(GX523 (Intuit)).

Response to Finding No. 252:

The Proposed Finding is incomplete and misleading because it is just a snippet of the full display video ad that actually ran and Complaint Counsel have omitted critical information for evaluating the advertisement. (GX523 (Intuit)). Consumers did not view the challenged advertisement as a single, static image. Not captured in the Proposed Finding is the fact that the TurboTax Live Basic logo and the phrase “[s]imple tax returns only” appear on screen throughout the entire ad and thus that the free offer was always presented in conjunction with those qualifications. (GX523 (Intuit)). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

The Proposed Finding is also incomplete because it fails to recognize that consumers clicking on the advertisement would be taken directly to the landing page on the TurboTax website for the free TurboTax Live Basic offer, where they would see detailed information about the free offer’s qualifications. (PFF ¶253; Rubin (Intuit) Tr. 1563-1564). Indeed, Complaint Counsel and their witnesses recognized that the TurboTax website repeatedly disclosed the qualifications of free TurboTax offers and provided detailed information about those qualifications. (PFF ¶¶369-370). For example, Complaint Counsel’s own 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 the free TurboTax offers. (PFF ¶790). Reasonable consumers understood that display ads such as GX523 link to a website when clicked (here, the TurboTax website) that includes more information about the advertised free offer, and by linking directly to the TurboTax website, the advertisement incorporated the detailed information on the TurboTax website. (PFF ¶254; *see also* CCF ¶455 (“The TurboTax website is ... integrated into TurboTax’s free advertising.”)).

Moreover, the Proposed Finding does not support an inference that the challenged ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The advertisement includes a TurboTax Live Basic logo and states prominently in a large font size similar to that of the other text in the ad, “Simple tax returns only.” (GX523 (Intuit)). By identifying the specific TurboTax SKU being advertised, the ad informed consumers that the offer does not apply to all TurboTax products. (See PFF ¶¶317, 321). And by stating that the offer was available for “Simple tax returns only,” the ad informed consumers that the free offer was not available to everyone, and that eligibility was contingent on the complexity of the consumer’s tax returns. (PFF ¶322; see also PFF ¶¶130-145). Complaint Counsel have offered no evidence that *all* components of the ad were not visible to consumers (see PFF ¶255), nor could they given the prominence of that content and the benchmarking analysis showing that the disclosures were comparable to disclosures in other companies’ ads (see PFF ¶¶257-259).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel assert were conveyed. Instead, the undisputed testimony from Intuit’s executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (See PFF ¶¶167-177, 190, 192-202, 405, 852, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel have not offered any evidence that this ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the qualifications included in the ad would prevent consumers from being misled

by the ad. (See PFF ¶¶260-264, 302-322, 328-330, 334). Even without those disclosures, consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

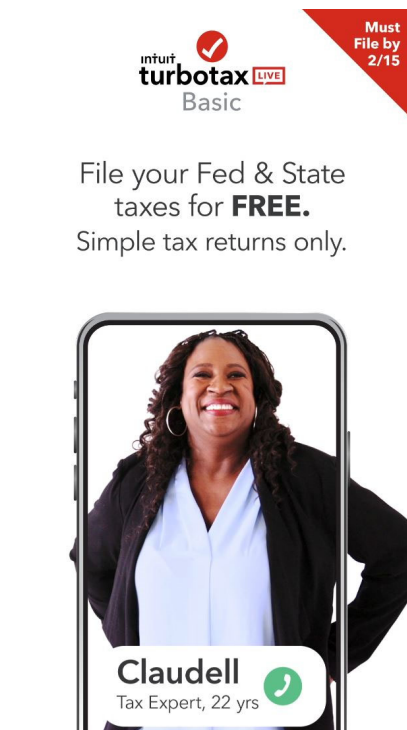
253. GX524, which Intuit produced bearing Bates number INTUIT-FTC-PART3-000000061 and with the original file name TT_TY20-312_TTLiveBasic_Baseline_LogoZoom_9_16.mp4, is an online TurboTax ad for TY 2020 that, according to Intuit's data at GX434, [REDACTED]. (GX524 (Intuit); GX434 (Intuit); GX Summary 002 (Complaint Counsel) at 'Summary-Online_Ads' row 142; Baburek (Complaint Counsel) Tr. 318-23).

Response to Finding No. 253:

The Proposed Finding is misleading because GX524 is not an "online TurboTax ad." It is a display advertisement for a specific TurboTax SKU, TurboTax Live Basic. (GX524 (Intuit)).

Intuit otherwise has no specific response except to note that the number of impressions or clicks an ad received is not evidence that the ad conveyed any of the claims asserted by Complaint Counsel, that reasonable consumers were likely to be deceived, or that the claims were material to reasonable consumers. The dissemination data offered in the Proposed Finding illustrates that reasonable consumers were *unlikely* to be deceived. That Complaint Counsel have identified only 17 even potentially relevant consumer complaints from Tax Year 2020 (see CCF ¶677), even though GX524 on its own received [REDACTED] that year, is strong evidence that reasonable consumers were not deceived by GX524 or any of the other challenged advertisements that ran in Tax Year 2020 (see PFF ¶¶632, 637, 639, 641-647).

254. A screenshot from GX524 is pictured below.



(GX524 (Intuit)).

Response to Finding No. 254:

The Proposed Finding is incomplete and misleading because it is just a snippet of the full display video ad that actually ran and Complaint Counsel have omitted critical information for evaluating the advertisement. (GX524 (Intuit)). Consumers did not view the challenged advertisement as a single, static image. Not captured in the Proposed Finding is the fact that the TurboTax Live Basic logo appeared alone on the screen at the beginning and end of the ad, or that the “[s]imple tax returns only” qualification accompanies every free claim presented in the ad. (GX524 (Intuit)). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

The Proposed Finding is also incomplete because it fails to recognize that consumers clicking on the advertisement would be taken directly to the landing page on the TurboTax website for the free TurboTax Live Basic offer, where they would see detailed information about

the free offer's qualifications. (PFF ¶253; Rubin (Intuit) Tr. 1563-1564). Indeed, Complaint Counsel and their witnesses recognized that the TurboTax website repeatedly disclosed the qualifications of free TurboTax offers and provided detailed information about those qualifications. (PFF ¶¶369-370). For example, Complaint Counsel's own 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 the free TurboTax offers. (PFF ¶790). Reasonable consumers understood that display ads such as GX524 link to a website when clicked (here, the TurboTax website) that includes more information about the advertised free offer, and by linking directly to the TurboTax website, the advertisement incorporated the detailed information on the TurboTax website. (PFF ¶254; *see also* CCFF ¶455 ("The TurboTax website is ... integrated into TurboTax's free advertising.")).

Moreover, the Proposed Finding does not support an inference that the challenged ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The advertisement includes a TurboTax Live Basic logo and states prominently in writing in the same font size as the reference to the free offer, "Simple tax returns only." (GX524 (Intuit)). By identifying the specific TurboTax SKU being advertised, the ad informed consumers that the offer does not apply to all TurboTax products. (*See* PFF ¶¶317, 321). And by stating that the offer was available for "Simple tax returns only," the ad informed consumers that the free offer was not available to everyone, and that eligibility was contingent on the complexity of the consumer's tax returns. (PFF ¶322; *see also* PFF ¶¶130-145). Complaint Counsel have offered no evidence that *all* components of the ad were not visible to consumers (*see* PFF ¶255), nor could they given the prominence of that

content and the benchmarking analysis showing that the disclosures were comparable to disclosures in other companies' ads (*see* PFF ¶¶257-259).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel assert were conveyed. Instead, the undisputed testimony from Intuit's executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (*See* PFF ¶¶167-177, 190, 192-202, 405, 852, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel have not offered any evidence that this ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the qualifications included in the ad would prevent consumers from being misled by the ad. (*See* PFF ¶¶260-264, 302-322, 328-330, 334). Even without those disclosures, consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

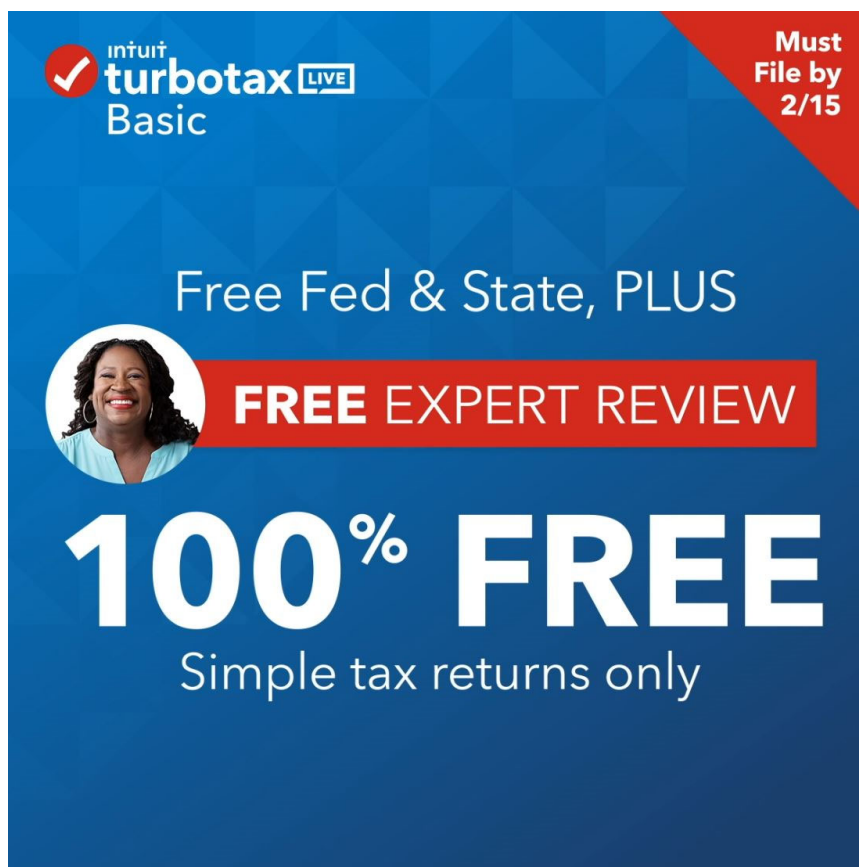
255. GX525, which Intuit produced bearing Bates number INTUIT-FTC-PART3-00000069 and with the original file name TT_TY20-144_TTLiveBasic_Baseline_Lifestyle_1_1.mp4, is an online TurboTax ad for TY 2020 that, according to Intuit's data at GX434, [REDACTED]. (GX525 (Intuit); GX434 (Intuit); GX Summary 002 (Complaint Counsel) at 'Summary-Online_Ads' row 53, row 54; Baburek (Complaint Counsel) Tr. 318–23).

Response to Finding No. 255:

The Proposed Finding is misleading because GX525 is not an “online TurboTax ad.” It is a display advertisement for a specific TurboTax SKU, TurboTax Live Basic. (GX525 (Intuit)).

Intuit otherwise has no specific response except to note that the number of impressions or clicks an ad received is not evidence that the ad conveyed any of the claims asserted by Complaint Counsel, that reasonable consumers were likely to be deceived, or that the claims were material to reasonable consumers. The dissemination data offered in the Proposed Finding illustrates that reasonable consumers were *unlikely* to be deceived. That Complaint Counsel have identified only 17 even potentially relevant consumer complaints from Tax Year 2020 (*see* CCF ¶¶677), even though GX525 on its own received [REDACTED] that year, is strong evidence that reasonable consumers were not deceived by GX525 or any of the other challenged advertisements that ran in Tax Year 2020 (*see* PFF ¶¶632, 637, 639, 641-647).

256. A screenshot from GX525 is pictured below.



(GX525 (Intuit)).

Response to Finding No. 256:

The Proposed Finding is incomplete and misleading because it is just a snippet of the full display video ad that actually ran and Complaint Counsel have omitted critical information for evaluating the advertisement. (GX525 (Intuit)). Consumers did not view the challenged advertisement as a single, static image. Not captured in the Proposed Finding is the voiceover at the beginning of the advertisement stating, “Simple tax returns only,” or the fact that the TurboTax Live Basic logo appeared on screen throughout the ad. (GX525 (Intuit)). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

The Proposed Finding is also incomplete because it fails to recognize that consumers clicking on the advertisement would be taken directly to the landing page on the TurboTax website for the free TurboTax Live Basic offer, where they would see detailed information about the free offer’s qualifications. (PFF ¶253; Rubin (Intuit) Tr. 1563-1564). Indeed, Complaint Counsel and their witnesses recognized that the TurboTax website repeatedly disclosed the qualifications of free TurboTax offers and provided detailed information about those qualifications. (PFF ¶¶369-370). For example, Complaint Counsel’s own 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 the free TurboTax offers. (PFF ¶790). Reasonable consumers understood that display ads such as GX525 link to a website when clicked (here, the TurboTax website) that includes more information about the advertised free offer, and by linking directly to the TurboTax website, the advertisement incorporated the detailed information on the TurboTax website. (PFF ¶254; *see also* CCF ¶455 (“The TurboTax website is ... integrated into TurboTax’s free advertising.”)).

Moreover, the Proposed Finding does not support an inference that the challenged ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The advertisement includes a TurboTax Live Basic logo and states both verbally and in writing in a large font size similar to that of other text in the ad, “Simple tax returns only.” (GX525 (Intuit)). By identifying the specific TurboTax SKU being advertised, the ad informed consumers that the offer does not apply to all TurboTax products. (See PFF ¶¶317, 321). And by stating that the offer was available for “Simple tax returns only,” the ad informed consumers that the free offer was not available to everyone, and that eligibility was contingent on the complexity of the consumer’s tax returns. (PFF ¶322; see also PFF ¶¶130-145). Complaint Counsel have offered no evidence that *all* components of the ad were not visible or audible to consumers (see PFF ¶¶255-256), nor could they given the prominence of that content and the benchmarking analysis showing that the disclosures were comparable to disclosures in other companies’ ads (see PFF ¶¶257-259).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel assert were conveyed. Instead, the undisputed testimony from Intuit’s executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (See PFF ¶¶167-177, 190, 192-202, 405, 852, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel have not offered any evidence that this ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the qualifications included in the ad would prevent consumers from being misled

by the ad. (See PFF ¶¶260-264, 302-322, 328-330, 334). Even without those disclosures, consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

257. GX526, which Intuit produced bearing Bates number INTUIT-FTC-PART3-000000070 and with the original file name TT_TY20-315_TTLiveBasic_Baseline_Lifestyle_16_9.mp4, is an online TurboTax ad for TY 2020 that, according to Intuit's data at GX434, [REDACTED]. (GX526 (Intuit); GX434 (Intuit); GX Summary 002 (Complaint Counsel) at 'Summary-Online_Ads' row 145; Baburek (Complaint Counsel) Tr. 318-23).

Response to Finding No. 257:

The Proposed Finding is misleading because GX526 is not an "online TurboTax ad." It is a display advertisement for a specific TurboTax SKU, TurboTax Live Basic. (GX526 (Intuit)).

Intuit otherwise has no specific response except to note that the number of impressions or clicks an ad received is not evidence that the ad conveyed any of the claims asserted by Complaint Counsel, that reasonable consumers were likely to be deceived, or that the claims were material to reasonable consumers. The dissemination data offered in the Proposed Finding illustrates that reasonable consumers were *unlikely* to be deceived. That Complaint Counsel have identified only 17 even potentially relevant consumer complaints from Tax Year 2020 (see CCF ¶677), even though GX526 on its own received [REDACTED] that year, is strong evidence that reasonable consumers were not deceived by GX526 or any of the other challenged advertisements that ran in Tax Year 2020 (see PFF ¶¶632, 637, 639, 641-647).

258. A screenshot from GX526 is pictured below.

(GX526 (Intuit)).

Response to Finding No. 258:

The Proposed Finding is incomplete and misleading because it is just a snippet of the full display video ad that actually ran and Complaint Counsel have omitted critical information for evaluating the advertisement. (GX526 (Intuit)). Consumers did not view the challenged advertisement as a single, static image. Not captured in the Proposed Finding is the voiceover at the beginning of the advertisement stating, “Simple tax returns only,” or the fact that the TurboTax Live Basic logo appeared on screen throughout the ad. (GX526 (Intuit)). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

The proposed Finding is also incomplete because it fails to recognize that consumers clicking on the advertisement would be taken directly to the landing page on the TurboTax website for the free TurboTax Live Basic offer, where they would see detailed information about

the free offer's qualifications. (PFF ¶253; Rubin (Intuit) Tr. 1563-1564). Indeed, Complaint Counsel and their witnesses recognized that the TurboTax website repeatedly disclosed the qualifications of free TurboTax offers and provided detailed information about those qualifications. (PFF ¶¶369-370). For example, Complaint Counsel's own 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 the free TurboTax offers. (PFF ¶790). Reasonable consumers understood that display ads such as GX526 link to a website when clicked (here, the TurboTax website) that includes more information about the advertised free offer, and by linking directly to the TurboTax website, the advertisement incorporated the detailed information on the TurboTax website. (PFF ¶254; *see also* CCFF ¶455 ("The TurboTax website is ... integrated into TurboTax's free advertising.")).

Moreover, the Proposed Finding does not support an inference that the challenged ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The advertisement includes a TurboTax Live Basic logo and states both verbally and in writing in a large font size similar to that of other text in the ad, "Simple tax returns only." (GX526 (Intuit)). By identifying the specific TurboTax SKU being advertised, the ad informed consumers that the offer does not apply to all TurboTax products. (*See* PFF ¶¶317, 321). And by stating that the offer was available for "Simple tax returns only," the ad informed consumers that the free offer was not available to everyone, and that eligibility was contingent on the complexity of the consumer's tax returns. (PFF ¶322; *see also* PFF ¶¶130-145). Complaint Counsel have offered no evidence that *all* components of the ad were not visible or audible to consumers (*see* PFF ¶¶255-256), nor could they given the

prominence of that content and the benchmarking analysis showing that the disclosures were comparable to disclosures in other companies' ads (*see* PFF ¶¶257-259).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel assert were conveyed. Instead, the undisputed testimony from Intuit's executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (*See* PFF ¶¶167-177, 190, 192-202, 405, 852, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel have not offered any evidence that this ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the qualifications included in the ad would prevent consumers from being misled by the ad. (*See* PFF ¶¶260-264, 302-322, 328-330, 334). Even without those disclosures, consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

259. GX527, which Intuit produced bearing Bates number INTUIT-FTC-PART3-000000073 and with the original file name TY20-162_FREE_FreeRearrange_Pandora_Insterstitial_750x1400.jpg, is an online TurboTax ad for TY 2020 that, according to Intuit's data at GX434, [REDACTED] (GX527 (Intuit); GX434 (Intuit); GX Summary 002 (Complaint Counsel) at 'Summary-Online_Ads' row 73; Baburek (Complaint Counsel) Tr. 318–23).

Response to Finding No. 259:

The Proposed Finding is misleading because GX527 is not an “online TurboTax ad.” It is a display advertisement for a specific TurboTax SKU, TurboTax Free Edition. (GX527 (Intuit)).

Intuit otherwise has no specific response except to note that the number of impressions or clicks an ad received is not evidence that the ad conveyed any of the claims asserted by Complaint Counsel, that reasonable consumers were likely to be deceived, or that the claims were material to reasonable consumers. The dissemination data offered in the Proposed Finding illustrates that reasonable consumers were *unlikely* to be deceived. That Complaint Counsel have identified only 17 even potentially relevant consumer complaints from Tax Year 2020 (*see* CCF ¶677), even though GX527 on its own received [REDACTED] that year, is strong evidence that reasonable consumers were not deceived by GX527 or any of the other challenged advertisements that ran in Tax Year 2020 (*see* PFF ¶¶632, 637, 639, 641-647).

260. A screenshot from GX527 is pictured below.

intuit
turbotax
Free Edition

FREE | \$0 | \$0 | \$0
— guaranteed — | Fed | State | To File

Simple tax returns only

Get App

Maximum refund, guaranteed.

NICE REFUND!
\$3,267
FEDERAL

(GX527 (Intuit)).

Response to Finding No. 260:

The Proposed Finding is incomplete because it fails to recognize that consumers clicking on the advertisement would be taken directly to the app store on their phone where they could download the TurboTax app, where they would see detailed information about the free offer's qualifications. (See PFF ¶253; Johnson (Intuit) Tr. 583; Rubin (Intuit) Tr. 1563-1564). Indeed, Complaint Counsel and their witnesses recognized that the TurboTax website repeatedly disclosed the qualifications of free TurboTax offers and provided detailed information about those qualifications, and the same information is available through the TurboTax app. (PFF

¶¶369-370; GX439 (Ryan (Intuit) Decl.) ¶29)). For example, Complaint Counsel’s own 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 the free TurboTax offers. (PFF ¶790). Reasonable consumers understood that display ads such as GX527 link to a website or app when clicked (here, the TurboTax app) that includes more information about the advertised free offer, and by linking to the TurboTax app, the advertisement incorporated the detailed information available through the app. (PFF ¶254; *see also* CCF ¶455 (“The TurboTax website is ... integrated into TurboTax’s free advertising.”)). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

Moreover, the Proposed Finding does not support an inference that the challenged ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The advertisement includes a TurboTax Free Edition logo and states prominently, “Simple tax returns only.” (GX527 (Intuit)). By identifying the specific TurboTax SKU being advertised, the ad informed consumers that the offer does not apply to all TurboTax products. (*See* PFF ¶¶317, 321). And by stating that the offer was available for “Simple tax returns only,” the ad informed consumers that the free offer was not available to everyone, and that eligibility was contingent on the complexity of the consumer’s tax returns. (PFF ¶322; *see also* PFF ¶¶130-145). Complaint Counsel have offered no evidence that *all* components of the ad were not visible to consumers (*see* PFF ¶255), nor could they given the prominence of that content and the benchmarking analysis showing that the disclosures were comparable to disclosures in other companies’ ads (*see* PFF ¶¶257-259).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel assert were conveyed. Instead, the undisputed testimony from Intuit's executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (See PFF ¶¶167-177, 190, 192-202, 405, 852, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel have not offered any evidence that this ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the qualifications included in the ad would prevent consumers from being misled by the ad. (See PFF ¶¶260-264, 302-322, 328-330, 334). Even without those disclosures, consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

261. GX528, which Intuit produced bearing Bates number INTUIT-FTC-PART3-000000082 and with the original file name TT_TY20-314_TTLiveBasic_Baseline_Rollout_9_16.mp4, is an online TurboTax ad for TY 2020 that, according to Intuit's data at GX434, [REDACTED]. (GX528 (Intuit); GX434 (Intuit); GX Summary 002 (Complaint Counsel) at 'Summary-Online_Ads' row 144; Baburek (Complaint Counsel) Tr. 318-23).

Response to Finding No. 261:

The Proposed Finding is misleading because GX528 is not an "online TurboTax ad." It is a display advertisement for a specific TurboTax SKU, TurboTax Live Basic. (GX528 (Intuit)).

Intuit otherwise has no specific response except to note that the number of impressions or clicks an ad received is not evidence that the ad conveyed any of the claims asserted by

Complaint Counsel, that reasonable consumers were likely to be deceived, or that the claims were material to reasonable consumers. The dissemination data offered in the Proposed Finding illustrates that reasonable consumers were *unlikely* to be deceived. That Complaint Counsel have identified only 17 even potentially relevant consumer complaints from Tax Year 2020 (*see* CCF ¶¶677), even though GX528 on its own received [REDACTED] that year, is strong evidence that reasonable consumers were not deceived by GX528 or any of the other challenged advertisements that ran in Tax Year 2020 (*see* PFF ¶¶632, 637, 639, 641-647).

262. A screenshot from GX528 is pictured below.



(GX528 (Intuit)).

Response to Finding No. 262:

The Proposed Finding is incomplete and misleading because it is just a snippet of the full display video ad that actually ran and Complaint Counsel have omitted critical information for

evaluating the advertisement. (GX528 (Intuit)). Consumers did not view the challenged advertisement as a single, static image. Not captured in the Proposed Finding is the fact that the TurboTax Live Basic logo appeared on screen throughout the ad, or that the free claim is always presented in tandem with “[s]imple tax returns only.” (GX528 (Intuit)). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

The Proposed Finding is also incomplete because it fails to recognize that consumers clicking on the advertisement would be taken directly to the landing page on the TurboTax website for the free TurboTax Live Basic offer, where they would see detailed information about the free offer’s qualifications. (PFF ¶253; Rubin (Intuit) Tr. 1563-1564). Indeed, Complaint Counsel and their witnesses recognized that the TurboTax website repeatedly disclosed the qualifications of free TurboTax offers and provided detailed information about those qualifications. (PFF ¶¶369-370). For example, Complaint Counsel’s own 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 the free TurboTax offers. (PFF ¶790). Reasonable consumers understood that display ads such as GX528 link to a website when clicked (here, the TurboTax website) that includes more information about the advertised free offer, and by linking directly to the TurboTax website, the advertisement incorporated the detailed information on the TurboTax website. (PFF ¶254; *see also* CCF ¶455 (“The TurboTax website is ... integrated into TurboTax’s free advertising.”)).

Moreover, the Proposed Finding does not support an inference that the challenged ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would

necessarily be free for the consumer when it was not. The advertisement includes a TurboTax Live Basic logo and states prominently, “Simple tax returns only.” (GX528 (Intuit)). By identifying the specific TurboTax SKU being advertised, the ad informed consumers that the offer does not apply to all TurboTax products. (*See* PFF ¶¶317, 321). And by stating that the offer was available for “Simple tax returns only,” the ad informed consumers that the free offer was not available to everyone, and that eligibility was contingent on the complexity of the consumer’s tax returns. (PFF ¶322; *see also* PFF ¶¶130-145). Complaint Counsel have offered no evidence that *all* components of the ad were not visible to consumers (*see* PFF ¶255), nor could they given the prominence of that content and the benchmarking analysis showing that the disclosures were comparable to disclosures in other companies’ ads (*see* PFF ¶¶257-259).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel assert were conveyed. Instead, the undisputed testimony from Intuit’s executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (*See* PFF ¶¶167-177, 190, 192-202, 405, 852, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel have not offered any evidence that this ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the qualifications included in the ad would prevent consumers from being misled by the ad. (*See* PFF ¶¶260-264, 302-322, 328-330, 334). Even without those disclosures, consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information

about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

263. GX529, which Intuit produced bearing Bates number INTUIT-FTC-PART3-000000085 and with the original file name TT_TY20-143_TTLiveBasic_Baseline_Rollout_16_9.mp4, is an online TurboTax ad for TY 2020 that, according to Intuit's data at GX434, [REDACTED]. (GX529 (Intuit); GX434 (Intuit); GX Summary 002 (Complaint Counsel) at 'Summary-Online_Ads' row 51, row 52; Baburek (Complaint Counsel) Tr. 318–23).

Response to Finding No. 263:

The Proposed Finding is misleading because GX529 is not an “online TurboTax ad.” It is a display advertisement for a specific TurboTax SKU, TurboTax Live Basic. (GX529 (Intuit)).

Intuit otherwise has no specific response except to note that the number of impressions or clicks an ad received is not evidence that the ad conveyed any of the claims asserted by Complaint Counsel, that reasonable consumers were likely to be deceived, or that the claims were material to reasonable consumers. The dissemination data offered in the Proposed Finding illustrates that reasonable consumers were *unlikely* to be deceived. That Complaint Counsel have identified only 17 even potentially relevant consumer complaints from Tax Year 2020 (*see* CCF ¶677), even though GX529 on its own received [REDACTED] that year, is strong evidence that reasonable consumers were not deceived by GX529 or any of the other challenged advertisements that ran in Tax Year 2020 (*see* PFF ¶¶632, 637, 639, 641-647).

264. A screenshot from GX529 is pictured below.

intuit
turbotax LIVE
Basic

Free Fed & State, PLUS

FREE EXPERT REVIEW

100% FREE
Simple tax returns only

Must File by 2/15

(GX529 (Intuit)).

Response to Finding No. 264:

The Proposed Finding is incomplete and misleading because it is just a snippet of the full display video ad that actually ran and Complaint Counsel have omitted critical information for evaluating the advertisement. (GX529 (Intuit)). Consumers did not view the challenged advertisement as a single, static image. Not captured in the Proposed Finding is the fact that the TurboTax Live Basic logo appeared on screen throughout the ad, or that the free claim is always presented in tandem with “[s]imple tax returns only.” (GX529 (Intuit)). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

The Proposed Finding is also incomplete because it fails to recognize that consumers clicking on the advertisement would be taken directly to the landing page on the TurboTax website for the free TurboTax Live Basic offer, where they would see detailed information about

the free offer's qualifications. (PFF ¶253; Rubin (Intuit) Tr. 1563-1564). Indeed, Complaint Counsel and their witnesses recognized that the TurboTax website repeatedly disclosed the qualifications of free TurboTax offers and provided detailed information about those qualifications. (PFF ¶¶369-370). For example, Complaint Counsel's own 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 the free TurboTax offers. (PFF ¶790). Reasonable consumers understood that display ads such as GX529 link to a website when clicked (here, the TurboTax website) that includes more information about the advertised free offer, and by linking directly to the TurboTax website, the advertisement incorporated the detailed information on the TurboTax website. (PFF ¶254; *see also* CCF ¶455 ("The TurboTax website is ... integrated into TurboTax's free advertising.")).

Moreover, the Proposed Finding does not support an inference that the challenged ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The advertisement includes a TurboTax Live Basic logo and states prominently in a large font size similar to other text in the ad, "Simple tax returns only." (GX529 (Intuit)). By identifying the specific TurboTax SKU being advertised, the ad informed consumers that the offer does not apply to all TurboTax products. (*See* PFF ¶¶317, 321). And by stating that the offer was available for "Simple tax returns only," the ad informed consumers that the free offer was not available to everyone, and that eligibility was contingent on the complexity of the consumer's tax returns. (PFF ¶322; *see also* PFF ¶¶130-145). Complaint Counsel have offered no evidence that *all* components of the ad were not visible to consumers (*see* PFF ¶255), nor could they given the prominence of that content and the

benchmarking analysis showing that the disclosures were comparable to disclosures in other companies' ads (*see* PFF ¶¶257-259).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel assert were conveyed. Instead, the undisputed testimony from Intuit's executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (*See* PFF ¶¶167-177, 190, 192-202, 405, 852, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel have not offered any evidence that this ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the qualifications included in the ad would prevent consumers from being misled by the ad. (*See* PFF ¶¶260-264, 302-322, 328-330, 334). Even without those disclosures, consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

265. GX530, which Intuit produced bearing Bates number INTUIT-FTC-PART3-000000086 and with the original file name TT_TY20-147_TTLiveBasic_Baseline_LogoZoom_TikTok_9_16.mp4, is an online TurboTax ad for TY 2020 that, according to Intuit's data at GX434, [REDACTED] (GX530 (Intuit); GX434 (Intuit); GX Summary 002 (Complaint Counsel) at 'Summary-Online_Ads' row 59; Baburek (Complaint Counsel) Tr. 318–23).

Response to Finding No. 265:

The Proposed Finding is misleading because GX530 is not an “online TurboTax ad.” It is a display advertisement for a specific TurboTax SKU, TurboTax Live Basic. (GX530 (Intuit)).

Intuit otherwise has no specific response except to note that the number of impressions or clicks an ad received is not evidence that the ad conveyed any of the claims asserted by Complaint Counsel, that reasonable consumers were likely to be deceived, or that the claims were material to reasonable consumers. The dissemination data offered in the Proposed Finding illustrates that reasonable consumers were *unlikely* to be deceived. That Complaint Counsel have identified only 17 even potentially relevant consumer complaints from Tax Year 2020 (*see* CCF ¶677), even though GX530 on its own received [REDACTED] that year, is strong evidence that reasonable consumers were not deceived by GX530 or any of the other challenged advertisements that ran in Tax Year 2020 (*see* PFF ¶¶632, 637, 639, 641-647).

266. A screenshot from GX530 is pictured below.



(GX530 (Intuit)).

Response to Finding No. 266:

The Proposed Finding is incomplete and misleading because it is just a snippet of the full display video ad that actually ran and Complaint Counsel have omitted critical information for evaluating the advertisement. (GX530 (Intuit)). Consumers did not view the challenged advertisement as a single, static image. Not captured in the Proposed Finding is the fact that the TurboTax Live Basic logo appeared alone on the screen at the beginning and end of the ad, or that the “[s]imple tax returns only” qualification accompanies every free claim presented in the ad. (GX530 (Intuit)). In determining the claims conveyed by an advertisement and whether it

was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

The Proposed Finding is also incomplete because it fails to recognize that consumers clicking on the advertisement would be taken directly to the app store on their phone where they could download the TurboTax app, where they would see detailed information about the free offer's qualifications. (*See* PFF ¶253; Johnson (Intuit) Tr. 583; Rubin (Intuit) Tr. 1563-1564). Indeed, Complaint Counsel and their witnesses recognized that the TurboTax website repeatedly disclosed the qualifications of free TurboTax offers and provided detailed information about those qualifications, and the same information is available through the TurboTax app. (PFF ¶¶369-370; GX439 (Ryan (Intuit) Decl.) ¶29)). For example, Complaint Counsel's own 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 the free TurboTax offers. (PFF ¶790). Reasonable consumers understood that display ads such as GX530 link to a website or app when clicked (here, the TurboTax app) that includes more information about the advertised free offer, and by linking to the TurboTax app, the advertisement incorporated the detailed information available through the app. (PFF ¶254; *see also* CCF ¶455 ("The TurboTax website is ... integrated into TurboTax's free advertising.")).

Moreover, the Proposed Finding does not support an inference that the challenged ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The advertisement includes a TurboTax Live Basic logo and states prominently in the same or similar font size as the free offer, "Simple tax returns only." (GX530 (Intuit)). By identifying the specific TurboTax SKU being advertised, the ad informed consumers that the offer does not apply to all TurboTax products. (*See* PFF

¶¶317, 321). And by stating that the offer was available for “Simple tax returns only,” the ad informed consumers that the free offer was not available to everyone, and that eligibility was contingent on the complexity of the consumer’s tax returns. (PFF ¶322; *see also* PFF ¶¶130-145). Complaint Counsel have offered no evidence that *all* components of the ad were not visible to consumers (*see* PFF ¶255), nor could they given the prominence of that content and the benchmarking analysis showing that the disclosures were comparable to disclosures in other companies’ ads (*see* PFF ¶¶257-259).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel assert were conveyed. Instead, the undisputed testimony from Intuit’s executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (*See* PFF ¶¶167-177, 190, 192-202, 405, 852, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel have not offered any evidence that this ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the qualifications included in the ad would prevent consumers from being misled by the ad. (*See* PFF ¶¶260-264, 302-322, 328-330, 334). Even without those disclosures, consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

267. GX531, which Intuit produced bearing Bates number INTUIT-FTC-PART3-000000087 and with the original file name TT_TY20-

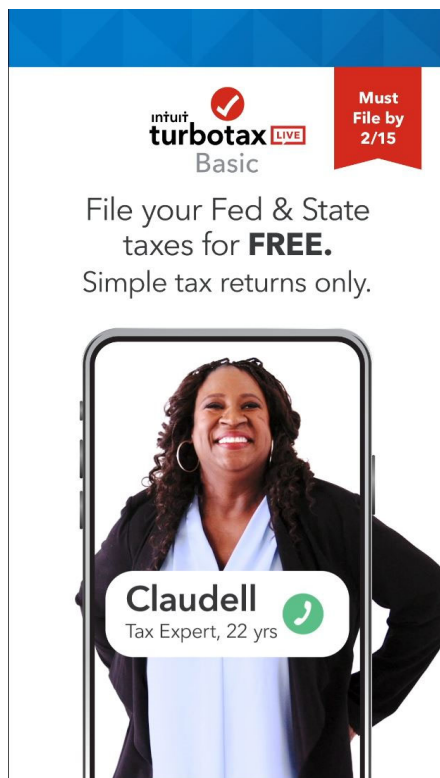
145_TTLiveBasic_Baseline_LogoZoom_Snap_9_16.mp4, is an online TurboTax ad for TY 2020 that, according to Intuit's data at GX434, [REDACTED] (GX531 (Intuit); GX434 (Intuit); GX Summary 002 (Complaint Counsel) at 'Summary-Online_Ads' row 55, row 56; Baburek (Complaint Counsel) Tr. 318–23).

Response to Finding No. 267:

The Proposed Finding is misleading because GX531 is not an “online TurboTax ad.” It is a display advertisement for a specific TurboTax SKU, TurboTax Live Basic. (GX531 (Intuit)).

Intuit otherwise has no specific response except to note that the number of impressions or clicks an ad received is not evidence that the ad conveyed any of the claims asserted by Complaint Counsel, that reasonable consumers were likely to be deceived, or that the claims were material to reasonable consumers. The dissemination data offered in the Proposed Finding illustrates that reasonable consumers were *unlikely* to be deceived. That Complaint Counsel have identified only 17 even potentially relevant consumer complaints from Tax Year 2020 (*see* CCF ¶677), even though GX531 on its own received [REDACTED] [REDACTED] that year, is strong evidence that reasonable consumers were not deceived by GX531 or any of the other challenged advertisements that ran in Tax Year 2020 (*see* PFF ¶¶632, 637, 639, 641-647).

268. A screenshot from GX531 is pictured below.



(GX531 (Intuit)).

Response to Finding No. 268:

The Proposed Finding is incomplete and misleading because it is just a snippet of the full display video ad that actually ran and Complaint Counsel have omitted critical information for evaluating the advertisement. (GX531 (Intuit)). Consumers did not view the challenged advertisement as a single, static image. Not captured in the Proposed Finding is the fact that the TurboTax Live Basic logo appeared alone on the screen at the beginning and end of the ad, or that the “[s]imple tax returns only” qualification accompanies every free claim presented in the ad. (GX531 (Intuit)). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

The Proposed Finding is also incomplete because it fails to recognize that consumers clicking on the advertisement would be taken directly to the app store on their phone where they

could download the TurboTax app, where they would see detailed information about the free offer's qualifications. (See PFF ¶253; Johnson (Intuit) Tr. 583; Rubin (Intuit) Tr. 1563-1564). Indeed, Complaint Counsel and their witnesses recognized that the TurboTax website repeatedly disclosed the qualifications of free TurboTax offers and provided detailed information about those qualifications, and the same information is available through the TurboTax app. (PFF ¶¶369-370; GX439 (Ryan (Intuit) Decl.) ¶29)). For example, Complaint Counsel's own 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 the free TurboTax offers. (PFF ¶790). Reasonable consumers understood that display ads such as GX531 link to a website or app when clicked (here, the TurboTax app) that includes more information about the advertised free offer, and by linking to the TurboTax app, the advertisement incorporated the detailed information available through the app. (PFF ¶254; *see also* CCF ¶455 ("The TurboTax website is ... integrated into TurboTax's free advertising.")).

Moreover, the Proposed Finding does not support an inference that the challenged ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The advertisement includes a TurboTax Live Basic logo and states prominently in the same or similar font size as the free offer, "Simple tax returns only." (GX531 (Intuit)). By identifying the specific TurboTax SKU being advertised, the ad informed consumers that the offer does not apply to all TurboTax products. (See PFF ¶¶317, 321). And by stating that the offer was available for "Simple tax returns only," the ad informed consumers that the free offer was not available to everyone, and that eligibility was contingent on the complexity of the consumer's tax returns. (PFF ¶322; *see also* PFF ¶¶130-145). Complaint Counsel have offered no evidence that *all* components of the ad were not

visible to consumers (*see* PFF ¶255), nor could they given the prominence of that content and the benchmarking analysis showing that the disclosures were comparable to disclosures in other companies' ads (*see* PFF ¶¶257-259).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel assert were conveyed. Instead, the undisputed testimony from Intuit's executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (*See* PFF ¶¶167-177, 190, 192-202, 405, 852, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel have not offered any evidence that this ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the qualifications included in the ad would prevent consumers from being misled by the ad. (*See* PFF ¶¶260-264, 302-322, 328-330, 334). Even without those disclosures, consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

269. GX532, which Intuit produced bearing Bates number INTUIT-FTC-PART3-000000088 and with the original file name TT_TY20-146_TTLiveBasic_Baseline_Rollout_Snap_9_16.mp4, is an online TurboTax ad for TY 2020 that, according to Intuit's data at GX434, [REDACTED] (GX532 (Intuit); GX434 (Intuit); GX Summary 002 (Complaint Counsel) at 'Summary-Online_Ads' row 57, row 58; Baburek (Complaint Counsel) Tr. 318-23).

Response to Finding No. 269:

The Proposed Finding is misleading because GX532 is not an “online TurboTax ad.” It is a display advertisement for a specific TurboTax SKU, TurboTax Live Basic. (GX532 (Intuit)).

Intuit otherwise has no specific response except to note that the number of impressions or clicks an ad received is not evidence that the ad conveyed any of the claims asserted by Complaint Counsel, that reasonable consumers were likely to be deceived, or that the claims were material to reasonable consumers. The dissemination data offered in the Proposed Finding illustrates that reasonable consumers were *unlikely* to be deceived. That Complaint Counsel have identified only 17 even potentially relevant consumer complaints from Tax Year 2020 (*see* CCF ¶¶677), even though GX532 on its own received [REDACTED] [REDACTED] that year, is strong evidence that reasonable consumers were not deceived by GX532 or any of the other challenged advertisements that ran in Tax Year 2020 (*see* PFF ¶¶632, 637, 639, 641-647).

270. A screenshot from GX532 is pictured below.



(GX532 (Intuit)).

Response to Finding No. 270:

The Proposed Finding is incomplete and misleading because it is just a snippet of the full display video ad that actually ran and Complaint Counsel have omitted critical information for evaluating the advertisement. (GX532 (Intuit)). Consumers did not view the challenged advertisement as a single, static image. Not captured in the Proposed Finding is the fact that the TurboTax Live Basic logo appeared on screen throughout the ad, or that the free claim is always presented in tandem with “[s]imple tax returns only.” (GX532 (Intuit)). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

The Proposed Finding is also incomplete because it fails to recognize that consumers clicking on the advertisement would be taken directly to the app store on their phone where they

could download the TurboTax app, where they would see detailed information about the free offer's qualifications. (See PFF ¶253; Johnson (Intuit) Tr. 583; Rubin (Intuit) Tr. 1563-1564). Indeed, Complaint Counsel and their witnesses recognized that the TurboTax website repeatedly disclosed the qualifications of free TurboTax offers and provided detailed information about those qualifications, and the same information is available through the TurboTax app. (PFF ¶¶369-370; GX439 (Ryan (Intuit) Decl.) ¶29)). For example, Complaint Counsel's own 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 the free TurboTax offers. (PFF ¶790). Reasonable consumers understood that display ads such as GX532 link to a website or app when clicked (here, the TurboTax app) that includes more information about the advertised free offer, and by linking to the TurboTax app, the advertisement incorporated the detailed information available through the app. (PFF ¶254; *see also* CCF ¶455 ("The TurboTax website is ... integrated into TurboTax's free advertising.")).

Moreover, the Proposed Finding does not support an inference that the challenged ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The advertisement includes a TurboTax Live Basic logo and states prominently, "Simple tax returns only." (GX532 (Intuit)). By identifying the specific TurboTax SKU being advertised, the ad informed consumers that the offer does not apply to all TurboTax products. (See PFF ¶¶317, 321). And by stating that the offer was available for "Simple tax returns only," the ad informed consumers that the free offer was not available to everyone, and that eligibility was contingent on the complexity of the consumer's tax returns. (PFF ¶322; *see also* PFF ¶¶130-145). Complaint Counsel have offered no evidence that *all* components of the ad were not visible to consumers (*see* PFF ¶255), nor

could they given the prominence of that content and the benchmarking analysis showing that the disclosures were comparable to disclosures in other companies' ads (*see* PFF ¶¶257-259).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel assert were conveyed. Instead, the undisputed testimony from Intuit's executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (*See* PFF ¶¶167-177, 190, 192-202, 405, 852, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel have not offered any evidence that this ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the qualifications included in the ad would prevent consumers from being misled by the ad. (*See* PFF ¶¶260-264, 302-322, 328-330, 334). Even without those disclosures, consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

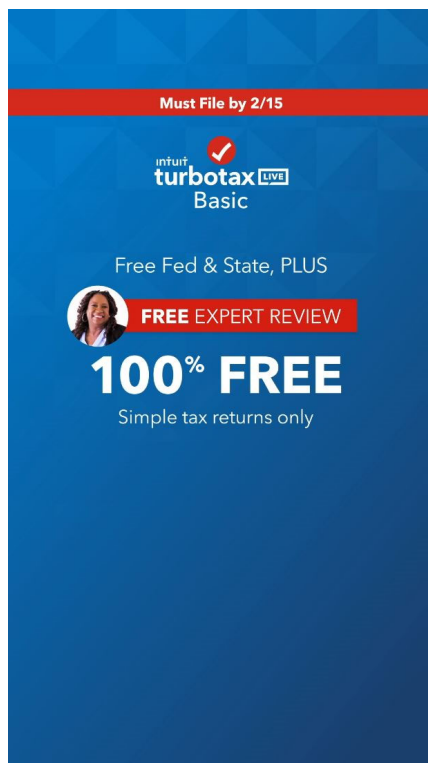
271. GX533, which Intuit produced bearing Bates number INTUIT-FTC-PART3-00000089 and with the original file name TT_TY20-148_TTLiveBasic_Baseline_Rollout_TikTok_9_16.mp4, is an online TurboTax ad for TY 2020 that, according to Intuit's data at GX434, [REDACTED] (GX533 (Intuit); GX434 (Intuit); GX Summary 002 (Complaint Counsel) at 'Summary-Online_Ads' row 60; Baburek (Complaint Counsel) Tr. 318-23).

Response to Finding No. 271:

The Proposed Finding is misleading because GX533 is not an "online TurboTax ad." It is a display advertisement for a specific TurboTax SKU, TurboTax Live Basic. (GX533 (Intuit)).

Intuit otherwise has no specific response except to note that the number of impressions or clicks an ad received is not evidence that the ad conveyed any of the claims asserted by Complaint Counsel, that reasonable consumers were likely to be deceived, or that the claims were material to reasonable consumers. The dissemination data offered in the Proposed Finding illustrates that reasonable consumers were *unlikely* to be deceived. That Complaint Counsel have identified only 17 even potentially relevant consumer complaints from Tax Year 2020 (*see* CCF ¶677), even though GX533 on its own received [REDACTED] that year, is strong evidence that reasonable consumers were not deceived by GX533 or any of the other challenged advertisements that ran in Tax Year 2020 (*see* PFF ¶¶632, 637, 639, 641-647).

272. A screenshot from GX533 is pictured below.



(GX533 (Intuit)).

Response to Finding No. 272:

The Proposed Finding is incomplete and misleading because it is just a snippet of the full display video ad that actually ran and Complaint Counsel have omitted critical information for evaluating the advertisement. (GX533 (Intuit)). Consumers did not view the challenged advertisement as a single, static image. Not captured in the Proposed Finding is the fact that the TurboTax Live Basic logo appeared on screen throughout the ad, or that the free claim is always presented in tandem with “[s]imple tax returns only.” (GX533 (Intuit)). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

The Proposed Finding is also incomplete because it fails to recognize that consumers clicking on the advertisement would be taken directly to the app store on their phone where they could download the TurboTax app, where they would see detailed information about the free offer’s qualifications. (See PFF ¶253; Johnson (Intuit) Tr. 583; Rubin (Intuit) Tr. 1563-1564). Indeed, Complaint Counsel and their witnesses recognized that the TurboTax website repeatedly disclosed the qualifications of free TurboTax offers and provided detailed information about those qualifications, and the same information is available through the TurboTax app. (PFF ¶¶369-370; GX439 (Ryan (Intuit) Decl.) ¶29)). For example, Complaint Counsel’s own 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 the free TurboTax offers. (PFF ¶790). Reasonable consumers understood that display ads such as GX533 link to a website or app when clicked (here, the TurboTax app) that includes more information about the advertised free offer, and by linking to the TurboTax app, the

advertisement incorporated the detailed information available through the app. (PFF ¶254; *see also* CCF ¶455 (“The TurboTax website is ... integrated into TurboTax’s free advertising.”)).

Moreover, the Proposed Finding does not support an inference that the challenged ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The advertisement includes a TurboTax Live Basic logo and states prominently, “Simple tax returns only.” (GX533 (Intuit)). By identifying the specific TurboTax SKU being advertised, the ad informed consumers that the offer does not apply to all TurboTax products. (*See* PFF ¶¶317, 321). And by stating that the offer was available for “Simple tax returns only,” the ad informed consumers that the free offer was not available to everyone, and that eligibility was contingent on the complexity of the consumer’s tax returns. (PFF ¶322; *see also* PFF ¶¶130-145). Complaint Counsel have offered no evidence that *all* components of the ad were not visible to consumers (*see* PFF ¶255), nor could they given the prominence of that content and the benchmarking analysis showing that the disclosures were comparable to disclosures in other companies’ ads (*see* PFF ¶¶257-259).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel assert were conveyed. Instead, the undisputed testimony from Intuit’s executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (*See* PFF ¶¶167-177, 190, 192-202, 405, 852, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel have not offered any evidence that this ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence

establishes that the qualifications included in the ad would prevent consumers from being misled by the ad. (See PFF ¶¶260-264, 302-322, 328-330, 334). Even without those disclosures, consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

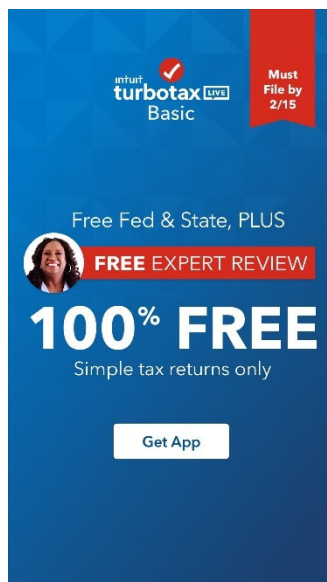
273. GX534, which Intuit produced bearing Bates number INTUIT-FTC-PART3-000000092 and with the original file name TT_TY20-304_TTLiveBasic_Baseline_ControlStatic_MM_App_1080x1920.jpg, is an online TurboTax ad for TY 2020 that, according to Intuit's data at GX434, [REDACTED]. (GX534 (Intuit); GX434 (Intuit); GX Summary 002 (Complaint Counsel) at 'Summary-Online_Ads' row 136; Baburek (Complaint Counsel) Tr. 318-23).

Response to Finding No. 273:

The Proposed Finding is misleading because GX534 is not an "online TurboTax ad." It is a display advertisement for a specific TurboTax SKU, TurboTax Live Basic. (GX534 (Intuit)).

Intuit otherwise has no specific response except to note that the number of impressions or clicks an ad received is not evidence that the ad conveyed any of the claims asserted by Complaint Counsel, that reasonable consumers were likely to be deceived, or that the claims were material to reasonable consumers. The dissemination data offered in the Proposed Finding illustrates that reasonable consumers were *unlikely* to be deceived. That Complaint Counsel have identified only 17 even potentially relevant consumer complaints from Tax Year 2020 (see CCF ¶677), even though GX534 on its own received [REDACTED] that year, is strong evidence that reasonable consumers were not deceived by GX534 or any of the other challenged advertisements that ran in Tax Year 2020 (see PFF ¶¶632, 637, 639, 641-647).

274. A screenshot from GX534 is pictured below.



(GX534 (Intuit)).

Response to Finding No. 274:

The Proposed Finding is incomplete because it fails to recognize that consumers clicking on the advertisement would be taken directly to the app store on their phone where they could download the TurboTax app, where they would see detailed information about the free offer's qualifications. (See PFF ¶253; Johnson (Intuit) Tr. 583; Rubin (Intuit) Tr. 1563-1564). Indeed, Complaint Counsel and their witnesses recognized that the TurboTax website repeatedly disclosed the qualifications of free TurboTax offers and provided detailed information about those qualifications, and the same information is available through the TurboTax app. (PFF ¶¶369-370; GX439 (Ryan (Intuit) Decl.) ¶29)). For example, Complaint Counsel's own 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 the free TurboTax offers. (PFF ¶790). Reasonable consumers understood that display ads such as GX534 link to a website or app when clicked (here, the TurboTax app) that includes more information about the advertised free offer, and by linking to the TurboTax app, the advertisement incorporated the detailed information available through the app. (PFF ¶254; see

also CCFE ¶455 (“The TurboTax website is ... integrated into TurboTax’s free advertising.”)). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

Moreover, the Proposed Finding does not support an inference that the challenged ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The advertisement includes a TurboTax Live Basic logo and states prominently, “Simple tax returns only.” (GX534 (Intuit)). By identifying the specific TurboTax SKU being advertised, the ad informed consumers that the offer does not apply to all TurboTax products. (*See* PFF ¶¶317, 321). And by stating that the offer was available for “Simple tax returns only,” the ad informed consumers that the free offer was not available to everyone, and that eligibility was contingent on the complexity of the consumer’s tax returns. (PFF ¶322; *see also* PFF ¶¶130-145). Complaint Counsel have offered no evidence that *all* components of the ad were not visible to consumers (*see* PFF ¶255), nor could they given the prominence of that content and the benchmarking analysis showing that the disclosures were comparable to disclosures in other companies’ ads (*see* PFF ¶¶257-259).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel assert were conveyed. Instead, the undisputed testimony from Intuit’s executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (*See* PFF ¶¶167-177, 190, 192-202, 405, 852, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel have not offered any evidence that this ad was likely

to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the qualifications included in the ad would prevent consumers from being misled by the ad. (See PFF ¶¶260-264, 302-322, 328-330, 334). Even without those disclosures, consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

275. GX535, which Intuit produced bearing Bates number INTUIT-FTC-PART3-000000093 and with the original file name TY20-610_TTLiveBasic_OfferControl_1200x627.jpg, is an online TurboTax ad for TY 2020 that, according to Intuit's data at GX434, [REDACTED] (GX535 (Intuit); GX434 (Intuit); GX Summary 002 (Complaint Counsel) at 'Summary-Online_Ads' row 173; Baburek (Complaint Counsel) Tr. 318–23).

Response to Finding No. 275:

The Proposed Finding is misleading because GX535 is not an “online TurboTax ad.” It is a display advertisement for a specific TurboTax SKU, TurboTax Live Basic. (GX535 (Intuit)).

Intuit otherwise has no specific response except to note that the number of impressions or clicks an ad received is not evidence that the ad conveyed any of the claims asserted by Complaint Counsel, that reasonable consumers were likely to be deceived, or that the claims were material to reasonable consumers. The dissemination data offered in the Proposed Finding illustrates that reasonable consumers were *unlikely* to be deceived. That Complaint Counsel have identified only 17 even potentially relevant consumer complaints from Tax Year 2020 (see CCF ¶677), even though GX535 on its own received [REDACTED] that year, is strong evidence that reasonable consumers were not deceived by GX535 or any of

the other challenged advertisements that ran in Tax Year 2020 (*see* PFF ¶¶632, 637, 639, 641-647).

276. A screenshot from GX535 is pictured below.



(GX535 (Intuit)).

Response to Finding No. 276:

The Proposed Finding is incomplete because it fails to recognize that consumers clicking on the advertisement would be taken directly to the landing page on the TurboTax website for the free TurboTax Live Basic offer, where they would see detailed information about the free offer’s qualifications. (PFF ¶253; Rubin (Intuit) Tr. 1563-1564). Indeed, Complaint Counsel and their witnesses recognized that the TurboTax website repeatedly disclosed the qualifications of free TurboTax offers and provided detailed information about those qualifications. (PFF ¶¶369-370). For example, Complaint Counsel’s own 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 the free TurboTax offers. (PFF ¶790). Reasonable consumers understood that display ads such as GX535 link to a website when clicked (here, the TurboTax website) that includes more information about the advertised free offer, and by linking directly to the TurboTax website, the advertisement incorporated the detailed information on the

TurboTax website. (PFF ¶254; *see also* CCF ¶455 (“The TurboTax website is ... integrated into TurboTax’s free advertising.”)). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

Moreover, the Proposed Finding does not support an inference that the challenged ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The advertisement includes a TurboTax Live Basic logo and states prominently, “Simple tax returns only.” (GX535 (Intuit)). By identifying the specific TurboTax SKU being advertised, the ad informed consumers that the offer does not apply to all TurboTax products. (*See* PFF ¶¶317, 321). And by stating that the offer was available for “Simple tax returns only,” the ad informed consumers that the free offer was not available to everyone, and that eligibility was contingent on the complexity of the consumer’s tax returns. (PFF ¶322; *see also* PFF ¶¶130-145). Complaint Counsel have offered no evidence that *all* components of the ad were not visible to consumers (*see* PFF ¶255), nor could they given the prominence of that content and the benchmarking analysis showing that the disclosures were comparable to disclosures in other companies’ ads (*see* PFF ¶¶257-259).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel assert were conveyed. Instead, the undisputed testimony from Intuit’s executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (*See* PFF ¶¶167-177, 190, 192-202, 405, 852, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel have not offered any evidence that this ad was likely

to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the qualifications included in the ad would prevent consumers from being misled by the ad. (See PFF ¶¶260-264, 302-322, 328-330, 334). Even without those disclosures, consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

277. GX536, which Intuit produced bearing Bates number INTUIT-FTC-PART3-000000097 and with the original file name TY20-742_TTLiveBasic_OfferControl_1200x628.jpg, is an online TurboTax ad for TY 2020 that, according to Intuit's data at GX434, [REDACTED] [REDACTED]. (GX536 (Intuit); GX434 (Intuit); GX Summary 002 (Complaint Counsel) at 'Summary-Online_Ads' row 210; Baburek (Complaint Counsel) Tr. 318–23).

Response to Finding No. 277:

The Proposed Finding is misleading because GX536 is not an “online TurboTax ad.” It is a display advertisement for a specific TurboTax SKU, TurboTax Live Basic. (GX536 (Intuit)).

Intuit otherwise has no specific response except to note that the number of impressions or clicks an ad received is not evidence that the ad conveyed any of the claims asserted by Complaint Counsel, that reasonable consumers were likely to be deceived, or that the claims were material to reasonable consumers. The dissemination data offered in the Proposed Finding illustrates that reasonable consumers were *unlikely* to be deceived. That Complaint Counsel have identified only 17 even potentially relevant consumer complaints from Tax Year 2020 (see CCF ¶677), even though GX536 on its own received [REDACTED] that year, is strong evidence that reasonable consumers were not deceived by GX536 or any of

the other challenged advertisements that ran in Tax Year 2020 (*see* PFF ¶¶632, 637, 639, 641-647).

278. A screenshot from GX536 is pictured below.



(GX536 (Intuit)).

Response to Finding No. 278:

The Proposed Finding is incomplete because it fails to recognize that consumers clicking on the advertisement would be taken directly to the app store on their phone where they could download the TurboTax app, where they would see detailed information about the free offer's qualifications. (*See* PFF ¶253; Johnson (Intuit) Tr. 583; Rubin (Intuit) Tr. 1563-1564). Indeed, Complaint Counsel and their witnesses recognized that the TurboTax website repeatedly disclosed the qualifications of free TurboTax offers and provided detailed information about those qualifications, and the same information is available through the TurboTax app. (PFF ¶¶369-370; GX439 (Ryan (Intuit) Decl.) ¶29)). For example, Complaint Counsel's own 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 the free TurboTax offers. (PFF ¶790). Reasonable consumers understood that display ads such as

GX536 link to a website or app when clicked (here, the TurboTax app) that includes more information about the advertised free offer, and by linking to the TurboTax app, the advertisement incorporated the detailed information available through the app. (PFF ¶254; *see also* CCF ¶455 (“The TurboTax website is ... integrated into TurboTax’s free advertising.”)). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

Moreover, the Proposed Finding does not support an inference that the challenged ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The advertisement includes a TurboTax Live Basic logo and states prominently in a large font size similar to that of other text in the ad, “Simple tax returns only.” (GX536 (Intuit)). By identifying the specific TurboTax SKU being advertised, the ad informed consumers that the offer does not apply to all TurboTax products. (*See* PFF ¶¶317, 321). And by stating that the offer was available for “Simple tax returns only,” the ad informed consumers that the free offer was not available to everyone, and that eligibility was contingent on the complexity of the consumer’s tax returns. (PFF ¶322; *see also* PFF ¶¶130-145). Complaint Counsel have offered no evidence that *all* components of the ad were not visible to consumers (*see* PFF ¶255), nor could they given the prominence of that content and the benchmarking analysis showing that the disclosures were comparable to disclosures in other companies’ ads (*see* PFF ¶¶257-259).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel assert were conveyed. Instead, the undisputed testimony from Intuit’s executives establishes that Intuit did not intend for any of the ads to claim

that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (See PFF ¶¶167-177, 190, 192-202, 405, 852, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel have not offered any evidence that this ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the qualifications included in the ad would prevent consumers from being misled by the ad. (See PFF ¶¶260-264, 302-322, 328-330, 334). Even without those disclosures, consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

279. GX537, which Intuit produced bearing Bates number INTUIT-FTC-PART3-000000108 and with the original file name TY20-581_TTLiveBasic_Baseline_LogoZoom_TikTok_9_16.mp4, is an online TurboTax ad for TY 2020 that, according to Intuit's data at GX434, [REDACTED] (GX537 (Intuit); GX434 (Intuit); GX Summary 002 (Complaint Counsel) at 'Summary-Online_Ads' row 160; Baburek (Complaint Counsel) Tr. 318–23).

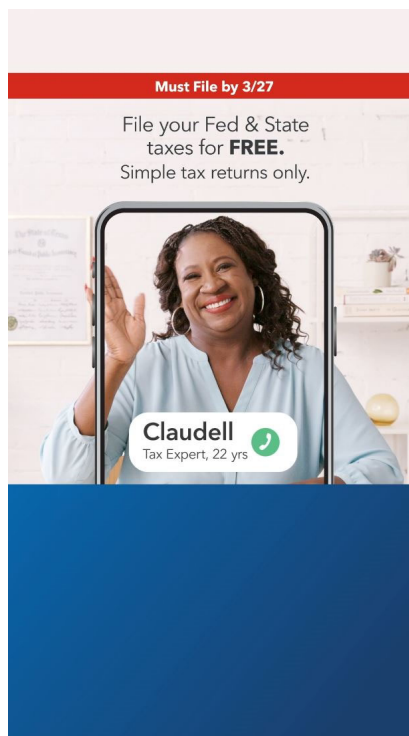
Response to Finding No. 279:

The Proposed Finding is misleading because GX537 is not an “online TurboTax ad.” It is a display advertisement for a specific TurboTax SKU, TurboTax Live Basic. (GX537 (Intuit)).

Intuit otherwise has no specific response except to note that the number of impressions or clicks an ad received is not evidence that the ad conveyed any of the claims asserted by Complaint Counsel, that reasonable consumers were likely to be deceived, or that the claims were material to reasonable consumers. The dissemination data offered in the Proposed Finding illustrates that reasonable consumers were *unlikely* to be deceived. That Complaint Counsel

have identified only 17 even potentially relevant consumer complaints from Tax Year 2020 (*see* CCF ¶¶677), even though GX537 on its own received [REDACTED] that year, is strong evidence that reasonable consumers were not deceived by GX537 or any of the other challenged advertisements that ran in Tax Year 2020 (*see* PFF ¶¶632, 637, 639, 641-647).

280. A screenshot from GX537 is pictured below.



(GX537 (Intuit)).

Response to Finding No. 280:

The Proposed Finding is incomplete and misleading because it is just a snippet of the full display video ad that actually ran and Complaint Counsel have omitted critical information for evaluating the advertisement. (GX537 (Intuit)). Consumers did not view the challenged advertisement as a single, static image. Not captured in the Proposed Finding is the fact that the TurboTax Live Basic logo appeared alone on the screen both at the beginning and end of the ad, or that the “[s]imple tax returns only” qualification accompanies every free claim presented in the ad. (GX537 (Intuit)). In determining the claims conveyed by an advertisement and whether

it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

The Proposed Finding is also incomplete because it fails to recognize that consumers clicking on the advertisement would be taken directly to the app store on their phone where they could download the TurboTax app, where they would see detailed information about the free offer's qualifications. (*See* PFF ¶253; Johnson (Intuit) Tr. 583; Rubin (Intuit) Tr. 1563-1564). Indeed, Complaint Counsel and their witnesses recognized that the TurboTax website repeatedly disclosed the qualifications of free TurboTax offers and provided detailed information about those qualifications, and the same information is available through the TurboTax app. (PFF ¶¶369-370; GX439 (Ryan (Intuit) Decl.) ¶29)). For example, Complaint Counsel's own 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 the free TurboTax offers. (PFF ¶790). Reasonable consumers understood that display ads such as GX537 link to a website or app when clicked (here, the TurboTax app) that includes more information about the advertised free offer, and by linking to the TurboTax app, the advertisement incorporated the detailed information available through the app. (PFF ¶254; *see also* CCF ¶455 ("The TurboTax website is ... integrated into TurboTax's free advertising.")).

Moreover, the Proposed Finding does not support an inference that the challenged ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The advertisement includes a TurboTax Live Basic logo and states prominently, "Simple tax returns only." (GX537 (Intuit)). By identifying the specific TurboTax SKU being advertised, the ad informed consumers that the offer does not apply to all TurboTax products. (*See* PFF ¶¶317, 321). And by stating that the

offer was available for “Simple tax returns only,” the ad informed consumers that the free offer was not available to everyone, and that eligibility was contingent on the complexity of the consumer’s tax returns. (PFF ¶¶322; *see also* PFF ¶¶130-145). Complaint Counsel have offered no evidence that *all* components of the ad were not visible to consumers (*see* PFF ¶255), nor could they given the prominence of that content and the benchmarking analysis showing that the disclosures were comparable to disclosures in other companies’ ads (*see* PFF ¶¶257-259).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel assert were conveyed. Instead, the undisputed testimony from Intuit’s executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (*See* PFF ¶¶167-177, 190, 192-202, 405, 852, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel have not offered any evidence that this ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the qualifications included in the ad would prevent consumers from being misled by the ad. (*See* PFF ¶¶260-264, 302-322, 328-330, 334). Even without those disclosures, consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

281. GX538, which Intuit produced bearing Bates number INTUIT-FTC-PART3-000000114 and with the original file name TY20-582_TTLiveBasic_Baseline_Rollout_TikTok_9_16.mp4, is an online TurboTax ad for TY 2020 that, according to Intuit’s data at GX434, [REDACTED]

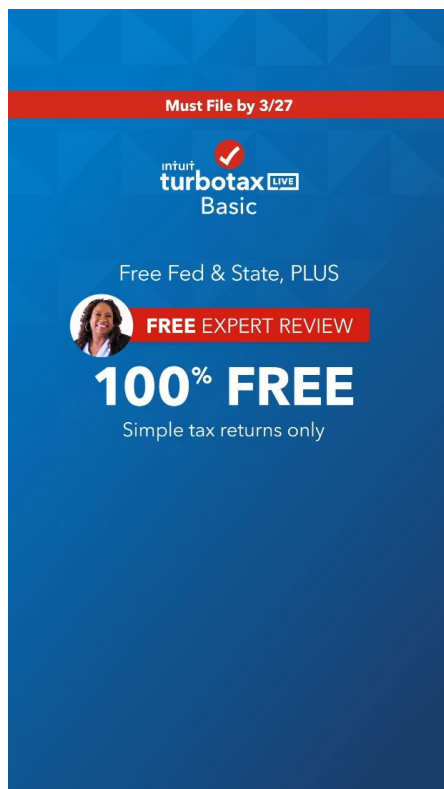
██████████ (GX538 (Intuit); GX434 (Intuit); GX Summary 002 (Complaint Counsel) at 'Summary-Online_Ads' row 161; Baburek (Complaint Counsel) Tr. 318–23).

Response to Finding No. 281:

The Proposed Finding is misleading because GX538 is not an “online TurboTax ad.” It is a display advertisement for a specific TurboTax SKU, TurboTax Live Basic. (GX538 (Intuit)).

Intuit otherwise has no specific response except to note that the number of impressions or clicks an ad received is not evidence that the ad conveyed any of the claims asserted by Complaint Counsel, that reasonable consumers were likely to be deceived, or that the claims were material to reasonable consumers. The dissemination data offered in the Proposed Finding illustrates that reasonable consumers were *unlikely* to be deceived. That Complaint Counsel have identified only 17 even potentially relevant consumer complaints from Tax Year 2020 (*see* CCF ¶677), even though GX538 on its own received ██████████ that year, is strong evidence that reasonable consumers were not deceived by GX538 or any of the other challenged advertisements that ran in Tax Year 2020 (*see* PFF ¶¶632, 637, 639, 641-647).

282. A screenshot from GX538 is pictured below.



(GX538 (Intuit)).

Response to Finding No. 282:

The Proposed Finding is incomplete because it is just a snippet of the video display advertisement that actually ran. (PFF ¶¶364). It does not capture the fact that the TurboTax Live Basic logo appeared on screen throughout the entire ad, or that “Simple tax returns only” was presented alongside any reference to the free offer. The Proposed Finding also does not include additional disclosures that would have been shown to consumers along with the screenshot above. Paired with the video was text stating: “100% Free for simple tax returns only.” (GX Summary 002 (FTC) at ‘Data-Online_Ad_Combined’ row 4261). Complaint Counsel have thus omitted critical information for evaluating the advertisement. In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

The Proposed Finding is also incomplete because it fails to recognize that consumers clicking on the advertisement would be taken directly to the app store on their phone where they could download the TurboTax app, where they would see detailed information about the free offer's qualifications. (*See* PFF ¶253; Johnson (Intuit) Tr. 583; Rubin (Intuit) Tr. 1563-1564). Indeed, Complaint Counsel and their witnesses recognized that the TurboTax website repeatedly disclosed the qualifications of free TurboTax offers and provided detailed information about those qualifications, and the same information is available through the TurboTax app. (PFF ¶¶369-370; GX439 (Ryan (Intuit) Decl.) ¶29)). For example, Complaint Counsel's own 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 the free TurboTax offers. (PFF ¶790). Reasonable consumers understood that display ads such as GX538 link to a website or app when clicked (here, the TurboTax app) that includes more information about the advertised free offer, and by linking to the TurboTax app, the advertisement incorporated the detailed information available through the app. (PFF ¶254; *see also* CCF ¶455 ("The TurboTax website is ... integrated into TurboTax's free advertising.")).

Moreover, the Proposed Finding does not support an inference that the challenged ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The advertisement includes a TurboTax Live Basic logo and states prominently, "Simple tax returns only." (GX538 (Intuit)). By identifying the specific TurboTax SKU being advertised, the ad informed consumers that the offer does not apply to all TurboTax products. (*See* PFF ¶¶317, 321). And by stating that the offer was available for "Simple tax returns only," the ad informed consumers that the free offer was not available to everyone, and that eligibility was contingent on the complexity of the

consumer's tax returns. (PFF ¶¶322; *see also* PFF ¶¶130-145). Complaint Counsel have offered no evidence that *all* components of the ad were not visible to consumers (*see* PFF ¶255), nor could they given the prominence of that content and the benchmarking analysis showing that the disclosures were comparable to disclosures in other companies' ads (*see* PFF ¶¶257-259).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel assert were conveyed. Instead, the undisputed testimony from Intuit's executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (*See* PFF ¶¶167-177, 190, 192-202, 405, 852, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel have not offered any evidence that this ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the qualifications included in the ad would prevent consumers from being misled by the ad. (*See* PFF ¶¶260-264, 302-322, 328-330, 334). Even without those disclosures, consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

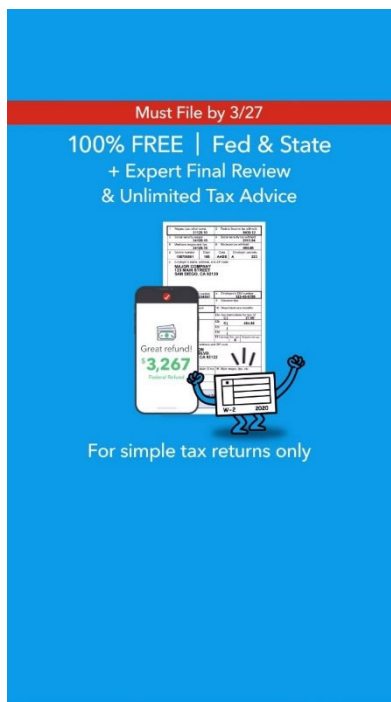
283. GX539, which Intuit produced bearing Bates number INTUIT-FTC-PART3-000000121 and with the original file name TY20-620_TTLiveBasic_W-2Guys_Dance_3.27_TikTok_9_16_VersionB.mp4, is an online TurboTax ad for TY 2020 that, according to Intuit's data at GX434, [REDACTED] (GX539 (Intuit); GX434 (Intuit); GX Summary 002 (Complaint Counsel) at 'Summary-Online_Ads' row 181, row 182; Baburek (Complaint Counsel) Tr. 318-23).

Response to Finding No. 283:

The Proposed Finding is misleading because GX539 is not an “online TurboTax ad.” It is a display advertisement for a free TurboTax Live offer. (GX539 (Intuit)).

Intuit otherwise has no specific response except to note that the number of impressions or clicks an ad received is not evidence that the ad conveyed any of the claims asserted by Complaint Counsel, that reasonable consumers were likely to be deceived, or that the claims were material to reasonable consumers. The dissemination data offered in the Proposed Finding illustrates that reasonable consumers were *unlikely* to be deceived. That Complaint Counsel have identified only 17 even potentially relevant consumer complaints from Tax Year 2020 (*see* CCF ¶677), even though GX539 on its own received [REDACTED] [REDACTED] that year, is strong evidence that reasonable consumers were not deceived by GX539 or any of the other challenged advertisements that ran in Tax Year 2020 (*see* PFF ¶¶632, 637, 639, 641-647).

284. A screenshot from GX539 is pictured below.



(GX539 (Intuit)).

Response to Finding No. 284:

The Proposed Finding is incomplete and misleading because it is just a snippet of the full display video ad that actually ran. (GX539 (Intuit)). Consumers did not view the challenged advertisement as a single, static image. Not captured in the Proposed Finding is the fact that video does not make any verbal free claims, or that most of the ad shows a W-2 form dancing across the screen. (GX539 (Intuit)). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

The Proposed Finding is also incomplete because it fails to recognize that consumers clicking on the advertisement would be taken directly to the app store on their phone where they could download the TurboTax app, where they would see detailed information about the free offer's qualifications. (See PFF ¶253; Johnson (Intuit) Tr. 583; Rubin (Intuit) Tr. 1563-1564). Indeed, Complaint Counsel and their witnesses recognized that the TurboTax website repeatedly

disclosed the qualifications of free TurboTax offers and provided detailed information about those qualifications, and the same information is available through the TurboTax app. (PFF ¶¶369-370; GX439 (Ryan (Intuit) Decl.) ¶29)). For example, Complaint Counsel’s own 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 the free TurboTax offers. (PFF ¶790). Reasonable consumers understood that display ads such as GX539 link to a website or app when clicked (here, the TurboTax app) that includes more information about the advertised free offer, and by linking to the TurboTax app, the advertisement incorporated the detailed information available through the app. (PFF ¶254; *see also* CCF ¶455 (“The TurboTax website is ... integrated into TurboTax’s free advertising.”)).

Moreover, the Proposed Finding does not support an inference that the challenged ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The advertisement states prominently, “Simple tax returns only.” (GX539 (Intuit)). By stating that the offer was available for “Simple tax returns only,” the ad informed consumers that the free offer was not available to everyone, and that eligibility was contingent on the complexity of the consumer’s tax returns. (PFF ¶322; *see also* PFF ¶¶130-145). Complaint Counsel have offered no evidence that *all* components of the ad were not visible to consumers (*see* PFF ¶255), nor could they given the prominence of that content and the benchmarking analysis showing that the disclosures were comparable to disclosures in other companies’ ads (*see* PFF ¶¶257-259).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel assert were conveyed. Instead, the undisputed testimony from Intuit’s executives establishes that Intuit did not intend for any of the ads to claim

that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (See PFF ¶¶167-177, 190, 192-202, 405, 852, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel have not offered any evidence that this ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the qualifications included in the ad would prevent consumers from being misled by the ad. (See PFF ¶¶260-264, 302-322, 328-330, 334). Even without those disclosures, consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

285. GX540, which Intuit produced bearing Bates number INTUIT-FTC-PART3-000000128 and with the original file name TY20-646_Free_X-Ray_TikTok_EFile_9_16.mp4, is an online TurboTax ad for TY 2020 that, according to Intuit's data at GX434, [REDACTED]. (GX540 (Intuit); GX434 (Intuit); GX Summary 002 (Complaint Counsel) at 'Summary-Online_Ads' row 195; Baburek (Complaint Counsel) Tr. 318-23).

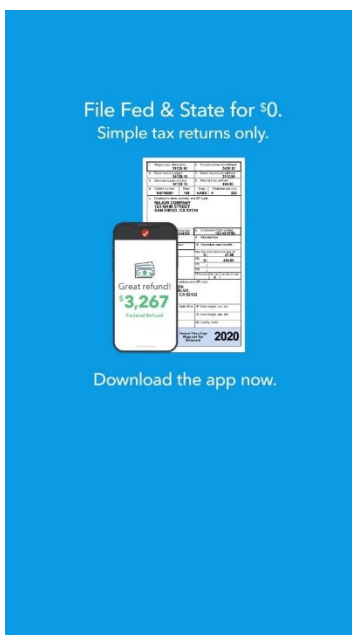
Response to Finding No. 285:

The Proposed Finding is misleading because GX540 is not an “online TurboTax ad.” (GX540 (Intuit)). It is a display advertisement directing consumers to the TurboTax app (GX160 (Rubin (Intuit) IHT) at 52-53), where they would see detailed information about all TurboTax SKUs, including the qualifications for free TurboTax SKUs (PFF ¶¶369-370; GX439 (Ryan (Intuit) Decl.) ¶29)).

Intuit otherwise has no specific response except to note that the number of impressions or clicks an ad received is not evidence that the ad conveyed any of the claims asserted by

Complaint Counsel, that reasonable consumers were likely to be deceived, or that the claims were material to reasonable consumers. The dissemination data offered in the Proposed Finding illustrates that reasonable consumers were *unlikely* to be deceived. That Complaint Counsel have identified only 17 even potentially relevant consumer complaints from Tax Year 2020 (*see* CCF ¶677), even though GX540 on its own received [REDACTED] that year, is strong evidence that reasonable consumers were not deceived by GX540 or any of the other challenged advertisements that ran in Tax Year 2020 (*see* PFF ¶¶632, 637, 639, 641-647).

286. A screenshot from GX540 is pictured below.



(GX540 (Intuit)).

Response to Finding No. 286:

The Proposed Finding is incomplete and misleading because it is just a snippet of the full display video ad that actually ran and Complaint Counsel have omitted critical information for evaluating the advertisement. (GX540 (Intuit)). Consumers did not view the challenged advertisement as a single, static image. Not captured in the Proposed Finding is the voiceover at

the beginning of the ad stating, “Simple tax returns only.” (GX540 (Intuit)). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

The Proposed Finding is also incomplete because it fails to recognize that consumers clicking on the advertisement would be taken directly to the app store on their phone where they could download the TurboTax app, where they would see detailed information about the free offer’s qualifications. (See PFF ¶253; Johnson (Intuit) Tr. 583; Rubin (Intuit) Tr. 1563-1564). Indeed, Complaint Counsel and their witnesses recognized that the TurboTax website repeatedly disclosed the qualifications of free TurboTax offers and provided detailed information about those qualifications, and the same information is available through the TurboTax app. (PFF ¶¶369-370; GX439 (Ryan (Intuit) Decl.) ¶29)). For example, Complaint Counsel’s own 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 the free TurboTax offers. (PFF ¶790). Reasonable consumers understood that display ads such as GX540 link to a website or app when clicked (here, the TurboTax app) that includes more information about the advertised free offer, and by linking to the TurboTax app, the advertisement incorporated the detailed information available through the app. (PFF ¶254; *see also* CCF ¶455 (“The TurboTax website is ... integrated into TurboTax’s free advertising.”)).

Moreover, the Proposed Finding does not support an inference that the challenged ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The advertisement states verbally and prominently in writing, “Simple tax returns only.” (GX540 (Intuit)). By stating that the offer

was available for “Simple tax returns only,” the ad informed consumers that the free offer was not available to everyone, and that eligibility was contingent on the complexity of the consumer’s tax returns. (PFF ¶¶322; *see also* PFF ¶¶130-145). Complaint Counsel have offered no evidence that *all* components of the ad were not visible or audible to consumers (*see* PFF ¶¶255-256), nor could they given the prominence of that content and the benchmarking analysis showing that the disclosures were comparable to disclosures in other companies’ ads (*see* PFF ¶¶257-259).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel assert were conveyed. Instead, the undisputed testimony from Intuit’s executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (*See* PFF ¶¶167-177, 190, 192-202, 405, 852, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel have not offered any evidence that this ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the qualifications included in the ad would prevent consumers from being misled by the ad. (*See* PFF ¶¶260-264, 302-322, 328-330, 334). Even without those disclosures, consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

287. GX541, which Intuit produced bearing Bates number INTUIT-FTC-PART3-000000131 and with the original file name TY20-645_Free_W-2Magnify_TikTok_EFile_9_16.mp4,

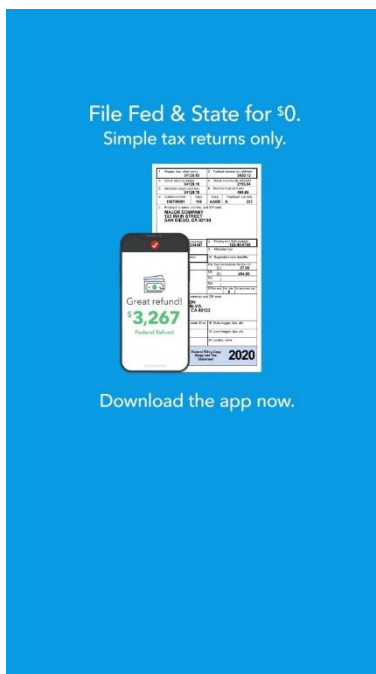
is an online TurboTax ad for TY 2020 that, according to Intuit's data at GX434, [REDACTED] (GX541 (Intuit); GX434 (Intuit); GX Summary 002 (Complaint Counsel) at 'Summary-Online_Ads' row 194; Baburek (Complaint Counsel) Tr. 318–23).

Response to Finding No. 287:

The Proposed Finding is misleading because GX541 is not an “online TurboTax ad.” (GX541 (Intuit)). It is a display advertisement directing consumers to the TurboTax app (GX160 (Rubin (Intuit) IHT) at 52-53), where they would see detailed information about all TurboTax SKUs, including the qualifications for free TurboTax SKUs (PFF ¶¶369-370; GX439 (Ryan (Intuit) Decl.) ¶29)).

Intuit otherwise has no specific response except to note that the number of impressions or clicks an ad received is not evidence that the ad conveyed any of the claims asserted by Complaint Counsel, that reasonable consumers were likely to be deceived, or that the claims were material to reasonable consumers. The dissemination data offered in the Proposed Finding illustrates that reasonable consumers were *unlikely* to be deceived. That Complaint Counsel have identified only 17 even potentially relevant consumer complaints from Tax Year 2020 (*see* CCF ¶677), even though GX541 on its own received [REDACTED] [REDACTED] that year, is strong evidence that reasonable consumers were not deceived by GX541 or any of the other challenged advertisements that ran in Tax Year 2020 (*see* PFF ¶¶632, 637, 639, 641-647).

288. A screenshot from GX541 is pictured below.



(GX541 (Intuit)).

Response to Finding No. 288:

The Proposed Finding is incomplete and misleading because it is just a snippet of the full display video ad that actually ran and Complaint Counsel have omitted critical information for evaluating the advertisement. (GX541 (Intuit)). Consumers did not view the challenged advertisement as a single, static image. Not captured in the Proposed Finding is the voiceover at the beginning of the ad stating, “Simple tax returns only.” (GX541 (Intuit)). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

The Proposed Finding is also incomplete because it fails to recognize that consumers clicking on the advertisement would be taken directly to the app store on their phone where they could download the TurboTax app, where they would see detailed information about the free offer’s qualifications. (See PFF ¶253; Johnson (Intuit) Tr. 583; Rubin (Intuit) Tr. 1563-1564).

Indeed, Complaint Counsel and their witnesses recognized that the TurboTax website repeatedly disclosed the qualifications of free TurboTax offers and provided detailed information about those qualifications, and the same information is available through the TurboTax app. (PFF ¶¶369-370; GX439 (Ryan (Intuit) Decl.) ¶29)). For example, Complaint Counsel’s own 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 the free TurboTax offers. (PFF ¶790). Reasonable consumers understood that display ads such as GX541 link to a website or app when clicked (here, the TurboTax app) that includes more information about the advertised free offer, and by linking to the TurboTax app, the advertisement incorporated the detailed information available through the app. (PFF ¶254; *see also* CCF ¶455 (“The TurboTax website is ... integrated into TurboTax’s free advertising.”)).

Moreover, the Proposed Finding does not support an inference that the challenged ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The advertisement states verbally and prominently in writing, “Simple tax returns only.” (GX541 (Intuit)). By stating that the offer was available for “Simple tax returns only,” the ad informed consumers that the free offer was not available to everyone, and that eligibility was contingent on the complexity of the consumer’s tax returns. (PFF ¶322; *see also* PFF ¶¶130-145). Complaint Counsel have offered no evidence that *all* components of the ad were not visible or audible to consumers (*see* PFF ¶¶255-256), nor could they given the prominence of that content and the benchmarking analysis showing that the disclosures were comparable to disclosures in other companies’ ads (*see* PFF ¶¶257-259).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel assert were conveyed. Instead, the undisputed testimony from Intuit's executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (See PFF ¶¶167-177, 190, 192-202, 405, 852, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel have not offered any evidence that this ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the qualifications included in the ad would prevent consumers from being misled by the ad. (See PFF ¶¶260-264, 302-322, 328-330, 334). Even without those disclosures, consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

289. GX542, which Intuit produced bearing Bates number INTUIT-FTC-PART3-000000140 and with the original file name TY20-746_TTLiveBasic_UGC_RealPeople_SnapStory_9_16.mp4, is an online TurboTax ad for TY 2020 that, according to Intuit's data at GX434, [REDACTED] (GX542 (Intuit); GX434 (Intuit); GX Summary 002 (Complaint Counsel) at 'Summary-Online_Ads' row 216, row 217; Baburek (Complaint Counsel) Tr. 318-23).

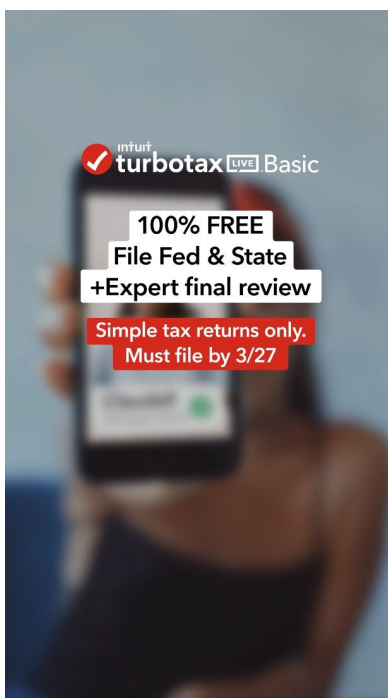
Response to Finding No. 289:

The Proposed Finding is misleading because GX542 is not an "online TurboTax ad." It is a display advertisement for a specific TurboTax SKU, TurboTax Live Basic. (GX542 (Intuit)).

Intuit otherwise has no specific response except to note that the number of impressions or clicks an ad received is not evidence that the ad conveyed any of the claims asserted by

Complaint Counsel, that reasonable consumers were likely to be deceived, or that the claims were material to reasonable consumers. The dissemination data offered in the Proposed Finding illustrates that reasonable consumers were *unlikely* to be deceived. That Complaint Counsel have identified only 17 even potentially relevant consumer complaints from Tax Year 2020 (*see* CCF ¶677), even though GX542 on its own received [REDACTED] that year, is strong evidence that reasonable consumers were not deceived by GX542 or any of the other challenged advertisements that ran in Tax Year 2020 (*see* PFF ¶¶632, 637, 639, 641-647).

290. A screenshot from GX542 is pictured below.



(GX542 (Intuit)).

Response to Finding No. 290:

The Proposed Finding is incomplete and misleading because it is just a snippet of the full display video ad that actually ran. (GX542 (Intuit)). Consumers did not view the challenged advertisement as a single, static image. Not captured in the Proposed Finding is the voiceover

stating that the offer was for “TurboTax Live” and that it was available for “[s]imple tax returns only.” (GX542 (Intuit)). Complaint Counsel have thus omitted critical information for evaluating the advertisement. In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

The Proposed Finding is also incomplete because it fails to recognize that consumers clicking on the advertisement would be taken directly to the TurboTax website, where they would see detailed information about the free offer’s qualifications. (*See* PFF ¶253; Johnson (Intuit) Tr. 583; Rubin (Intuit) Tr. 1563-1564). Indeed, Complaint Counsel and their witnesses recognized that the TurboTax website repeatedly disclosed the qualifications of free TurboTax offers and provided detailed information about those qualifications. (PFF ¶¶369-370). For example, Complaint Counsel’s own 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 the free TurboTax offers. (PFF ¶790). Reasonable consumers understood that display ads such as GX542 link to a website when clicked (here, the TurboTax website) that includes more information about the advertised free offer, and by linking to the TurboTax website, the advertisement incorporated the detailed information available on the website. (PFF ¶254; *see also* CCF ¶455 (“The TurboTax website is ... integrated into TurboTax’s free advertising.”)).

Moreover, the Proposed Finding does not support an inference that the challenged ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The advertisement states verbally and in writing highlighted in red, “Simple tax returns only.” (GX542 (Intuit)). By stating that the offer

was available for “Simple tax returns only,” the ad informed consumers that the free offer was not available to everyone, and that eligibility was contingent on the complexity of the consumer’s tax returns. (PFF ¶¶322; *see also* PFF ¶¶130-145). Complaint Counsel have offered no evidence that *all* components of the ad were not visible or audible to consumers (*see* PFF ¶¶255-256), nor could they given the prominence of that content and the benchmarking analysis showing that the disclosures were comparable to disclosures in other companies’ ads (*see* PFF ¶¶257-259).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel assert were conveyed. Instead, the undisputed testimony from Intuit’s executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (*See* PFF ¶¶167-177, 190, 192-202, 405, 852, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel have not offered any evidence that this ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the qualifications included in the ad would prevent consumers from being misled by the ad. (*See* PFF ¶¶260-264, 302-322, 328-330, 334). Even without those disclosures, consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

291. GX544, which Intuit produced bearing Bates number INTUIT-FTC-PART3-000000145 and with the original file name TT_TY20-179_EOS_Free_W-

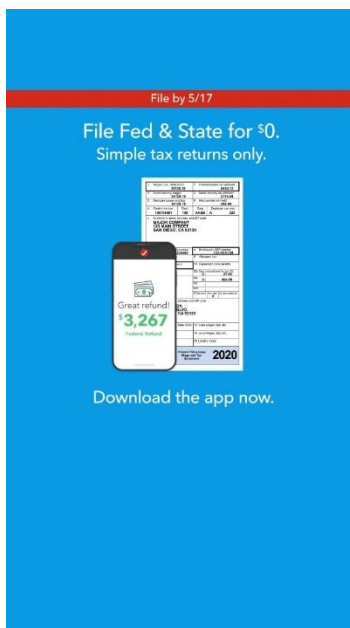
2Magnify_TikTok_9_16.mp4, is an online TurboTax ad for TY 2020 that, according to Intuit's data at GX434, [REDACTED]. (GX544 (Intuit); GX434 (Intuit); GX Summary 002 (Complaint Counsel) at 'Summary-Online_Ads' row 91; Baburek (Complaint Counsel) Tr. 318-23).

Response to Finding No. 291:

The Proposed Finding is misleading because GX544 is not an “online TurboTax ad.” (GX544 (Intuit)). It is a display advertisement directing consumers to the TurboTax app (GX160 (Rubin (Intuit) IHT) at 52-53), where they would see detailed information about all TurboTax SKUs, including the qualifications for free TurboTax SKUs (PFF ¶¶369-370; GX439 (Ryan (Intuit) Decl.) ¶29)).

Intuit otherwise has no specific response except to note that the number of impressions or clicks an ad received is not evidence that the ad conveyed any of the claims asserted by Complaint Counsel, that reasonable consumers were likely to be deceived, or that the claims were material to reasonable consumers. The dissemination data offered in the Proposed Finding illustrates that reasonable consumers were *unlikely* to be deceived. That Complaint Counsel have identified only 17 even potentially relevant consumer complaints from Tax Year 2020 (*see* CCF ¶677), even though GX544 on its own received [REDACTED] [REDACTED] that year, is strong evidence that reasonable consumers were not deceived by GX544 or any of the other challenged advertisements that ran in Tax Year 2020 (*see* PFF ¶¶632, 637, 639, 641-647).

292. A screenshot from GX544 is pictured below.



(GX544 (Intuit)).

Response to Finding No. 292:

The Proposed Finding is incomplete and misleading because it is just a snippet of the full display video ad that actually ran and Complaint Counsel have omitted critical information for evaluating the advertisement. (GX544 (Intuit)). Consumers did not view the challenged advertisement as a single, static image. Not captured in the Proposed Finding is the voiceover at the beginning of the ad stating, “Simple tax returns only.” (GX544 (Intuit)). Moreover, the Proposed Finding does not include additional disclosures that would have been shown to consumers along with the screenshot above. Paired with the video was text stating: “With TurboTax you pay \$0 Fed. \$0 State. \$0 to File. Simple tax returns only.” (GX Summary 002 (FTC) at ‘Data-Online_Ad_Combined’ row 4293). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

The Proposed Finding is also incomplete because it fails to recognize that consumers clicking on the advertisement would be taken directly to the app store on their phone where they

could download the TurboTax app, where they would see detailed information about the free offer's qualifications. (See PFF ¶253; Johnson (Intuit) Tr. 583; Rubin (Intuit) Tr. 1563-1564). Indeed, Complaint Counsel and their witnesses recognized that the TurboTax website repeatedly disclosed the qualifications of free TurboTax offers and provided detailed information about those qualifications, and the same information is available through the TurboTax app. (PFF ¶¶369-370; GX439 (Ryan (Intuit) Decl.) ¶29)). For example, Complaint Counsel's own 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 the free TurboTax offers. (PFF ¶790). Reasonable consumers understood that display ads such as GX544 link to a website or app when clicked (here, the TurboTax app) that includes more information about the advertised free offer, and by linking to the TurboTax app, the advertisement incorporated the detailed information available through the app. (PFF ¶254; *see also* CCF ¶455 ("The TurboTax website is ... integrated into TurboTax's free advertising.")).

Moreover, the Proposed Finding does not support an inference that the challenged ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The advertisement states verbally and in writing, in multiple places, "Simple tax returns only." (GX544 (Intuit)). By stating that the offer was available for "Simple tax returns only," the ad informed consumers that the free offer was not available to everyone, and that eligibility was contingent on the complexity of the consumer's tax returns. (PFF ¶322; *see also* PFF ¶¶130-145). Complaint Counsel have offered no evidence that *all* components of the ad were not visible or audible to consumers (*see* PFF ¶¶255-256), nor could they given the prominence of that content and the benchmarking analysis

showing that the disclosures were comparable to disclosures in other companies' ads (*see* PFF ¶¶257-259).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel assert were conveyed. Instead, the undisputed testimony from Intuit's executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (*See* PFF ¶¶167-177, 190, 192-202, 405, 852, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel have not offered any evidence that this ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the qualifications included in the ad would prevent consumers from being misled by the ad. (*See* PFF ¶¶260-264, 302-322, 328-330, 334). Even without those disclosures, consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

293. GX545, which Intuit produced bearing Bates number INTUIT-FTC-PART3-000000146 and with the original file name TT_TY20-171_EOS_Free_CelebrationDance_SnapAd_9_16.mp4, is an online TurboTax ad for TY 2020 that, according to Intuit's data at GX434, [REDACTED] (GX545 (Intuit); GX434 (Intuit); GX Summary 002 (Complaint Counsel) at 'Summary-Online_Ads' row 82, row 83; Baburek (Complaint Counsel) Tr. 318–23).

Response to Finding No. 293:

The Proposed Finding is misleading because GX545 is not an “online TurboTax ad.” It is a display advertisement for a specific TurboTax SKU, TurboTax Free Edition. (GX545 (Intuit)).

Intuit otherwise has no specific response except to note that the number of impressions or clicks an ad received is not evidence that the ad conveyed any of the claims asserted by Complaint Counsel, that reasonable consumers were likely to be deceived, or that the claims were material to reasonable consumers. The dissemination data offered in the Proposed Finding illustrates that reasonable consumers were *unlikely* to be deceived. That Complaint Counsel have identified only 17 even potentially relevant consumer complaints from Tax Year 2020 (*see* CCF ¶677), even though GX545 on its own received [REDACTED] [REDACTED] that year, is strong evidence that reasonable consumers were not deceived by GX545 or any of the other challenged advertisements that ran in Tax Year 2020 (*see* PFF ¶¶632, 637, 639, 641-647).

294. Screenshots from GX545 are pictured below.



(GX545 (Intuit)).

Response to Finding No. 294:

The Proposed Finding is incomplete because it is just a snippet of the full display video advertisement that actually ran and Complaint Counsel have omitted critical information for evaluating the advertisement. (PFF ¶364). Consumers did not view the challenged advertisement as a single, static image. Not captured in the Proposed Finding is the fact that the

TurboTax Free Edition logo appeared on screen throughout the ad, that “[s]imple tax returns only” appeared on screen the entire time the ad referenced the free offer, and that the free offer was not shown for most of the ad. The Proposed Finding also does not include additional disclosures that would have been shown to consumers along with the screenshots above. Paired with the video was text stating: “File your Fed & State taxes for FREE with TurboTax. Simple tax returns only.” (GX Summary 002 (FTC) at ‘Data-Online_Ad_Combined’ row 4291). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

The Proposed Finding is also incomplete because it fails to recognize that consumers clicking on the advertisement would be taken directly to the app store on their phone where they could download the TurboTax app, where they would see detailed information about the free offer’s qualifications. (See PFF ¶253; Johnson (Intuit) Tr. 583; Rubin (Intuit) Tr. 1563-1564). Indeed, Complaint Counsel and their witnesses recognized that the TurboTax website repeatedly disclosed the qualifications of free TurboTax offers and provided detailed information about those qualifications, and the same information is available through the TurboTax app. (PFF ¶¶369-370; GX439 (Ryan (Intuit) Decl.) ¶29)). For example, Complaint Counsel’s own 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 the free TurboTax offers. (PFF ¶790). Reasonable consumers understood that display ads such as GX545 link to a website or app when clicked (here, the TurboTax app) that includes more information about the advertised free offer, and by linking to the TurboTax app, the

advertisement incorporated the detailed information available through the app. (PFF ¶254; *see also* CCF ¶455 (“The TurboTax website is ... integrated into TurboTax’s free advertising.”)).

Moreover, the Proposed Finding does not support an inference that the challenged ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The advertisement includes a TurboTax Free Edition logo and states prominently in the same or similar font size as the free offer, “Simple tax returns only.” (GX545 (Intuit)). By identifying the specific TurboTax SKU being advertised, the ad informed consumers that the offer does not apply to all TurboTax products. (*See* PFF ¶¶317, 321). And by stating that the offer was available for “Simple tax returns only,” the ad informed consumers that the free offer was not available to everyone, and that eligibility was contingent on the complexity of the consumer’s tax returns. (PFF ¶322; *see also* PFF ¶¶130-145). Complaint Counsel have offered no evidence that *all* components of the ad were not visible to consumers (*see* PFF ¶255), nor could they given the prominence of that content and the benchmarking analysis showing that the disclosures were comparable to disclosures in other companies’ ads (*see* PFF ¶¶257-259).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel assert were conveyed. Instead, the undisputed testimony from Intuit’s executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (*See* PFF ¶¶167-177, 190, 192-202, 405, 852, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel have not offered any evidence that this ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that

TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the qualifications included in the ad would prevent consumers from being misled by the ad. (See PFF ¶¶260-264, 302-322, 328-330, 334). Even without those disclosures, consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

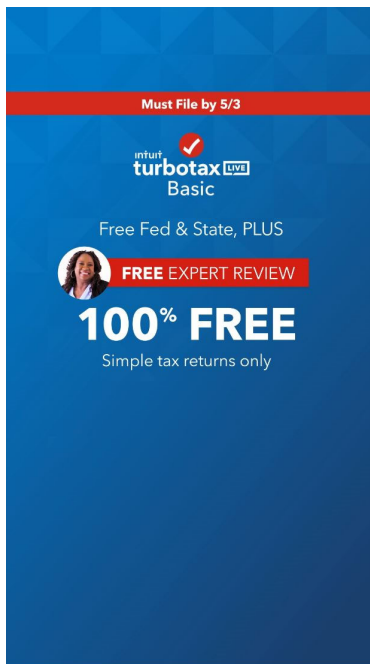
295. GX546, which Intuit produced bearing Bates number INTUIT-FTC-PART3-000000147 and with the original file name TY20-731_EOS_TTLiveBasic_Rollout_TikTok_9_16.mp4, is an online TurboTax ad for TY 2020 that, according to Intuit's data at GX434, [REDACTED] (GX546 (Intuit); GX434 (Intuit); GX Summary 002 (Complaint Counsel) at 'Summary-Online_Ads' row 207; Baburek (Complaint Counsel) Tr. 318–23).

Response to Finding No. 295:

The Proposed Finding is misleading because GX546 is not an “online TurboTax ad.” It is a display advertisement for a specific TurboTax SKU, TurboTax Live Basic. (GX546 (Intuit)).

Intuit otherwise has no specific response except to note that the number of impressions or clicks an ad received is not evidence that the ad conveyed any of the claims asserted by Complaint Counsel, that reasonable consumers were likely to be deceived, or that the claims were material to reasonable consumers. The dissemination data offered in the Proposed Finding illustrates that reasonable consumers were *unlikely* to be deceived. That Complaint Counsel have identified only 17 even potentially relevant consumer complaints from Tax Year 2020 (see CCF ¶677), even though GX546 on its own received [REDACTED] that year, is strong evidence that reasonable consumers were not deceived by GX546 or any of the other challenged advertisements that ran in Tax Year 2020 (see PFF ¶¶632, 637, 639, 641-647).

296. A screenshot from GX546 is pictured below.



(GX546 (Intuit)).

Response to Finding No. 296:

The Proposed Finding is incomplete because it is just a snippet of the display advertisement that actually ran. (PFF ¶364). The Proposed Finding does not include additional disclosures that would have been shown to consumers along with screenshot above. Paired with the video was text stating: “100% Free for simple tax returns only.” (GX Summary 002 (FTC) at ‘Data-Online_Ad_Combined’ row 4234). Complaint Counsel have thus omitted critical information for evaluating the advertisement. In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

The Proposed Finding is also incomplete because it fails to recognize that consumers clicking on the advertisement would be taken directly to the app store on their phone where they could download the TurboTax app, where they would see detailed information about the free offer’s qualifications. (See PFF ¶253; Johnson (Intuit) Tr. 583; Rubin (Intuit) Tr. 1563-1564).

Indeed, Complaint Counsel and their witnesses recognized that the TurboTax website repeatedly disclosed the qualifications of free TurboTax offers and provided detailed information about those qualifications, and the same information is available through the TurboTax app. (PFF ¶¶369-370; GX439 (Ryan (Intuit) Decl.) ¶29)). For example, Complaint Counsel’s own 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 the free TurboTax offers. (PFF ¶790). Reasonable consumers understood that display ads such as GX546 link to a website or app when clicked (here, the TurboTax app) that includes more information about the advertised free offer, and by linking to the TurboTax app, the advertisement incorporated the detailed information available through the app. (PFF ¶254; *see also* CCF ¶455 (“The TurboTax website is ... integrated into TurboTax’s free advertising.”)).

Moreover, the Proposed Finding does not support an inference that the challenged ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The advertisement includes a TurboTax Live Basic logo and states prominently, “Simple tax returns only.” (GX546 (Intuit)). By identifying the specific TurboTax SKU being advertised, the ad informed consumers that the offer does not apply to all TurboTax products. (*See* PFF ¶¶317, 321). And by stating that the offer was available for “Simple tax returns only,” the ad informed consumers that the free offer was not available to everyone, and that eligibility was contingent on the complexity of the consumer’s tax returns. (PFF ¶322; *see also* PFF ¶¶130-145). Complaint Counsel have offered no evidence that *all* components of the ad were not visible to consumers (*see* PFF ¶255), nor could they given the prominence of that content and the benchmarking analysis showing that the disclosures were comparable to disclosures in other companies’ ads (*see* PFF ¶¶257-259).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel assert were conveyed. Instead, the undisputed testimony from Intuit's executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (See PFF ¶¶167-177, 190, 192-202, 405, 852, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel have not offered any evidence that this ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the qualifications included in the ad would prevent consumers from being misled by the ad. (See PFF ¶¶260-264, 302-322, 328-330, 334). Even without those disclosures, consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

297. GX547, which Intuit produced bearing Bates number INTUIT-FTC-PART3-000000150 and with the original file name TY20-767_EOS_TTLiveBasic_UGC_RealPeople_TikTok_9_16.mp4, is an online TurboTax ad for TY 2020 that, according to Intuit's data at GX434 [REDACTED] (GX547 (Intuit); GX434 (Intuit); GX Summary 002 (Complaint Counsel) at 'Summary-Online_Ads' row 221; Baburek (Complaint Counsel) Tr. 318-23).

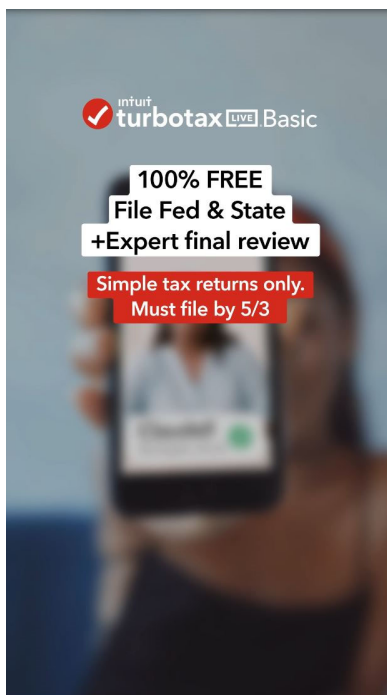
Response to Finding No. 297:

The Proposed Finding is misleading because GX547 is not an "online TurboTax ad." It is a display advertisement for a specific TurboTax SKU, TurboTax Live Basic. (GX547 (Intuit)).

Intuit otherwise has no specific response except to note that the number of impressions or clicks an ad received is not evidence that the ad conveyed any of the claims asserted by Complaint

Counsel, that reasonable consumers were likely to be deceived, or that the claims were material to reasonable consumers. The dissemination data offered in the Proposed Finding illustrates that reasonable consumers were *unlikely* to be deceived. That Complaint Counsel have identified only 17 even potentially relevant consumer complaints from Tax Year 2020 (*see* CCFF ¶677), even though GX547 on its own received [REDACTED] that year, is strong evidence that reasonable consumers were not deceived by GX547 or any of the other challenged advertisements that ran in Tax Year 2020 (*see* PFF ¶¶632, 637, 639, 641-647).

298. A screenshot from GX547 is pictured below.



(GX547 (Intuit)).

Response to Finding No. 298:

The Proposed Finding is incomplete and misleading because it is just a snippet of the full display video ad that actually ran and Complaint Counsel have omitted critical information for evaluating the advertisement. (GX547 (Intuit)). Consumers did not view the challenged advertisement as a single, static image. Not captured in the Proposed Finding is the voiceover

stating that the offer was for “TurboTax Live” and that it was available for “[s]imple tax returns only.” (GX547 (Intuit)). The text that was shown with the ad when it was viewed on TikTok also stated that it was “for simple tax returns only.” (GX Summary 002 (FTC) at ‘Data-Online_Ad_Combined’ row 4226). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

The Proposed Finding is also incomplete because it fails to recognize that consumers clicking on the advertisement would be taken directly to the app store on their phone where they could download the TurboTax app, where they would see detailed information about the free offer’s qualifications. (See PFF ¶253; Johnson (Intuit) Tr. 583; Rubin (Intuit) Tr. 1563-1564). Indeed, Complaint Counsel and their witnesses recognized that the TurboTax website repeatedly disclosed the qualifications of free TurboTax offers and provided detailed information about those qualifications, and the same information is available through the TurboTax app. (PFF ¶¶369-370; GX439 (Ryan (Intuit) Decl.) ¶29)). For example, Complaint Counsel’s own 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 the free TurboTax offers. (PFF ¶790). Reasonable consumers understood that display ads such as GX547 link to a website or app when clicked (here, the TurboTax app) that includes more information about the advertised free offer, and by linking to the TurboTax app, the advertisement incorporated the detailed information available through the app. (PFF ¶254; *see also* CCF ¶455 (“The TurboTax website is ... integrated into TurboTax’s free advertising.”)).

Moreover, the Proposed Finding does not support an inference that the challenged ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would

necessarily be free for the consumer when it was not. The advertisement includes a TurboTax Live Basic logo and states verbally and in writing highlighted in red, “Simple tax returns only.” (GX547 (Intuit)). By stating that the offer was available for “Simple tax returns only,” the ad informed consumers that the free offer was not available to everyone, and that eligibility was contingent on the complexity of the consumer’s tax returns. (PFF ¶¶322; *see also* PFF ¶¶130-145). Complaint Counsel have offered no evidence that *all* components of the ad were not visible or audible to consumers (*see* PFF ¶¶255-256), nor could they given the prominence of that content and the benchmarking analysis showing that the disclosures were comparable to disclosures in other companies’ ads (*see* PFF ¶¶257-259).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel assert were conveyed. Instead, the undisputed testimony from Intuit’s executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (*See* PFF ¶¶167-177, 190, 192-202, 405, 852, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel have not offered any evidence that this ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the qualifications included in the ad would prevent consumers from being misled by the ad. (*See* PFF ¶¶260-264, 302-322, 328-330, 334). Even without those disclosures, consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information

about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

299. RX1404 (GX605), which Intuit produced bearing Bates number INTUIT-FTC-PART3-000000520 and with the original file name QTTX1921H_Echo_HD_WEB_TTX_YouTube_TurboTax_06.mp4, is an online TurboTax ad for TY 2020 that, according to Intuit's data at GX434, [REDACTED] [REDACTED]. (RX1404 (GX605) (Intuit); GX434 (Intuit); GX Summary 002 (Complaint Counsel) at 'Summary-Online_Ads' row 39, row 40, row 41; Baburek (Complaint Counsel) Tr. 318-23).

Response to Finding No. 299:

The Proposed Finding is misleading because RX1404 is not an "online TurboTax ad." It is a brand video advertisement for a specific TurboTax SKU, TurboTax Free Edition. (RX1404 (Intuit); GX146 (Ryan (Intuit) Dep.) at 39).

Intuit otherwise has no specific response except to note that the number of impressions or clicks an ad received is not evidence that the ad conveyed any of the claims asserted by Complaint Counsel, that reasonable consumers were likely to be deceived, or that the claims were material to reasonable consumers. The dissemination data offered in the Proposed Finding illustrates that reasonable consumers were *unlikely* to be deceived. That Complaint Counsel have identified only 17 even potentially relevant consumer complaints from Tax Year 2020 (*see* CCF ¶677), even though RX1404 on its own received [REDACTED] [REDACTED] that year, is strong evidence that reasonable consumers were not deceived by RX1404 or any of the other challenged advertisements that ran in Tax Year 2020 (*see* PFF ¶¶632, 637, 639, 641-647).

The challenged ad also has not aired in the last two years. Moreover, the binding Consent Order with the attorneys general of all 50 states and the District of Columbia already prohibits Intuit from running this ad or substantially similar ads in the future, and Intuit has disclaimed any intention of running such ads ever again. (*See* PFF ¶¶225, 810, 824).

300. A screenshot from RX1404 (GX605) is pictured below.



(RX1404 (Intuit)).

Response to Finding No. 300:

The Proposed Finding is misleading because it does not reflect how consumers would have actually seen the ad. The ad would appear much larger, and the text much clearer, to consumers viewing the ad on YouTube, either on a TV or a computer. (See PFF ¶¶229, 232).

The Proposed Finding is also incomplete and misleading because it is just a snippet of the full brand video ad that actually ran and Complaint Counsel have omitted critical information for evaluating the advertisement. (RX1404 (Intuit)). Consumers did not view the challenged advertisement as a single, static image. Not captured in the Proposed Finding is the voiceover included in RX1404 stating that “TurboTax Free Edition is free.” In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

The Proposed Finding is also incomplete because it fails to recognize that consumers clicking on the links accompanying the advertisement would be taken directly to the landing

page on the TurboTax website for TurboTax Free Edition, where they would see detailed information about the SKU's qualifications. (Johnson (Intuit) Tr. 595-596; *see also* PFF ¶253; Rubin (Intuit) Tr. 1563-1564). Indeed, Complaint Counsel and their witnesses recognized that the TurboTax website repeatedly disclosed the qualifications of free TurboTax offers and provided detailed information about those qualifications. (PFF ¶¶369-370). For example, Complaint Counsel's own 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 the free TurboTax offers. (PFF ¶790). Reasonable consumers understood that clicking on the links accompanying brand video ads such as RX1404 would take them to a website (here, the TurboTax website) that includes more information about the advertised free offer, and by linking directly to the TurboTax website, the advertisement incorporated the detailed information on the TurboTax website. (Golder (Intuit) Tr. 1116-1117; *see also* PFF ¶254; CCFF ¶455 ("The TurboTax website is ... integrated into TurboTax's free advertising.")).

Moreover, the Proposed Finding does not support an inference that the challenged ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The advertisement includes a large TurboTax Free Edition logo, states that "TurboTax Free Edition is for simple U.S. returns only," and tells consumers that they can "See if [they] qualify at turbotax.com." (RX1404 (Intuit)). The ad also included a voiceover stating that the free offer was for a specific TurboTax SKU, "TurboTax Free Edition." (RX1404 (Intuit)). By identifying the specific TurboTax SKU being advertised, the ad informed consumers that the offer does not apply to all TurboTax products. (*See* PFF ¶¶317, 321). Likewise, by stating that "TurboTax Free Edition is for simple U.S.

returns only,” the ad informed consumers that the free offer was not available to everyone, and that eligibility was contingent on the complexity of the consumer’s tax returns. (PFF ¶¶322; *see also* PFF ¶¶130-145). And by stating “See if you qualify at turbotax.com,” the ad again told consumers that not everyone would qualify and where to find additional information about the offer’s qualifications. (*See* PFF ¶¶323-325). Complaint Counsel have offered no evidence that *all* components of the ad were not visible or audible to consumers (*see* PFF ¶¶230-231), nor could they given the prominence of that content and the benchmarking analysis showing that the disclosures were comparable to disclosures in other companies’ ads (*see* PFF ¶¶237-240).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel assert were conveyed. Instead, the undisputed testimony from Intuit’s executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (*See* PFF ¶¶167-177, 190, 192-202, 405, 852, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel have not offered any evidence that this ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the qualifications included in the ad would prevent consumers from being misled by the ad. (*See* PFF ¶¶242-246, 302-322, 328-330, 334). Even without those disclosures, consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

301. RX1405 (GX606), which Intuit produced bearing Bates number INTUIT-FTC-PART3-000000521 and with the original file name QTTX1923H_Auctioneer_HD_WEB_TTX_YouTube_TurboTax_30.mp4, is an online TurboTax ad for TY 2020 that, according to Intuit's data at GX434, [REDACTED] [REDACTED]. (RX1405 (GX606) (Intuit); GX434 (Intuit); GX Summary 002 (Complaint Counsel) at 'Summary-Online_Ads' row 42, row 43, row 44, row 45; Baburek (Complaint Counsel) Tr. 318–23).

Response to Finding No. 301:

The Proposed Finding is misleading because RX1405 is not an “online TurboTax ad.” It is a brand video advertisement for a specific TurboTax SKU, TurboTax Free Edition. (RX1405 (Intuit); GX146 (Ryan (Intuit) Dep.) at 39).

Intuit otherwise has no specific response except to note that the number of impressions or clicks an ad received is not evidence that the ad conveyed any of the claims asserted by Complaint Counsel, that reasonable consumers were likely to be deceived, or that the claims were material to reasonable consumers. The dissemination data offered in the Proposed Finding illustrates that reasonable consumers were *unlikely* to be deceived. That Complaint Counsel have identified only 17 even potentially relevant consumer complaints from Tax Year 2020 (*see* CCF ¶677), even though RX1405 on its own received [REDACTED] [REDACTED] that year, is strong evidence that reasonable consumers were not deceived by RX1405 or any of the other challenged advertisements that ran in Tax Year 2020 (*see* PFF ¶¶632, 637, 639, 641-647).

The challenged ad also has not aired in the last two years. Moreover, the binding Consent Order with the attorneys general of all 50 states and the District of Columbia already prohibits Intuit from running this ad or substantially similar ads in the future, and Intuit has disclaimed any intention of running such ads ever again. (*See* PFF ¶¶225, 810, 824).

302. Screenshots from RX1405 (GX606) are pictured below.



(RX1405 (Intuit)).

Response to Finding No. 302:

The Proposed Finding is misleading because it does not reflect how consumers would have actually seen the ad. The ad would appear much larger, and the text much clearer, to consumers viewing the ad on YouTube, either on a TV or a computer. (See PFF ¶¶229, 232).

The Proposed Finding is also incomplete and misleading because it is just a snippet of the full brand video ad that actually ran and Complaint Counsel have omitted critical information for evaluating the advertisement. (RX1405 (Intuit)). Consumers did not view the challenged advertisement as a single, static image. Not captured in the Proposed Finding is the voiceover

included in RX1405 stating that “TurboTax Free Edition is free.” In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

The Proposed Finding is also incomplete because it fails to recognize that consumers clicking on the links accompanying the advertisement would be taken directly to the landing page on the TurboTax website for TurboTax Free Edition, where they would see detailed information about the SKU’s qualifications. (Johnson (Intuit) Tr. 595-596; *see also* PFF ¶253; Rubin (Intuit) Tr. 1563-1564). Indeed, Complaint Counsel and their witnesses recognized that the TurboTax website repeatedly disclosed the qualifications of free TurboTax offers and provided detailed information about those qualifications. (PFF ¶¶369-370). For example, Complaint Counsel’s own 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 the free TurboTax offers. (PFF ¶790). Reasonable consumers understood that clicking on the links accompanying brand video ads such as RX1405 would take them to a website (here, the TurboTax website) that includes more information about the advertised free offer, and by linking directly to the TurboTax website, the advertisement incorporated the detailed information on the TurboTax website. (Golder (Intuit) Tr. 1116-1117; *see also* PFF ¶254; CCF ¶455 (“The TurboTax website is ... integrated into TurboTax’s free advertising.”)).

Moreover, the Proposed Finding does not support an inference that the challenged ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The advertisement includes a large

TurboTax Free Edition logo, states that “TurboTax Free Edition is for simple U.S. returns only,” and tells consumers that they can “See if [they] qualify at turbotax.com.” (RX1405 (Intuit)). The ad also included a voiceover stating that the free offer was for a specific TurboTax SKU, “TurboTax Free Edition.” (RX1405 (Intuit)). By identifying the specific TurboTax SKU being advertised, the ad informed consumers that the offer does not apply to all TurboTax products. (See PFF ¶¶317, 321). Likewise, by stating that “TurboTax Free Edition is for simple U.S. returns only,” the ad informed consumers that the free offer was not available to everyone, and that eligibility was contingent on the complexity of the consumer’s tax returns. (PFF ¶322; *see also* PFF ¶¶130-145). And by stating “See if you qualify at turbotax.com,” the ad again told consumers that not everyone would qualify and where to find additional information about the offer’s qualifications. (See PFF ¶¶323-325). Complaint Counsel have offered no evidence that *all* components of the ad were not visible or audible to consumers (*see* PFF ¶¶230-231), nor could they given the prominence of that content and the benchmarking analysis showing that the disclosures were comparable to disclosures in other companies’ ads (*see* PFF ¶¶237-240).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel assert were conveyed. Instead, the undisputed testimony from Intuit’s executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (See PFF ¶¶167-177, 190, 192-202, 405, 852, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel have not offered any evidence that this ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence

establishes that the qualifications included in the ad would prevent consumers from being misled by the ad. (See PFF ¶¶242-246, 302-322, 328-330, 334). Even without those disclosures, consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

303. RX1122 (GX608), which Intuit produced bearing Bates number INTUIT-FTC-PART3-000000523 and with the original file name QTTX1895H_Dance_Workout_HD_WEB_TTX_YouTube_TurboTax_15.mp4, is an online TurboTax ad for TY 2020 that, according to Intuit's data at GX434, [REDACTED] (RX1122 (GX608) (Intuit); GX434 (Intuit); GX Summary 002 (Complaint Counsel) at 'Summary-Online_Ads' row 10, row 11, row 12, row 13; Baburek (Complaint Counsel) Tr. 318–23).

Response to Finding No. 303:

The Proposed Finding is misleading because RX1122 is not an “online TurboTax ad.” It is a brand video advertisement for a specific TurboTax SKU, TurboTax Free Edition. (RX1122 (Intuit); GX146 (Ryan (Intuit) Dep.) at 39).

Intuit otherwise has no specific response except to note that the number of impressions or clicks an ad received is not evidence that the ad conveyed any of the claims asserted by Complaint Counsel, that reasonable consumers were likely to be deceived, or that the claims were material to reasonable consumers. The dissemination data offered in the Proposed Finding illustrates that reasonable consumers were *unlikely* to be deceived. That Complaint Counsel have identified only 17 even potentially relevant consumer complaints from Tax Year 2020 (see CCF ¶677), even though RX1122 on its own received [REDACTED] [REDACTED] that year, is strong evidence that reasonable consumers were not deceived by RX1122 or any of the other challenged advertisements that ran in Tax Year 2020 (see PFF ¶¶632, 637, 639, 641-647).

The challenged ad also has not aired in the last two years. Moreover, the binding Consent Order with the attorneys general of all 50 states and the District of Columbia already prohibits Intuit from running this ad or substantially similar ads in the future, and Intuit has disclaimed any intention of running such ads ever again. (See PFF ¶¶225, 810, 824).

304. Screenshots from RX1122 (GX608) are pictured below.



(RX1122 (Intuit)).

Response to Finding No. 304:

The Proposed Finding is misleading because it does not reflect how consumers would have actually seen the ad. The ad would appear much larger, and the text much clearer, to consumers viewing the ad on YouTube, either on a TV or a computer. (See PFF ¶¶229, 232).

The Proposed Finding is also incomplete and misleading because it is just a snippet of the full brand video ad that actually ran and Complaint Counsel have omitted critical information for evaluating the advertisement. (RX1122 (Intuit)). Consumers did not view the challenged advertisement as a single, static image. Not captured in the Proposed Finding is the voiceover included in RX1122 stating that “TurboTax Free Edition is free.” In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

The Proposed Finding is also incomplete because it fails to recognize that consumers clicking on the links accompanying the advertisement would be taken directly to the landing page on the TurboTax website for TurboTax Free Edition, where they would see detailed information about the SKU’s qualifications. (Johnson (Intuit) Tr. 595-596; *see also* PFF ¶253; Rubin (Intuit) Tr. 1563-1564). Indeed, Complaint Counsel and their witnesses recognized that the TurboTax website repeatedly disclosed the qualifications of free TurboTax offers and provided detailed information about those qualifications. (PFF ¶¶369-370). For example, Complaint Counsel’s own 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 the free TurboTax offers. (PFF ¶790). Reasonable consumers understood that clicking on the links accompanying brand video ads such as RX1122 would take them to a website (here, the TurboTax website) that includes more information about the advertised free offer, and by linking directly to the TurboTax website, the advertisement incorporated the detailed information on the TurboTax website. (Golder (Intuit) Tr. 1116-1117;

see also PFF ¶254; CCF ¶455 (“The TurboTax website is ... integrated into TurboTax’s free advertising.”)).

Moreover, the Proposed Finding does not support an inference that the challenged ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The advertisement includes a large TurboTax Free Edition logo, states that “TurboTax Free Edition is for simple U.S. returns only,” and tells consumers that they can “See if [they] qualify at turbotax.com.” (RX1122 (Intuit)). The ad also included a voiceover stating that the free offer was for a specific TurboTax SKU, “TurboTax Free Edition.” (RX1122 (Intuit)). By identifying the specific TurboTax SKU being advertised, the ad informed consumers that the offer does not apply to all TurboTax products. (*See* PFF ¶¶317, 321). Likewise, by stating that “TurboTax Free Edition is for simple U.S. returns only,” the ad informed consumers that the free offer was not available to everyone, and that eligibility was contingent on the complexity of the consumer’s tax returns. (PFF ¶322; *see also* PFF ¶¶130-145). And by stating “See if you qualify at turbotax.com,” the ad again told consumers that not everyone would qualify and where to find additional information about the offer’s qualifications. (*See* PFF ¶¶323-325). Complaint Counsel have offered no evidence that *all* components of the ad were not visible or audible to consumers (*see* PFF ¶¶230-231), nor could they given the prominence of that content and the benchmarking analysis showing that the disclosures were comparable to disclosures in other companies’ ads (*see* PFF ¶¶237-240).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel assert were conveyed. Instead, the undisputed testimony from Intuit’s executives establishes that Intuit did not intend for any of the ads to claim

that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (See PFF ¶¶167-177, 190, 192-202, 405, 852, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel have not offered any evidence that this ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the qualifications included in the ad would prevent consumers from being misled by the ad. (See PFF ¶¶242-246, 302-322, 328-330, 334). Even without those disclosures, consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

305. RX1124 (GX609), which Intuit produced bearing Bates number INTUIT-FTC-PART3-000000524 and with the original file name QTTX1903H_Echo_HD_WEB_TTX_YouTube_TurboTax_15.mp4, is an online TurboTax ad for TY 2020 that, according to Intuit's data at GX434, [REDACTED]. (RX1124 (GX609) (Intuit); GX434 (Intuit); GX Summary 002 (Complaint Counsel) at 'Summary-Online_Ads' row 26, row 27, row 28, row 29; Baburek (Complaint Counsel) Tr. 318-23).

Response to Finding No. 305:

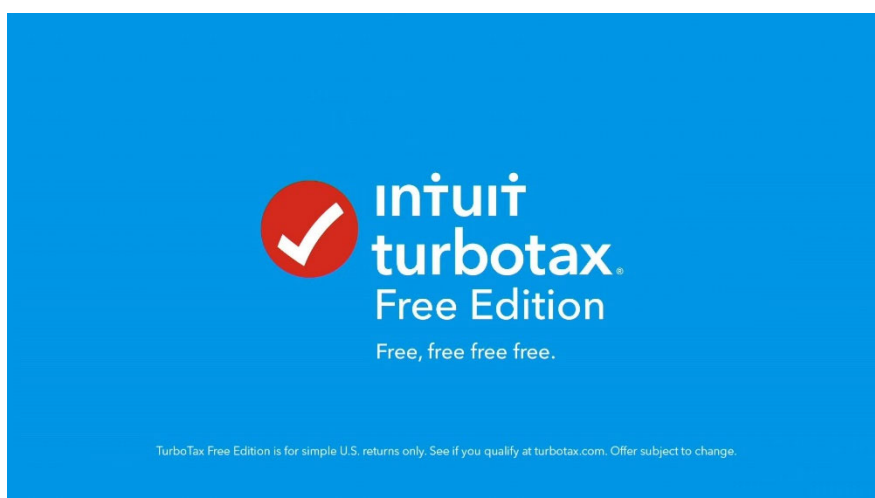
The Proposed Finding is misleading because RX1124 is not an "online TurboTax ad." It is a brand video advertisement for a specific TurboTax SKU, TurboTax Free Edition. (RX1124 (Intuit); GX146 (Ryan (Intuit) Dep.) at 39).

Intuit otherwise has no specific response except to note that the number of impressions or clicks an ad received is not evidence that the ad conveyed any of the claims asserted by Complaint Counsel, that reasonable consumers were likely to be deceived, or that the claims were material to reasonable consumers. The dissemination data offered in the Proposed Finding

illustrates that reasonable consumers were *unlikely* to be deceived. That Complaint Counsel have identified only 17 even potentially relevant consumer complaints from Tax Year 2020 (*see* CCF ¶¶677), even though RX1124 on its own received [REDACTED] [REDACTED] that year, is strong evidence that reasonable consumers were not deceived by RX1124 or any of the other challenged advertisements that ran in Tax Year 2020 (*see* PFF ¶¶632, 637, 639, 641-647).

The challenged ad also has not aired in the last two years. Moreover, the binding Consent Order with the attorneys general of all 50 states and the District of Columbia already prohibits Intuit from running this ad or substantially similar ads in the future, and Intuit has disclaimed any intention of running such ads ever again. (*See* PFF ¶¶225, 810, 824).

306. Screenshots from RX1124 (GX609) are pictured below.



(RX1124 (Intuit)).

Response to Finding No. 306:

The Proposed Finding is misleading because it does not reflect how consumers would have actually seen the ad. The ad would appear much larger, and the text much clearer, to consumers viewing the ad on YouTube, either on a TV or a computer. (See PFF ¶¶229, 232).

The Proposed Finding is also incomplete and misleading because it is just a snippet of the full brand video ad that actually ran and Complaint Counsel have omitted critical information for evaluating the advertisement. (RX1124 (Intuit)). Consumers did not view the challenged advertisement as a single, static image. Not captured in the Proposed Finding is the voiceover included in RX1124 stating that “TurboTax Free Edition is free.” In determining the claims

conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

The Proposed Finding is also incomplete because it fails to recognize that consumers clicking on the links accompanying the advertisement would be taken directly to the landing page on the TurboTax website for TurboTax Free Edition, where they would see detailed information about the SKU's qualifications. (Johnson (Intuit) Tr. 595-596; *see also* PFF ¶253; Rubin (Intuit) Tr. 1563-1564). Indeed, Complaint Counsel and their witnesses recognized that the TurboTax website repeatedly disclosed the qualifications of free TurboTax offers and provided detailed information about those qualifications. (PFF ¶¶369-370). For example, Complaint Counsel's own 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 the free TurboTax offers. (PFF ¶790). Reasonable consumers understood that clicking on the links accompanying brand video ads such as RX1124 would take them to a website (here, the TurboTax website) that includes more information about the advertised free offer, and by linking directly to the TurboTax website, the advertisement incorporated the detailed information on the TurboTax website. (Golder (Intuit) Tr. 1116-1117; *see also* PFF ¶254; CCF ¶455 ("The TurboTax website is ... integrated into TurboTax's free advertising.")).

Moreover, the Proposed Finding does not support an inference that the challenged ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The advertisement includes a large TurboTax Free Edition logo, states that "TurboTax Free Edition is for simple U.S. returns only," and tells consumers that they can "See if [they] qualify at turbotax.com." (RX1124 (Intuit)).

The ad also included a voiceover stating that the free offer was for a specific TurboTax SKU, “TurboTax Free Edition.” (RX1124 (Intuit)). By identifying the specific TurboTax SKU being advertised, the ad informed consumers that the offer does not apply to all TurboTax products. (See PFF ¶¶317, 321). Likewise, by stating that “TurboTax Free Edition is for simple U.S. returns only,” the ad informed consumers that the free offer was not available to everyone, and that eligibility was contingent on the complexity of the consumer’s tax returns. (PFF ¶322; *see also* PFF ¶¶130-145). And by stating “See if you qualify at turbotax.com,” the ad again told consumers that not everyone would qualify and where to find additional information about the offer’s qualifications. (See PFF ¶¶323-325). Complaint Counsel have offered no evidence that *all* components of the ad were not visible or audible to consumers (*see* PFF ¶¶230-231), nor could they given the prominence of that content and the benchmarking analysis showing that the disclosures were comparable to disclosures in other companies’ ads (*see* PFF ¶¶237-240).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel assert were conveyed. Instead, the undisputed testimony from Intuit’s executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (See PFF ¶¶167-177, 190, 192-202, 405, 852, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel have not offered any evidence that this ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the qualifications included in the ad would prevent consumers from being misled by the ad. (See PFF ¶¶242-246, 302-322, 328-330, 334). Even without those disclosures,

consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

307. RX1407 (GX610), which Intuit produced bearing Bates number INTUIT-FTC-PART3-000000525 and with the original file name QTTX1919H_Auctioneer_HD_WEB_TTX_YouTube_TurboTax_06.mp4, is an online TurboTax ad for TY 2020 that, according to Intuit's data at GX434, [REDACTED]. (RX1407 (GX610) (Intuit); GX434 (Intuit); GX Summary 002 (Complaint Counsel) at 'Summary-Online_Ads' row 36, row 37, row 38; Baburek (Complaint Counsel) Tr. 318–23).

Response to Finding No. 307:

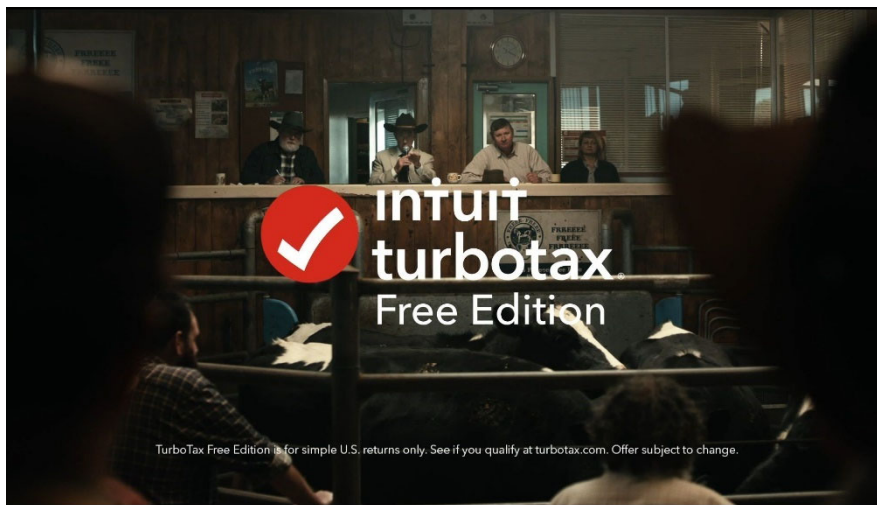
The Proposed Finding is misleading because RX1407 is not an “online TurboTax ad.” It is a brand video advertisement for a specific TurboTax SKU, TurboTax Free Edition. (RX1407 (Intuit); GX146 (Ryan (Intuit) Dep.) at 39).

Intuit otherwise has no specific response except to note that the number of impressions or clicks an ad received is not evidence that the ad conveyed any of the claims asserted by Complaint Counsel, that reasonable consumers were likely to be deceived, or that the claims were material to reasonable consumers. The dissemination data offered in the Proposed Finding illustrates that reasonable consumers were *unlikely* to be deceived. That Complaint Counsel have identified only 17 even potentially relevant consumer complaints from Tax Year 2020 (*see* CCF ¶677), even though RX1407 on its own received [REDACTED] [REDACTED] that year, is strong evidence that reasonable consumers were not deceived by RX1407 or any of the other challenged advertisements that ran in Tax Year 2020 (*see* PFF ¶¶632, 637, 639, 641-647).

The challenged ad also has not aired in the last two years. Moreover, the binding Consent Order with the attorneys general of all 50 states and the District of Columbia already

prohibits Intuit from running this ad or substantially similar ads in the future, and Intuit has disclaimed any intention of running such ever ads again. (See PFF ¶¶225, 810, 824).

308. A screenshot from RX1407 (GX610) is pictured below.



(RX1407 (Intuit)).

Response to Finding No. 308:

The Proposed Finding is misleading because it does not reflect how consumers would have actually seen the ad. The ad would appear much larger, and the text much clearer, to consumers viewing the ad on YouTube, either on a TV or a computer. (See PFF ¶¶229, 232).

The Proposed Finding is also incomplete and misleading because it is just a snippet of the full brand video ad that actually ran and Complaint Counsel have omitted critical information for evaluating the advertisement. (RX1407 (Intuit)). Consumers did not view the challenged advertisement as a single, static image. Not captured in the Proposed Finding is the voiceover included in RX1407 stating that “TurboTax Free Edition is free.” In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

The Proposed Finding is also incomplete because it fails to recognize that consumers clicking on the links accompanying the advertisement would be taken directly to the landing page on the TurboTax website for TurboTax Free Edition, where they would see detailed information about the SKU's qualifications. (Johnson (Intuit) Tr. 595-596; *see also* PFF ¶253; Rubin (Intuit) Tr. 1563-1564). Indeed, Complaint Counsel and their witnesses recognized that the TurboTax website repeatedly disclosed the qualifications of free TurboTax offers and provided detailed information about those qualifications. (PFF ¶¶369-370). For example, Complaint Counsel's own 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 the free TurboTax offers. (PFF ¶790). Reasonable consumers understood that clicking on the links accompanying brand video ads such as RX1407 would take them to a website (here, the TurboTax website) that includes more information about the advertised free offer, and by linking directly to the TurboTax website, the advertisement incorporated the detailed information on the TurboTax website. (Golder (Intuit) Tr. 1116-1117; *see also* PFF ¶254; CCF ¶455 ("The TurboTax website is ... integrated into TurboTax's free advertising.")).

Moreover, the Proposed Finding does not support an inference that the challenged ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The advertisement includes a large TurboTax Free Edition logo, states that "TurboTax Free Edition is for simple U.S. returns only," and tells consumers that they can "See if [they] qualify at turbotax.com." (RX1407 (Intuit)). The ad also included a voiceover stating that the free offer was for a specific TurboTax SKU, "TurboTax Free Edition." (RX1407 (Intuit)). By identifying the specific TurboTax SKU being

advertised, the ad informed consumers that the offer does not apply to all TurboTax products. (See PFF ¶¶317, 321). Likewise, by stating that “TurboTax Free Edition is for simple U.S. returns only,” the ad informed consumers that the free offer was not available to everyone, and that eligibility was contingent on the complexity of the consumer’s tax returns. (PFF ¶322; *see also* PFF ¶¶130-145). And by stating “See if you qualify at turbotax.com,” the ad again told consumers that not everyone would qualify and where to find additional information about the offer’s qualifications. (See PFF ¶¶323-325). Complaint Counsel have offered no evidence that *all* components of the ad were not visible or audible to consumers (*see* PFF ¶¶230-231), nor could they given the prominence of that content and the benchmarking analysis showing that the disclosures were comparable to disclosures in other companies’ ads (*see* PFF ¶¶237-240).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel assert were conveyed. Instead, the undisputed testimony from Intuit’s executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (See PFF ¶¶167-177, 190, 192-202, 405, 852, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel have not offered any evidence that this ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the qualifications included in the ad would prevent consumers from being misled by the ad. (See PFF ¶¶242-246, 302-322, 328-330, 334). Even without those disclosures, consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information

about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

309. RX1408 (GX611), which Intuit produced bearing Bates number INTUIT-FTC-PART3-000000526 and with the original file name QTTX1901H_Auctioneer_HD_WEB_TTX_YouTube_TurboTax_15.mp4, is an online TurboTax ad for TY 2020 that, according to Intuit's data at GX434 [REDACTED] [REDACTED]. (RX1408 (GX611) (Intuit); GX434 (Intuit); GX Summary 002 (Complaint Counsel) at 'Summary-Online_Ads' row 22, row 23, row 24, row 25; Baburek (Complaint Counsel) Tr. 318-23).

Response to Finding No. 309:

The Proposed Finding is misleading because RX1408 is not an "online TurboTax ad." It is a brand video advertisement for a specific TurboTax SKU, TurboTax Free Edition. (RX1408 (Intuit); GX146 (Ryan (Intuit) Dep.) at 39).

Intuit otherwise has no specific response except to note that the number of impressions or clicks an ad received is not evidence that the ad conveyed any of the claims asserted by Complaint Counsel, that reasonable consumers were likely to be deceived, or that the claims were material to reasonable consumers. The dissemination data offered in the Proposed Finding illustrates that reasonable consumers were *unlikely* to be deceived. That Complaint Counsel have identified only 17 even potentially relevant consumer complaints from Tax Year 2020 (*see* CCF ¶677), even though RX1408 on its own received [REDACTED] [REDACTED] that year, is strong evidence that reasonable consumers were not deceived by RX1408 or any of the other challenged advertisements that ran in Tax Year 2020 (*see* PFF ¶¶632, 637, 639, 641-647).

The challenged ad also has not aired in the last two years. Moreover, the binding Consent Order with the attorneys general of all 50 states and the District of Columbia already prohibits Intuit from running this ad or substantially similar ads in the future, and Intuit has disclaimed any intention of running such ads ever again. (*See* PFF ¶¶225, 810, 824).

310. Screenshots from RX1408 (GX611) are pictured below.



(RX1408 (Intuit)).

Response to Finding No. 310:

The Proposed Finding is misleading because it does not reflect how consumers would have actually seen the ad. The ad would appear much larger, and the text much clearer, to consumers viewing the ad on YouTube, either on a TV or a computer. (See PFF ¶¶229, 232).

The Proposed Finding is also incomplete and misleading because it is just a snippet of the full brand video ad that actually ran and Complaint Counsel have omitted critical information for evaluating the advertisement. (RX1408 (Intuit)). Consumers did not view the challenged advertisement as a single, static image. Not captured in the Proposed Finding is the voiceover included in RX1408 stating that “TurboTax Free Edition is free.” In determining the claims

conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

The Proposed Finding is also incomplete because it fails to recognize that consumers clicking on the links accompanying the advertisement would be taken directly to the landing page on the TurboTax website for TurboTax Free Edition, where they would see detailed information about the SKU's qualifications. (Johnson (Intuit) Tr. 595-596; *see also* PFF ¶253; Rubin (Intuit) Tr. 1563-1564). Indeed, Complaint Counsel and their witnesses recognized that the TurboTax website repeatedly disclosed the qualifications of free TurboTax offers and provided detailed information about those qualifications. (PFF ¶¶369-370). For example, Complaint Counsel's own 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 the free TurboTax offers. (PFF ¶790). Reasonable consumers understood that clicking on the links accompanying brand video ads such as RX1408 would take them to a website (here, the TurboTax website) that includes more information about the advertised free offer, and by linking directly to the TurboTax website, the advertisement incorporated the detailed information on the TurboTax website. (Golder (Intuit) Tr. 1116-1117; *see also* PFF ¶254; CCFF ¶455 ("The TurboTax website is ... integrated into TurboTax's free advertising.")).

Moreover, the Proposed Finding does not support an inference that the challenged ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The advertisement includes a large TurboTax Free Edition logo, states that "TurboTax Free Edition is for simple U.S. returns only,"

and tells consumers that they can “See if [they] qualify at turbotax.com.” (RX1408 (Intuit)). The ad also includes a voiceover stating that the free offer was for a specific TurboTax SKU, “TurboTax Free Edition.” (RX1408 (Intuit)). By identifying the specific TurboTax SKU being advertised, the ad informed consumers that the offer does not apply to all TurboTax products. (See PFF ¶¶317, 321). Likewise, by stating that “TurboTax Free Edition is for simple U.S. returns only,” the ad informed consumers that the free offer was not available to everyone, and that eligibility was contingent on the complexity of the consumer’s tax returns. (PFF ¶322; see also PFF ¶¶130-145). And by stating “See if you qualify at turbotax.com,” the ad again told consumers that not everyone would qualify and where to find additional information about the offer’s qualifications. (See PFF ¶¶323-325). Complaint Counsel have offered no evidence that *all* components of the ad were not visible or audible to consumers (see PFF ¶¶230-231), nor could they given the prominence of that content and the benchmarking analysis showing that the disclosures were comparable to disclosures in other companies’ ads (see PFF ¶¶237-240).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel assert were conveyed. Instead, the undisputed testimony from Intuit’s executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (See PFF ¶¶167-177, 190, 192-202, 405, 852, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel have not offered any evidence that this ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the qualifications included in the ad would prevent consumers from being misled

by the ad. (See PFF ¶¶242-246, 302-322, 328-330, 334). Even without those disclosures, consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

311. RX1409 (GX612), which Intuit produced bearing Bates number INTUIT-FTC-PART3-000000527 and with the original file name QTTX1915H_Dance_Workout_HD_WEB_TTX_YouTube_TurboTax_06.mp4, is an online TurboTax ad for TY 2020 that, according to Intuit's data at GX434, [REDACTED] (RX1409 (GX612) (Intuit); GX434 (Intuit); GX Summary 002 (Complaint Counsel) at 'Summary-Online_Ads' row 30, row 31, row 32; Baburek (Complaint Counsel) Tr. 318-23).

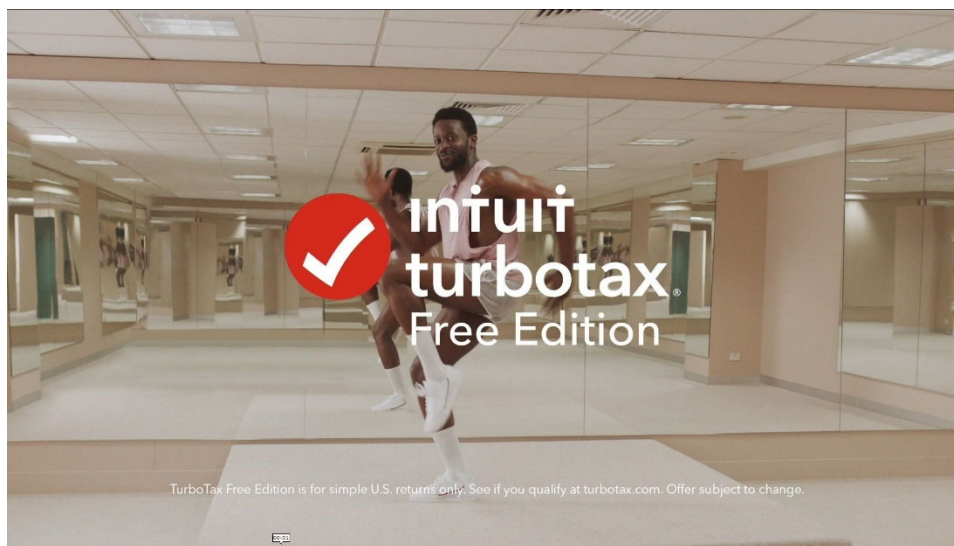
Response to Finding No. 311:

The Proposed Finding is misleading because RX1409 is not an "online TurboTax ad." It is a brand video advertisement for a specific TurboTax SKU, TurboTax Free Edition. (RX1409 (Intuit); GX146 (Ryan (Intuit) Dep.) at 39).

Intuit otherwise has no specific response except to note that the number of impressions or clicks an ad received is not evidence that the ad conveyed any of the claims asserted by Complaint Counsel, that reasonable consumers were likely to be deceived, or that the claims were material to reasonable consumers. The dissemination data offered in the Proposed Finding illustrates that reasonable consumers were *unlikely* to be deceived. That Complaint Counsel have identified only 17 even potentially relevant consumer complaints from Tax Year 2020 (see CCF ¶677), even though RX1409 on its own received [REDACTED] [REDACTED] that year, is strong evidence that reasonable consumers were not deceived by RX1409 or any of the other challenged advertisements that ran in Tax Year 2020 (see PFF ¶¶632, 637, 639, 641-647).

The challenged ad also has not aired in the last two years. Moreover, the binding Consent Order with the attorneys general of all 50 states and the District of Columbia already prohibits Intuit from running this ad or substantially similar ads in the future, and Intuit has disclaimed any intention of running such ads ever again. (See PFF ¶¶225, 810, 824).

312. A screenshot from RX1409 (GX612) is pictured below.



(RX1409 (Intuit)).

Response to Finding No. 312:

The Proposed Finding is misleading because it does not reflect how consumers would have actually seen the ad. The ad would appear much larger, and the text much clearer, to consumers viewing the ad on YouTube, either on a TV or a computer. (See PFF ¶¶229, 232).

The Proposed Finding is also incomplete and misleading because it is just a snippet of the full brand video ad that actually ran and Complaint Counsel have omitted critical information for evaluating the advertisement. (RX1409 (Intuit)). Consumers did not view the challenged advertisement as a single, static image. Not captured in the Proposed Finding is the voiceover included in RX1409 stating that “TurboTax Free Edition is free.” In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the

full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

The Proposed Finding is also incomplete because it fails to recognize that consumers clicking on the advertisement would be taken directly to the landing page on the TurboTax website for TurboTax Free Edition, where they would see detailed information about the SKU's qualifications. (Johnson (Intuit) Tr. 595-596; *see also* PFF ¶253; Rubin (Intuit) Tr. 1563-1564). Indeed, Complaint Counsel and their witnesses recognized that the TurboTax website repeatedly disclosed the qualifications of free TurboTax offers and provided detailed information about those qualifications. (PFF ¶¶369-370). For example, Complaint Counsel's own 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 the free TurboTax offers. (PFF ¶790). Reasonable consumers understood that clicking on the links accompanying brand video ads such as RX1409 would take them to a website (here, the TurboTax website) that includes more information about the advertised free offer, and by linking directly to the TurboTax website, the advertisement incorporated the detailed information on the TurboTax website. (Golder (Intuit) Tr. 1116-1117; *see also* PFF ¶254; CCF ¶455 ("The TurboTax website is ... integrated into TurboTax's free advertising.")).

Moreover, the Proposed Finding does not support an inference that the challenged ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The advertisement includes a large TurboTax Free Edition logo, states that "TurboTax Free Edition is for simple U.S. returns only," and tells consumers that they can "See if [they] qualify at turbotax.com." (RX1409 (Intuit)). The ad also included a voiceover stating that the free offer was for a specific TurboTax SKU,

“TurboTax Free Edition.” (RX1409 (Intuit)). By identifying the specific TurboTax SKU being advertised, the ad informed consumers that the offer does not apply to all TurboTax products. (See PFF ¶¶317, 321). Likewise, by stating that “TurboTax Free Edition is for simple U.S. returns only,” the ad informed consumers that the free offer was not available to everyone, and that eligibility was contingent on the complexity of the consumer’s tax returns. (PFF ¶322; *see also* PFF ¶¶130-145). And by stating “See if you qualify at turbotax.com,” the ad again told consumers that not everyone would qualify and where to find additional information about the offer’s qualifications. (See PFF ¶¶323-325). Complaint Counsel have offered no evidence that *all* components of the ad were not visible or audible to consumers (*see* PFF ¶¶230-231), nor could they given the prominence of that content and the benchmarking analysis showing that the disclosures were comparable to disclosures in other companies’ ads (*see* PFF ¶¶237-240).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel assert were conveyed. Instead, the undisputed testimony from Intuit’s executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (See PFF ¶¶167-177, 190, 192-202, 405, 852, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel have not offered any evidence that this ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the qualifications included in the ad would prevent consumers from being misled by the ad. (See PFF ¶¶242-246, 302-322, 328-330, 334). Even without those disclosures, consumers understand that free tax-preparation offers are qualified, that their ability to qualify

for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

313. RX1410 (GX613), which Intuit produced bearing Bates number INTUIT-FTC-PART3-000000528 and with the original file name QTTX1917H_Dog_Show_HD_WEB_TTX_YouTube_TurboTax_06.mp4, is an online TurboTax ad for TY 2020 that, according to Intuit's data at GX434, [REDACTED] (RX1410 (GX613) (Intuit); GX434 (Intuit); GX Summary 002 (Complaint Counsel) at 'Summary-Online_Ads' row 33, row 34, row 35; Baburek (Complaint Counsel) Tr. 318–23).

Response to Finding No. 313:

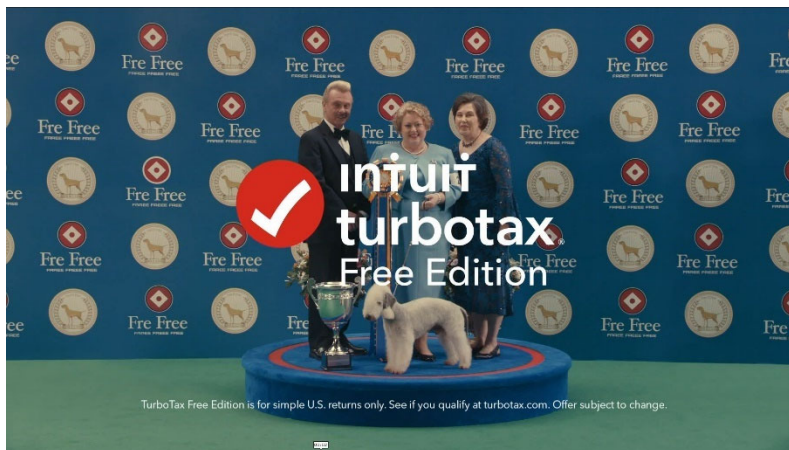
The Proposed Finding is misleading because RX1410 is not an “online TurboTax ad.” It is a brand video advertisement for a specific TurboTax SKU, TurboTax Free Edition. (RX1410 (Intuit); GX146 (Ryan (Intuit) Dep.) at 39).

Intuit otherwise has no specific response except to note that the number of impressions or clicks an ad received is not evidence that the ad conveyed any of the claims asserted by Complaint Counsel, that reasonable consumers were likely to be deceived, or that the claims were material to reasonable consumers. The dissemination data offered in the Proposed Finding illustrates that reasonable consumers were *unlikely* to be deceived. That Complaint Counsel have identified only 17 even potentially relevant consumer complaints from Tax Year 2020 (*see* CCF ¶677), even though RX1410 on its own received [REDACTED] [REDACTED] that year, is strong evidence that reasonable consumers were not deceived by RX1410 or any of the other challenged advertisements that ran in Tax Year 2020 (*see* PFF ¶¶632, 637, 639, 641-647).

The challenged ad also has not aired in the last two years. Moreover, the binding Consent Order with the attorneys general of all 50 states and the District of Columbia already

prohibits Intuit from running this ad or substantially similar ads in the future, and Intuit has disclaimed any intention of running such ads ever again. (See PFF ¶¶225, 810, 824).

314. A screenshot from RX1410 (GX613) is pictured below.



(RX1410 (Intuit)).

Response to Finding No. 314:

The Proposed Finding is misleading because it does not reflect how consumers would have actually seen the ad. The ad would appear much larger, and the text much clearer, to consumers viewing the ad on YouTube, either on a TV or a computer. (See PFF ¶¶229, 232).

The Proposed Finding is also incomplete and misleading because it is just a snippet of the full brand video ad that actually ran and Complaint Counsel have omitted critical information for evaluating the advertisement. (RX1410 (Intuit)). Consumers did not view the challenged advertisement as a single, static image. Not captured in the Proposed Finding is the voiceover included in RX1410 stating that “TurboTax Free Edition is free.” In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

The Proposed Finding is also incomplete because it fails to recognize that consumers clicking on the links accompanying the advertisement would be taken directly to the landing

page on the TurboTax website for TurboTax Free Edition, where they would see detailed information about the SKU's qualifications. (Johnson (Intuit) Tr. 595-596; *see also* PFF ¶253; Rubin (Intuit) Tr. 1563-1564). Indeed, Complaint Counsel and their witnesses recognized that the TurboTax website repeatedly disclosed the qualifications of free TurboTax offers and provided detailed information about those qualifications. (PFF ¶¶369-370). For example, Complaint Counsel's own 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 the free TurboTax offers. (PFF ¶790). Reasonable consumers understood that clicking on the links accompanying brand video ads such as RX1410 would take them to a website (here, the TurboTax website) that includes more information about the advertised free offer, and by linking directly to the TurboTax website, the advertisement incorporated the detailed information on the TurboTax website. (Golder (Intuit) Tr. 1116-1117; *see also* PFF ¶254; CCFF ¶455 ("The TurboTax website is ... integrated into TurboTax's free advertising.")).

Moreover, the Proposed Finding does not support an inference that the challenged ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The advertisement includes a large TurboTax Free Edition logo, states that "TurboTax Free Edition is for simple U.S. returns only," and tells consumers that they can "See if [they] qualify at turbotax.com." (RX1410 (Intuit)). The ad also included a voiceover stating that the free offer was for a specific TurboTax SKU, "TurboTax Free Edition." (RX1410 (Intuit)). By identifying the specific TurboTax SKU being advertised, the ad informed consumers that the offer does not apply to all TurboTax products. (*See* PFF ¶¶317, 321). Likewise, by stating that "TurboTax Free Edition is for simple U.S.

returns only,” the ad informed consumers that the free offer was not available to everyone, and that eligibility was contingent on the complexity of the consumer’s tax returns. (PFF ¶¶322; *see also* PFF ¶¶130-145). And by stating “See if you qualify at turbotax.com,” the ad again told consumers that not everyone would qualify and where to find additional information about the offer’s qualifications. (*See* PFF ¶¶323-325). Complaint Counsel have offered no evidence that *all* components of the ad were not visible or audible to consumers (*see* PFF ¶¶230-231), nor could they given the prominence of that content and the benchmarking analysis showing that the disclosures were comparable to disclosures in other companies’ ads (*see* PFF ¶¶237-240).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel assert were conveyed. Instead, the undisputed testimony from Intuit’s executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (*See* PFF ¶¶167-177, 190, 192-202, 405, 852, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel have not offered any evidence that this ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the qualifications included in the ad would prevent consumers from being misled by the ad. (*See* PFF ¶¶242-246, 302-322, 328-330, 334). Even without those disclosures, consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

315. RX1120 (GX615), which Intuit produced bearing Bates number INTUIT-FTC-PART3-000000530 and with the original file name QTTX1899H_Dog_Show_HD_WEB_TTX_YouTube_TurboTax_15.mp4, is an online TurboTax ad for TY 2020 that, according to Intuit's data at GX434, [REDACTED] (RX1120 (GX615) (Intuit); GX434 (Intuit); GX Summary 002 (Complaint Counsel) at 'Summary-Online_Ads' row 18, row 19, row 20, row 21; Baburek (Complaint Counsel) Tr. 318–23).

Response to Finding No. 315:

The Proposed Finding is misleading because RX1120 is not an “online TurboTax ad.” It is a brand video advertisement for a specific TurboTax SKU, TurboTax Free Edition. (RX1120 (Intuit); GX146 (Ryan (Intuit) Dep.) at 39).

Intuit otherwise has no specific response except to note that the number of impressions or clicks an ad received is not evidence that the ad conveyed any of the claims asserted by Complaint Counsel, that reasonable consumers were likely to be deceived, or that the claims were material to reasonable consumers. The dissemination data offered in the Proposed Finding illustrates that reasonable consumers were *unlikely* to be deceived. That Complaint Counsel have identified only 17 even potentially relevant consumer complaints from Tax Year 2020 (*see* CCF ¶677), even though RX1120 on its own received [REDACTED] [REDACTED] that year, is strong evidence that reasonable consumers were not deceived by RX1120 or any of the other challenged advertisements that ran in Tax Year 2020 (*see* PFF ¶¶632, 637, 639, 641-647).

The challenged ad also has not aired in the last two years. Moreover, the binding Consent Order with the attorneys general of all 50 states and the District of Columbia already prohibits Intuit from running this ad or substantially similar ads in the future, and Intuit has disclaimed any intention of running such ads ever again. (*See* PFF ¶¶225, 810, 824).

316. Screenshots from RX1120 (GX615) are pictured below.



(RX1120 (Intuit)).

Response to Finding No. 316:

The Proposed Finding is misleading because it does not reflect how consumers would have actually seen the ad. The ad would appear much larger, and the text much clearer, to consumers viewing the ad on YouTube, either on a TV or a computer. (See PFF ¶¶229, 232).

The Proposed Finding is also incomplete and misleading because it is just a snippet of the full brand video ad that actually ran and Complaint Counsel have omitted critical information for evaluating the advertisement. (RX1120 (Intuit)). Consumers did not view the challenged advertisement as a single, static image. Not captured in the Proposed Finding is the voiceover included in RX1120 stating that “TurboTax Free Edition is free.” In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

The Proposed Finding is also incomplete because it fails to recognize that consumers clicking on the links accompanying the advertisement would be taken directly to the landing page on the TurboTax website for TurboTax Free Edition, where they would see detailed information about the SKU's qualifications. (Johnson (Intuit) Tr. 595-596; *see also* PFF ¶253; Rubin (Intuit) Tr. 1563-1564). Indeed, Complaint Counsel and their witnesses recognized that the TurboTax website repeatedly disclosed the qualifications of free TurboTax offers and provided detailed information about those qualifications. (PFF ¶¶369-370). For example, Complaint Counsel's own 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 the free TurboTax offers. (PFF ¶790). Reasonable consumers understood that clicking on the links accompanying brand video ads such as RX1120 would take them to a website (here, the TurboTax website) that includes more information about the advertised free offer, and by linking directly to the TurboTax website, the advertisement incorporated the detailed information on the TurboTax website. (Golder (Intuit) Tr. 1116-1117; *see also* PFF ¶254; CCF ¶455 ("The TurboTax website is ... integrated into TurboTax's free advertising.")).

Moreover, the Proposed Finding does not support an inference that the challenged ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The advertisement includes a large TurboTax Free Edition logo, states that "TurboTax Free Edition is for simple U.S. returns only," and tells consumers that they can "See if [they] qualify at turbotax.com." (RX1120 (Intuit)). The ad also included a voiceover stating that the free offer was for a specific TurboTax SKU, "TurboTax Free Edition." (RX1120 (Intuit)). By identifying the specific TurboTax SKU being

advertised, the ad informed consumers that the offer does not apply to all TurboTax products. (See PFF ¶¶317, 321). Likewise, by stating that “TurboTax Free Edition is for simple U.S. returns only,” the ad informed consumers that the free offer was not available to everyone, and that eligibility was contingent on the complexity of the consumer’s tax returns. (PFF ¶322; *see also* PFF ¶¶130-145). And by stating “See if you qualify at turbotax.com,” the ad again told consumers that not everyone would qualify and where to find additional information about the offer’s qualifications. (See PFF ¶¶323-325). Complaint Counsel have offered no evidence that *all* components of the ad were not visible or audible to consumers (*see* PFF ¶¶230-231), nor could they given the prominence of that content and the benchmarking analysis showing that the disclosures were comparable to disclosures in other companies’ ads (*see* PFF ¶¶237-240).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel assert were conveyed. Instead, the undisputed testimony from Intuit’s executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (See PFF ¶¶167-177, 190, 192-202, 405, 852, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel have not offered any evidence that this ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the qualifications included in the ad would prevent consumers from being misled by the ad. (See PFF ¶¶242-246, 302-322, 328-330, 334). Even without those disclosures, consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information

about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

317. RX1412 (GX628), which Intuit produced bearing Bates number INTUIT-FTC-PART3-000000543 and with the original file name QTTX1893H_Dance_Workout_HD_WEB_TTX_YouTube_TurboTax_30.mp4, is an online TurboTax ad for TY 2020 that, according to Intuit's data at GX434, [REDACTED] (RX1412 (GX628) (Intuit); GX434 (Intuit); GX Summary 002 (Complaint Counsel) at 'Summary-Online_Ads' row 6, row 7, row 8, row 9; Baburek (Complaint Counsel) Tr. 318-23).

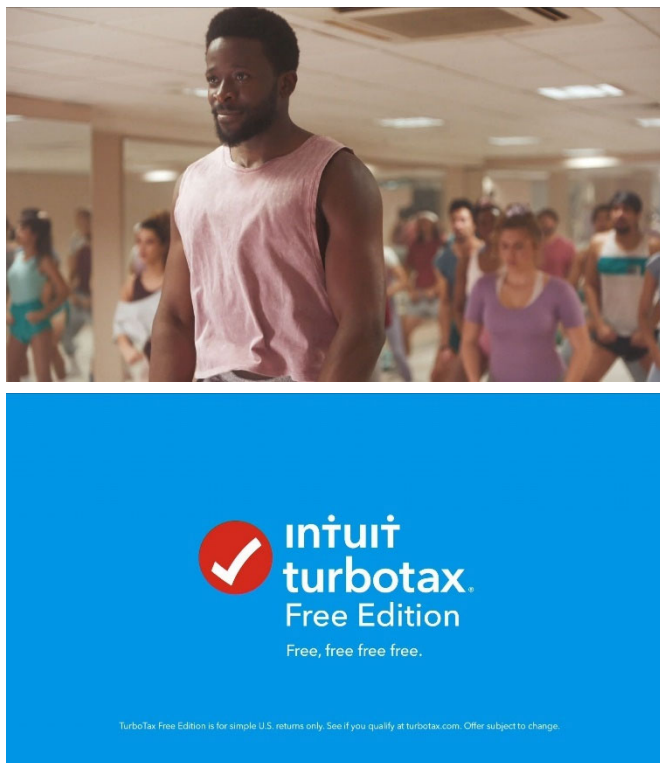
Response to Finding No. 317:

The Proposed Finding is misleading because RX1412 is not an "online TurboTax ad." It is a brand video advertisement for a specific TurboTax SKU, TurboTax Free Edition. (RX1412 (Intuit); GX146 (Ryan (Intuit) Dep.) at 39).

Intuit otherwise has no specific response except to note that the number of impressions or clicks an ad received is not evidence that the ad conveyed any of the claims asserted by Complaint Counsel, that reasonable consumers were likely to be deceived, or that the claims were material to reasonable consumers. The dissemination data offered in the Proposed Finding illustrates that reasonable consumers were *unlikely* to be deceived. That Complaint Counsel have identified only 17 even potentially relevant consumer complaints from Tax Year 2020 (*see* CCF ¶677), even though RX1412 on its own received [REDACTED] that year, is strong evidence that reasonable consumers were not deceived by RX1412 or any of the other challenged advertisements that ran in Tax Year 2020 (*see* PFF ¶¶632, 637, 639, 641-647).

The challenged ad also has not aired in the last two years. Moreover, the binding Consent Order with the attorneys general of all 50 states and the District of Columbia already prohibits Intuit from running this ad or substantially similar ads in the future, and Intuit has disclaimed any intention of running such ads ever again. (*See* PFF ¶¶225, 810, 824).

318. Screenshots from RX1412 (GX628) are pictured below.



(RX1412 (Intuit)).

Response to Finding No. 318:

The Proposed Finding is misleading because it does not reflect how consumers would have actually seen the ad. The ad would appear much larger, and the text much clearer, to consumers viewing the ad on YouTube, either on a TV or a computer. (See PFF ¶¶229, 232).

The Proposed Finding is also incomplete and misleading because it is just a snippet of the full brand video ad that actually ran and Complaint Counsel have omitted critical information for evaluating the advertisement. (RX1412 (Intuit)). Consumers did not view the challenged advertisement as a single, static image. Not captured in the Proposed Finding is the voiceover included in RX1412 stating that “TurboTax Free Edition is free.” In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the

full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

The Proposed Finding is also incomplete because it fails to recognize that consumers clicking on the links accompanying the advertisement would be taken directly to the landing page on the TurboTax website for TurboTax Free Edition, where they would see detailed information about the SKU's qualifications. (Johnson (Intuit) Tr. 595-596; *see also* PFF ¶253; Rubin (Intuit) Tr. 1563-1564). Indeed, Complaint Counsel and their witnesses recognized that the TurboTax website repeatedly disclosed the qualifications of free TurboTax offers and provided detailed information about those qualifications. (PFF ¶¶369-370). For example, Complaint Counsel's own 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 the free TurboTax offers. (PFF ¶790). Reasonable consumers understood that clicking on the links accompanying brand video ads such as RX1412 would take them to a website (here, the TurboTax website) that includes more information about the advertised free offer, and by linking directly to the TurboTax website, the advertisement incorporated the detailed information on the TurboTax website. (Golder (Intuit) Tr. 1116-1117; *see also* PFF ¶254; CCF ¶455 ("The TurboTax website is ... integrated into TurboTax's free advertising.")).

Moreover, the Proposed Finding does not support an inference that the challenged ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The advertisement includes a large TurboTax Free Edition logo, states that "TurboTax Free Edition is for simple U.S. returns only," and tells consumers that they can "See if [they] qualify at turbotax.com." (RX1412 (Intuit)).

The ad also included a voiceover stating that the free offer was for a specific TurboTax SKU, “TurboTax Free Edition.” (RX1412 (Intuit)). By identifying the specific TurboTax SKU being advertised, the ad informed consumers that the offer does not apply to all TurboTax products. (See PFF ¶¶317, 321). Likewise, by stating that “TurboTax Free Edition is for simple U.S. returns only,” the ad informed consumers that the free offer was not available to everyone, and that eligibility was contingent on the complexity of the consumer’s tax returns. (PFF ¶322; *see also* PFF ¶¶130-145). And by stating “See if you qualify at turbotax.com,” the ad again told consumers that not everyone would qualify and where to find additional information about the offer’s qualifications. (See PFF ¶¶323-325). Complaint Counsel have offered no evidence that *all* components of the ad were not visible or audible to consumers (*see* PFF ¶¶230-231), nor could they given the prominence of that content and the benchmarking analysis showing that the disclosures were comparable to disclosures in other companies’ ads (*see* PFF ¶¶237-240).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel assert were conveyed. Instead, the undisputed testimony from Intuit’s executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (See PFF ¶¶167-177, 190, 192-202, 405, 852, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel have not offered any evidence that this ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the qualifications included in the ad would prevent consumers from being misled by the ad. (See PFF ¶¶242-246, 302-322, 328-330, 334). Even without those disclosures,

consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

319. RX1123 (GX629), which Intuit produced bearing Bates number INTUIT-FTC-PART3-000000544 and with the original file name QTTX1891H_Young_love_HD_WEB_TTX_YouTube_TurboTax_15.mp4, is an online TurboTax ad for TY 2020 that, according to Intuit's data at GX434, [REDACTED]. (RX1123 (GX629) (Intuit); GX434 (Intuit); GX Summary 002 (Complaint Counsel) at 'Summary-Online_Ads' row 2, row 3, row 4, row 5; Baburek (Complaint Counsel) Tr. 318–23).

Response to Finding No. 319:

The Proposed Finding is misleading because RX1123 is not an “online TurboTax ad.” It is a brand video advertisement for a specific TurboTax SKU, TurboTax Free Edition. (RX1123 (Intuit); GX146 (Ryan (Intuit) Dep.) at 39).

Intuit otherwise has no specific response except to note that the number of impressions or clicks an ad received is not evidence that the ad conveyed any of the claims asserted by Complaint Counsel, that reasonable consumers were likely to be deceived, or that the claims were material to reasonable consumers. The dissemination data offered in the Proposed Finding illustrates that reasonable consumers were *unlikely* to be deceived. That Complaint Counsel have identified only 17 even potentially relevant consumer complaints from Tax Year 2020 (*see* CCF ¶677), even though RX1123 on its own received [REDACTED] [REDACTED] that year, is strong evidence that reasonable consumers were not deceived by RX1123 or any of the other challenged advertisements that ran in Tax Year 2020 (*see* PFF ¶¶632, 637, 639, 641-647).

The challenged ad also has not aired in the last two years. Moreover, the binding Consent Order with the attorneys general of all 50 states and the District of Columbia already

prohibits Intuit from running this ad or substantially similar ads in the future, and Intuit has disclaimed any intention of running such ads ever again. (See PFF ¶¶225, 810, 824).

320. Screenshots from RX1123 (GX629) are pictured below.



(RX1123 (Intuit)).

Response to Finding No. 320:

The Proposed Finding is misleading because it does not reflect how consumers would have actually seen the ad. The ad would appear much larger, and the text much clearer, to consumers viewing the ad on YouTube, either on a TV or a computer. (See PFF ¶¶229, 232).

The Proposed Finding is also incomplete and misleading because it is just a snippet of the full brand video ad that actually ran and Complaint Counsel have omitted critical information for evaluating the advertisement. (RX1123 (Intuit)). Consumers did not view the challenged

advertisement as a single, static image. Not captured in the Proposed Finding is the voiceover included in RX1123 stating that “TurboTax Free Edition is free.” In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

The Proposed Finding is also incomplete because it fails to recognize that consumers clicking on the links accompanying the advertisement would be taken directly to the landing page on the TurboTax website for TurboTax Free Edition, where they would see detailed information about the SKU’s qualifications. (Johnson (Intuit) Tr. 595-596; *see also* PFF ¶253; Rubin (Intuit) Tr. 1563-1564). Indeed, Complaint Counsel and their witnesses recognized that the TurboTax website repeatedly disclosed the qualifications of free TurboTax offers and provided detailed information about those qualifications. (PFF ¶¶369-370). For example, Complaint Counsel’s own 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 the free TurboTax offers. (PFF ¶790). Reasonable consumers understood that clicking on the links accompanying brand video ads such as RX1123 would take them to a website (here, the TurboTax website) that includes more information about the advertised free offer, and by linking directly to the TurboTax website, the advertisement incorporated the detailed information on the TurboTax website. (Golder (Intuit) Tr. 1116-1117; *see also* PFF ¶254; CCF ¶455 (“The TurboTax website is ... integrated into TurboTax’s free advertising.”)).

Moreover, the Proposed Finding does not support an inference that the challenged ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would

necessarily be free for the consumer when it was not. The advertisement includes a large TurboTax Free Edition logo, states that “TurboTax Free Edition is for simple U.S. returns only,” and tells consumers that they can “See if [they] qualify at turbotax.com.” (RX1123 (Intuit)). The ad also included a voiceover stating that the free offer was for a specific TurboTax SKU, “TurboTax Free Edition.” (RX1123 (Intuit)). By identifying the specific TurboTax SKU being advertised, the ad informed consumers that the offer does not apply to all TurboTax products. (See PFF ¶¶317, 321). Likewise, by stating that “TurboTax Free Edition is for simple U.S. returns only,” the ad informed consumers that the free offer was not available to everyone, and that eligibility was contingent on the complexity of the consumer’s tax returns. (PFF ¶322; see also PFF ¶¶130-145). And by stating “See if you qualify at turbotax.com,” the ad again told consumers that not everyone would qualify and where to find additional information about the offer’s qualifications. (See PFF ¶¶323-325). Complaint Counsel have offered no evidence that all components of the ad were not visible or audible to consumers (see PFF ¶¶230-231), nor could they given the prominence of that content and the benchmarking analysis showing that the disclosures were comparable to disclosures in other companies’ ads (see PFF ¶¶237-240).

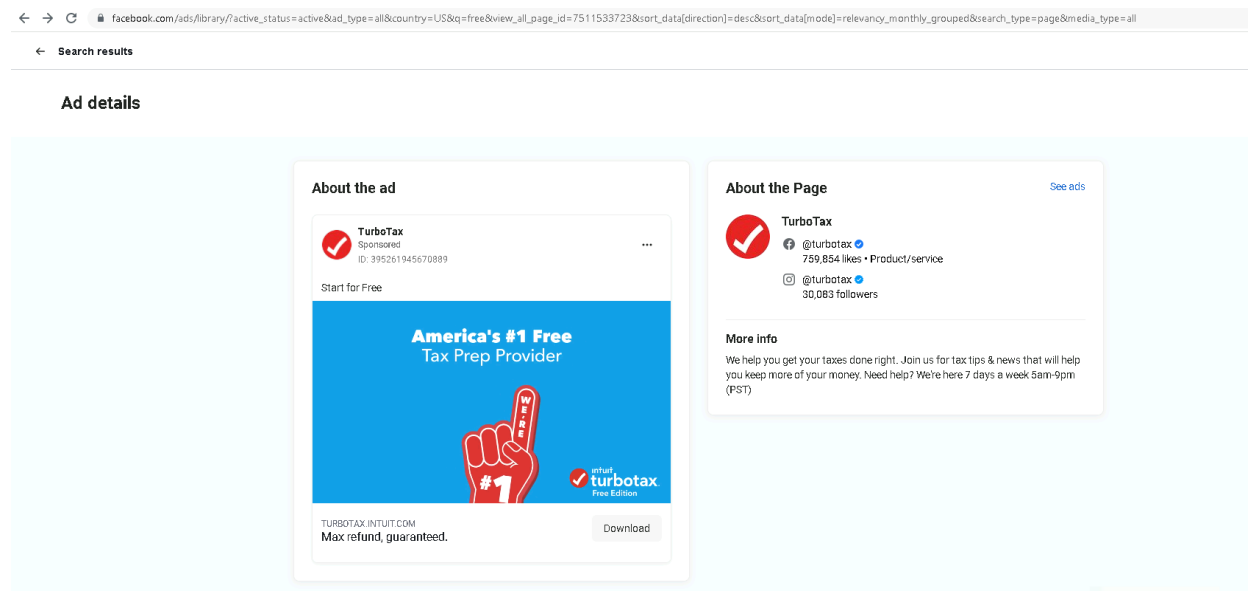
Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel assert were conveyed. Instead, the undisputed testimony from Intuit’s executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (See PFF ¶¶167-177, 190, 192-202, 405, 852, 860, 870).

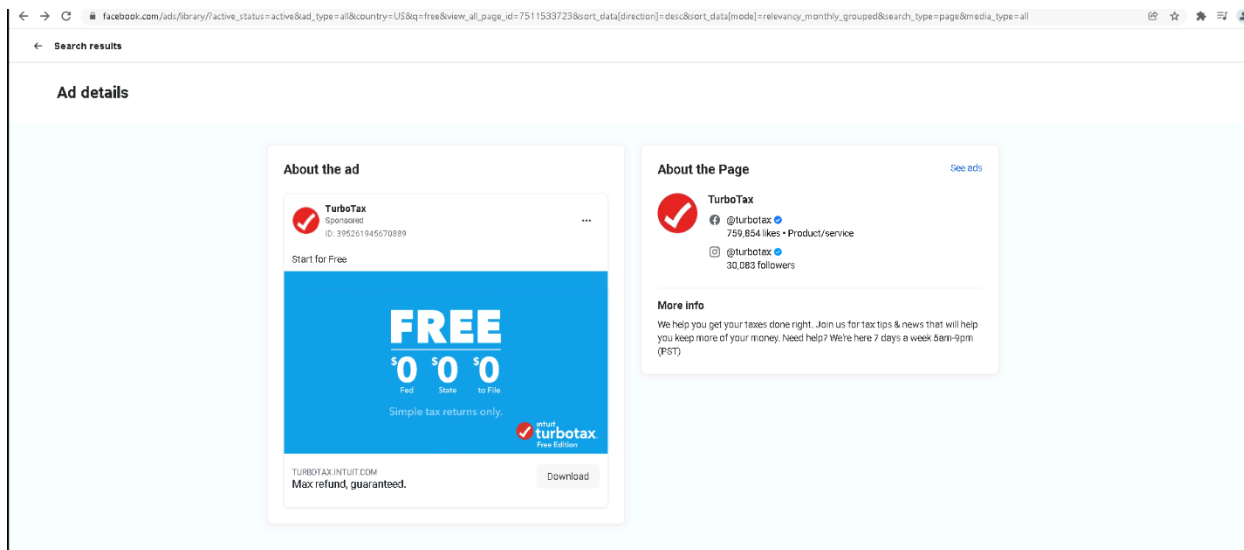
The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel have not offered any evidence that this ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that

TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the qualifications included in the ad would prevent consumers from being misled by the ad. (See PFF ¶¶242-246, 302-322, 328-330, 334). Even without those disclosures, consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

2. Social Media and Online Ads TY 2021

321. On March 27, 2022, Intuit displayed a TurboTax ad on Facebook that said, “America’s #1 Free Tax Prep Provider,” with a 10-second video and a screen stating, “FREE \$0 \$0 \$0.”:





(GX342 (Complaint Counsel) ¶ 159, at CC-00006979-80; GX187 (Complaint Counsel); GX188 (Complaint Counsel)). In smaller, fainter print underneath, the ad contains a disclaimer that states “Simple tax returns only.” (GX187 (Complaint Counsel); GX188 (Complaint Counsel)).

Response to Finding No. 321:

The Proposed Finding is incorrect because it wrongly refers to the language in the ad as a “disclaimer.” Complaint Counsel have not established that there was anything in the ad that needed to be disclaimed.

The Proposed Finding is also incomplete and misleading because it is just a snippet of the full 10-second video display ad that actually ran and Complaint Counsel have omitted critical information for evaluating the advertisement. (CCFF ¶321; GX187 (FTC); GX188(FTC)). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334). Because Complaint Counsel have not provided the full video of the challenged ad, they cannot establish that it was deceptive.

Moreover, the Proposed Finding is incomplete because it fails to recognize that consumers clicking on the advertisement would be taken directly to the TurboTax Free Edition

landing page on the TurboTax website, where they would see detailed information about the free offer's qualifications. (PFF ¶253; Johnson (Intuit) Tr. 595-596). Indeed, Complaint Counsel and their witnesses recognized that the TurboTax website repeatedly disclosed the qualifications of free TurboTax offers and provided detailed information about those qualifications. (PFF ¶¶369-370). For example, Complaint Counsel's own 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 the free TurboTax offers. (PFF ¶790). Reasonable consumers understood that display ads such as the one reflected in GX187 and GX188 link to a website when clicked (here, the TurboTax website) that includes more information about the advertised free offer, and by linking directly to the TurboTax website, the advertisement incorporated the detailed information on the TurboTax website. (PFF ¶254; *see also* CCF ¶455 ("The TurboTax website is ... integrated into TurboTax's free advertising.")).

Moreover, the Proposed Finding does not support an inference that the challenged ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The advertisement includes a "TurboTax Free Edition" logo and states prominently, "Simple tax returns only." (GX187 (FTC); GX188 (FTC)). By identifying the specific TurboTax SKU being advertised, the ad informed consumers that the offer does not apply to all TurboTax products. (*See* PFF ¶¶317, 321). And by stating that the offer was available for "Simple tax returns only," the ad informed consumers that the free offer was not available to everyone, and that eligibility was contingent on the complexity of the consumer's tax returns. (PFF ¶322; *see also* PFF ¶¶130-145). Complaint Counsel have offered no evidence that *all* components of the ad were not visible to consumers (*see* PFF ¶255),

nor could they given the prominence of that content and the benchmarking analysis showing that the disclosures were comparable to disclosures in other companies' ads (*see* PFF ¶¶257-259).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel assert were conveyed. Instead, the undisputed testimony from Intuit's executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (*See* PFF ¶¶167-177, 190, 192-202, 405, 852, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel have not offered any evidence that this ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the qualifications included in the ad would prevent consumers from being misled by the ad. (*See* PFF ¶¶260-264, 302-322, 328-330, 334). Even without those disclosures, consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

322. The Facebook TurboTax ad that said, "America's #1 Free Tax Prep Provider," with a 10-second video and a screen stating, "FREE \$0 \$0 \$0," (GX187 & GX188) was still active on Facebook on April 18, 2022. (GX342 (Complaint Counsel) ¶ 160, at CC-00006980).

Response to Finding No. 322:

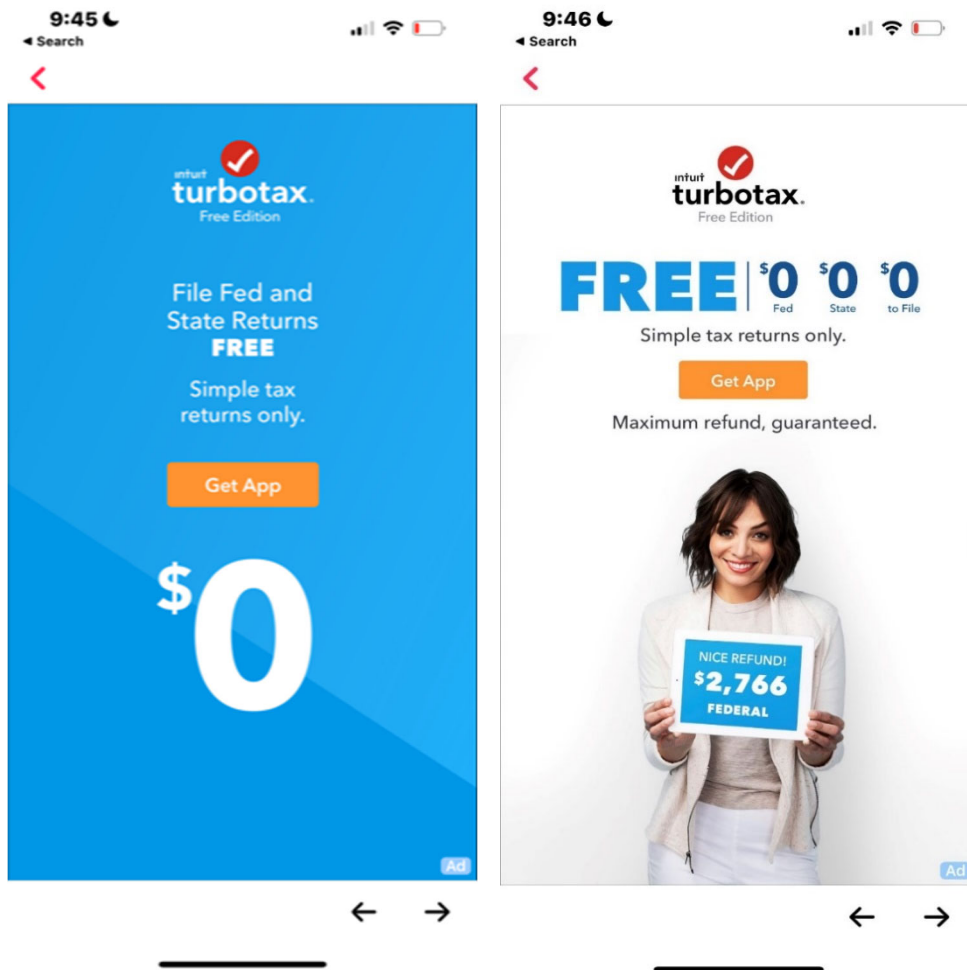
The Proposed Finding is incomplete and misleading for the reasons stated. (*See* Response to CCF ¶321).

Further, the only evidence Complaint Counsel provide to support the assertion that the advertisement was still active on Facebook on April 18, 2022 is a declaration from Ms. Shiller

that she found the advertisement in “Facebook’s Ad Library” on that date. (GX342 (FTC) ¶160). Complaint Counsel omitted any explanation of what “Facebook’s Ad Library” is and what it contains as well as an explanation of what it means for an advertisement in “Facebook’s Ad Library” to be “active.” (GX342 (FTC) ¶¶159-160). Complaint Counsel have provided no evidence that an advertisement located in “Facebook’s Ad Library” is shown to consumers on Facebook while it is in the “Library.” (GX342 (FTC) ¶¶159-160). Simply put, the evidence cited by Complaint Counsel evidence does not explain who, if anyone, was exposed to this advertisement on Facebook.

Finally, even if the ad was shown on April 18, 2022, that fact is irrelevant. Intuit does not dispute that the ad was shown to consumers during Tax Year 2021, and Complaint Counsel have not established that the date identified has any special significance.

323. On March 30, 2022, the following two TurboTax ads were displayed on the Apple News application:



(GX342 (Complaint Counsel) ¶ 161, at CC-00006981; GX189 (Complaint Counsel); GX189-A (Complaint Counsel); *see also* Shiller (Complaint Counsel) Tr. 193-96).

Response to Finding No. 323:

The Proposed Finding is incomplete because it fails to recognize that consumers clicking on the advertisement would be taken directly to the landing page on the TurboTax website for TurboTax Free Edition, where they would see detailed information about the free offer’s qualifications. (PFF ¶253; Johnson (Intuit) Tr. 595-596). Indeed, Complaint Counsel and their witnesses recognized that the TurboTax website repeatedly disclosed the qualifications of free TurboTax offers and provided detailed information about those qualifications. (PFF ¶¶369-370). For example, Complaint Counsel’s own 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 the free TurboTax offers. (PFF ¶790). Reasonable consumers understood that display ads such as the two reflected in GX189 and GX189-A link to a website when clicked (here, the TurboTax website) that includes more information about the advertised free offer, and by linking directly to the TurboTax website, the advertisement incorporated the detailed information on the TurboTax website. (PFF ¶254; *see also* CCF ¶455 (“The TurboTax website is ... integrated into TurboTax’s free advertising.”)). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶9, 16, 681 PFF ¶241, 313, 320, 334).

Moreover, the Proposed Finding does not support an inference that the challenged ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The advertisements include a “TurboTax Free Edition” logo and state prominently in the same size font as other text in the ad, “Simple tax returns only.” (GX189 (FTC); GX189-A (FTC)). By identifying the specific TurboTax SKU being advertised, the ad informed consumers that the offer does not apply to all TurboTax products. (*See* PFF ¶¶317, 321). And by stating that the offer was available for “Simple tax returns only,” the ad informed consumers that the free offer was not available to everyone, and that eligibility was contingent on the complexity of the consumer’s tax returns. (PFF ¶322; *see also* PFF ¶¶130-145). Complaint Counsel have offered no evidence that *all* components of the ad were not visible to consumers (*see* PFF ¶255), nor could they given the prominence of that content and the benchmarking analysis showing that the disclosures were comparable to disclosures in other companies’ ads (*see* PFF ¶¶257-259).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel assert were conveyed. Instead, the undisputed testimony from Intuit's executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (See PFF ¶¶167-177, 190, 192-202, 405, 852, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel have not offered any evidence that this ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the qualifications included in the ad would prevent consumers from being misled by the ad. (See PFF ¶¶260-264, 302-322, 328-330, 334). Even without those disclosures, consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

324. The TurboTax ads marked GX189 and GX189-A appeared repeatedly on the Apple News application between March 20 and April 18, 2022. (GX342 (Complaint Counsel) ¶ 162, at CC-00006981).

Response to Finding No. 324:

The Proposed Finding is incomplete and misleading for the reasons stated. (See Response to CCF ¶321).

Moreover, the Proposed Finding is irrelevant. Intuit does not dispute that the ad was shown to consumers during Tax Year 2021, and Complaint Counsel have not established that the dates identified have any special significance.

325. On April 7, 2022, Intuit displayed the following TurboTax ads on Reddit:

u/TurboTaxOfficial • Promoted

File FREE with TurboTax: \$0 Fed. \$0 State. \$0 to File. Simple tax returns only.

turbotax.intuit.com Download

↑ Vote ↓ 0 Share 📦

(GX342 (Complaint Counsel) ¶ 169, at CC-00006987; GX196 (Complaint Counsel);

u/TurboTaxOfficial • Promoted

\$0 Fed. \$0 State. \$0 to File. TurboTax is FREE for simple tax returns only.

turbotax.intuit.com Download

↑ Vote ↓ 0 Share 📦

GX197 (Complaint Counsel)).

Response to Finding No. 325:

The Proposed Finding is incomplete because it fails to recognize that consumers clicking on the advertisement would be taken directly to the landing page on the TurboTax website for

TurboTax Free Edition, where they would see detailed information about the free offer's qualifications. (PFF ¶253; Johnson (Intuit) Tr. 595-596). Indeed, Complaint Counsel and their witnesses recognized that the TurboTax website repeatedly disclosed the qualifications of free TurboTax offers and provided detailed information about those qualifications. (PFF ¶¶369-370). For example, Complaint Counsel's own 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 the free TurboTax offers. (PFF ¶790). Reasonable consumers understood that display ads such as GX196 and GX197 link to a website when clicked (here, the TurboTax website) that includes more information about the advertised free offer, and by linking directly to the TurboTax website, the advertisement incorporated the detailed information on the TurboTax website. (PFF ¶254; *see also* CCF ¶455 ("The TurboTax website is ... integrated into TurboTax's free advertising.")). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶9, 16, 681 PFF ¶241, 313, 320, 334).

Moreover, the Proposed Finding does not support an inference that the challenged ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The advertisements include a "TurboTax Free Edition" logo and state prominently in the same size font as or larger than the other text in the ad, "Simple tax returns only." (GX196 (FTC); GX197 (FTC)). By identifying the specific TurboTax SKU being advertised, the ads informed consumers that the offer does not apply to all TurboTax products. (*See* PFF ¶¶317, 321). And by stating that the offer was available for "Simple tax returns only," the ad informed consumers that the free offer was not available to

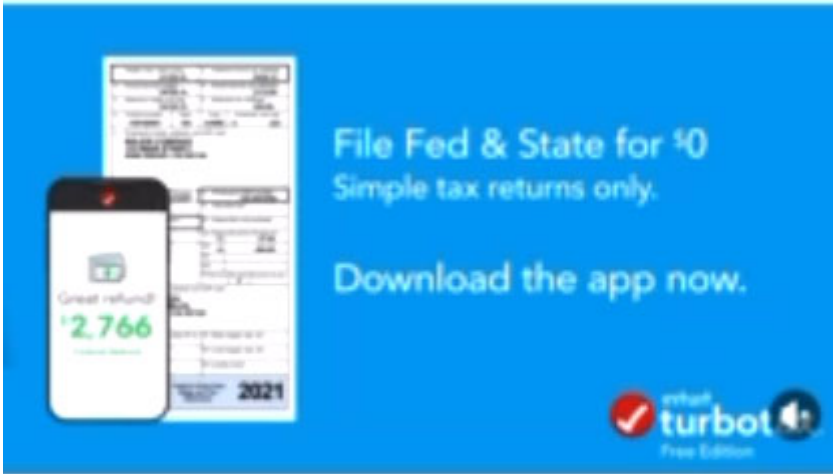
everyone, and that eligibility was contingent on the complexity of the consumer's tax returns. (PFF ¶¶322; *see also* PFF ¶¶130-145). Complaint Counsel have offered no evidence that *all* components of the ads were not visible to consumers (*see* PFF ¶255), nor could they given the prominence of that content and the benchmarking analysis showing that the disclosures were comparable to disclosures in other companies' ads (*see* PFF ¶¶257-259).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel assert were conveyed. Instead, the undisputed testimony from Intuit's executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (*See* PFF ¶¶167-177, 190, 192-202, 405, 852, 860, 870).

The Proposed Finding also does not support an inference that the ads were likely to mislead reasonable consumers. Complaint Counsel have not offered any evidence that these ads were likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the qualifications included in the ad would prevent consumers from being misled by the ad. (*See* PFF ¶¶260-264, 302-322, 328-330, 334). Even without those disclosures, consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

326. On April 8, 2022, Intuit displayed the following TurboTax ad on Reddit:

File FREE with TurboTax: \$0 Fed. \$0 State.
\$0 to File. Simple tax returns only.



turbotax.intuit.com

Download

↑ Vote ↓ 0 ↑ Share

(GX342 (Complaint Counsel) ¶ 170, at CC-00006988; GX198 (Complaint Counsel)).

Response to Finding No. 326:

The Proposed Finding is incomplete because it fails to recognize that consumers clicking on the advertisement would be taken directly to the landing page on the TurboTax website for TurboTax Free Edition, where they would see detailed information about the free offer's qualifications. (PFF ¶25; Johnson (Intuit) Tr. 595-596). Indeed, Complaint Counsel and their witnesses recognized that the TurboTax website repeatedly disclosed the qualifications of free TurboTax offers and provided detailed information about those qualifications. (PFF ¶¶369-370). For example, Complaint Counsel's own 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 the free TurboTax offers. (PFF ¶790). Reasonable consumers understood that display ads such as GX198 link to a website when clicked (here, the

TurboTax website) that includes more information about the advertised free offer, and by linking directly to the TurboTax website, the advertisement incorporated the detailed information on the TurboTax website. (PFF ¶254; *see also* CCF ¶455 (“The TurboTax website is ... integrated into TurboTax’s free advertising.”)). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

Moreover, the Proposed Finding does not support an inference that the challenged ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The advertisement includes a “TurboTax Free Edition” logo and states prominently in multiple places and in the same size font as other text in the ad, “Simple tax returns only.” (GX198 (FTC)). By identifying the specific TurboTax SKU being advertised, the ad informed consumers that the offer does not apply to all TurboTax products. (*See* PFF ¶¶317, 321). And by stating that the offer was available for “Simple tax returns only,” the ad informed consumers that the free offer was not available to everyone, and that eligibility was contingent on the complexity of the consumer’s tax returns. (PFF ¶322; *see also* PFF ¶¶130-145). Complaint Counsel have offered no evidence that *all* components of the ad were not visible to consumers (*see* PFF ¶255), nor could they given the prominence of that content and the benchmarking analysis showing that the disclosures were comparable to disclosures in other companies’ ads (*see* PFF ¶¶257-259).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel assert were conveyed. Instead, the undisputed testimony from Intuit’s executives establishes that Intuit did not intend for any of the ads to

claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (See PFF ¶¶167-177, 190, 192-202, 405, 852, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel have not offered any evidence that this ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the qualifications included in the ad would prevent consumers from being misled by the ad. (See PFF ¶¶260-264, 302-322, 328-330, 334). Even without those disclosures, consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

327. On April 14, 2022, the following TurboTax ad appeared on the webpage of the Milwaukee Journal Sentinel, jsonline.com/travel/:

The screenshot shows a web browser window displaying the Milwaukee Journal Sentinel website. At the top, there are navigation links for News, Sports, Packers, Business, Communities, USA TODAY, Obituaries, E-Edition, Legals, and a search bar. A prominent blue banner advertisement for TurboTax is centered on the page. The ad features a large white '\$0' on a blue background, followed by the text 'IRS deadline is 4/18! File your simple tax returns FREE.' and a 'File for '0' button. The TurboTax logo is in the top right corner of the ad. Below the ad, a 'Travel' section is visible, featuring a photo of a forest and two article teasers: 'Peeps Art Show celebrates artwork in a marshmallow medium' and 'Ice Age Trail endpoint in Sturgeon Bay to move, but stay within Potawatomi State Park'.

(GX342 (Complaint Counsel) ¶ 171, at CC-00006988; GX199 (Complaint Counsel); see also Shiller (Complaint Counsel) Tr. 196-97).

Response to Finding No. 327:

The Proposed Finding is incomplete because it fails to recognize that consumers clicking on the advertisement would be taken directly to the landing page on the TurboTax website for TurboTax Free Edition, where they would see detailed information about the free offer's qualifications. (PFF ¶253; Johnson (Intuit) Tr. 595-596). Indeed, Complaint Counsel and their witnesses recognized that the TurboTax website repeatedly disclosed the qualifications of free TurboTax offers and provided detailed information about those qualifications. (PFF ¶¶369-370). For example, Complaint Counsel's own 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 the free TurboTax offers. (PFF ¶790). Reasonable consumers understood that display ads such as GX199 link to a website when clicked (here, the TurboTax website) that includes more information about the advertised free offer, and by linking directly to the TurboTax website, the advertisement incorporated the detailed information on the TurboTax website. (PFF ¶254; *see also* CCF ¶455 ("The TurboTax website is ... integrated into TurboTax's free advertising.")). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

Moreover, the Proposed Finding does not support an inference that the challenged ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The advertisement includes a "TurboTax Free Edition" logo and states prominently in the same size font as other text in the ad, "File your simple tax returns." (GX199 (FTC)). By identifying the specific TurboTax SKU being advertised, the ad informed consumers that the offer does not apply to all TurboTax products. (*See* PFF ¶¶317, 321). And by stating that the offer was available for "simple tax returns," the ad

informed consumers that the free offer was not available to everyone, and that eligibility was contingent on the complexity of the consumer's tax returns. (PFF ¶¶322; *see also* PFF ¶¶130-145). Complaint Counsel have offered no evidence that *all* components of the ad were not visible to consumers (*see* PFF ¶255), nor could they given the prominence of that content and the benchmarking analysis showing that the disclosures were comparable to disclosures in other companies' ad (*see* PFF ¶¶257-259).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel assert were conveyed. Instead, the undisputed testimony from Intuit's executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (*See* PFF ¶¶167-177, 190, 192-202, 405, 852, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel have not offered any evidence that this ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the qualifications included in the ad would prevent consumers from being misled by the ad. (*See* PFF ¶¶260-264, 302-322, 328-330, 334). Even without those disclosures, consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

328. GX548, which Intuit produced bearing Bates number INTUIT-FTC-PART3-000000184 and with the original file name ty21-630-bust_ttlfsbo-SpinningZeros_1200x628.jpg, is an online TurboTax ad for TY 2021 that, according to Intuit's data at GX434, [REDACTED]. (GX548 (Intuit); GX434 (Intuit); GX

Summary 002 (Complaint Counsel) at ‘Summary-Online_Ads’ row 497; Baburek (Complaint Counsel) Tr. 318–23).

Response to Finding No. 328:

The Proposed Finding is misleading because GX548 is not an “online TurboTax ad.” It is a display advertisement for free offers for specific TurboTax DIY, Live Assisted, and Live Full Service SKUs. (GX548 (Intuit)).

Intuit otherwise has no specific response except to note that the number of impressions or clicks an ad received is not evidence that the ad conveyed any of the claims asserted by Complaint Counsel, that reasonable consumers were likely to be deceived, or that the claims were material to reasonable consumers. The dissemination data offered in the Proposed Finding illustrates that reasonable consumers were *unlikely* to be deceived. That Complaint Counsel have identified only 26 even potentially relevant consumer complaints from Tax Year 2021 (*see* CCF ¶677) when GX548 ran, even though GX548 on its own received [REDACTED] [REDACTED] that year, is strong evidence that reasonable consumers were not deceived by GX548 or any of the other challenged advertisements that ran in Tax Year 2021 (*see* PFF ¶¶632, 637, 639, 641-647).

329. A screenshot from GX548 is pictured below.



(GX548 (Intuit)).

Response to Finding No. 329:

The Proposed Finding is incomplete and misleading because Complaint Counsel have omitted critical information for evaluating the advertisement. (CCFF ¶329; GX548 (Intuit)). The Proposed Finding does not include additional disclosures that would have been shown to consumers along with the image reproduced above. Not captured in the Proposed Finding is the fact that the image is part of a display advertisement that was paired with text stating, “Simple tax returns only. For a limited time.” (GX Summary 002 (FTC) at ‘Data-Online_Ad_Combined’ row 5470; RX1030 (Intuit) at row 5164). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

The Proposed Finding is also incomplete because it fails to recognize that consumers clicking on the advertisement would be taken directly to the TurboTax website, where they would see detailed information about the qualifications for the free offers for specific TurboTax DIY, Live Assisted, and Live Full Service SKUs. (PFF ¶253; Rubin (Intuit) Tr. 1563-1564; Johnson (Intuit) Tr. 595-596). Indeed, Complaint Counsel and their witnesses recognized that the TurboTax website repeatedly disclosed the qualifications of free TurboTax offers and

provided detailed information about those qualifications. (PFF ¶¶369-370). For example, Complaint Counsel’s own 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 the free TurboTax offers. (PFF ¶790). Reasonable consumers understood that display ads such as GX548 link to a website when clicked (here, the TurboTax website) that includes more information about the advertised free offer, and by linking directly to the TurboTax website, the advertisement incorporated the detailed information on the TurboTax website. (PFF ¶254; *see also* CCF ¶455 (“The TurboTax website is ... integrated into TurboTax’s free advertising.”)).

Moreover, the Proposed Finding does not support an inference that the challenged ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The advertisement states in large text that there are “3 Ways to File Free,” conveying that not every TurboTax SKU is free. (GX548 (FTC)). The ad also states prominently, “Simple tax returns only. Must file by 2/15.” (GX548 (FTC)). By stating that the offer was available for “Simple tax returns only,” the ad informed consumers that the free offer was not available to everyone, and that eligibility was contingent on the complexity of the consumer’s tax returns. (PFF ¶322; *see also* PFF ¶¶130-145). Complaint Counsel have offered no evidence that *all* components of the ad were not visible to consumers (*see* PFF ¶255), nor could they given the prominence of that content and the benchmarking analysis showing that the disclosures were comparable to disclosures in other companies’ ads (*see* PFF ¶¶257-259).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel assert were conveyed. Instead, the undisputed

testimony from Intuit's executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (See PFF ¶¶167-177, 190, 192-202, 405, 852, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel have not offered any evidence that this ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the qualifications included in the ad would prevent consumers from being misled by the ad. (See PFF ¶¶260-264, 302-322, 328-330, 334). Even without those disclosures, consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

330. GX549, which Intuit produced bearing Bates number INTUIT-FTC-PART3-000000185 and with the original file name ty21-392-csrf_gm-MariahTablet_1200x628.jpg, is an online TurboTax ad for TY 2021 that, according to Intuit's data at GX434, [REDACTED] (GX549 (Intuit); GX434 (Intuit); GX Summary 002 (Complaint Counsel) at 'Summary-Online_Ads' row 404; Baburek (Complaint Counsel) Tr. 318-23).

Response to Finding No. 330:

The Proposed Finding is misleading because GX549 is not an "online TurboTax ad." It is a display advertisement for a specific TurboTax SKU, TurboTax Free Edition. (GX549 (Intuit)).

Intuit otherwise has no specific response except to note that the number of impressions or clicks an ad received is not evidence that the ad conveyed any of the claims asserted by Complaint Counsel, that reasonable consumers were likely to be deceived, or that the claims were material to reasonable consumers. The dissemination data offered in the Proposed Finding

illustrates that reasonable consumers were *unlikely* to be deceived. That Complaint Counsel have identified only 26 even potentially relevant consumer complaints from Tax Year 2021 (*see* CCFF ¶677) when GX549 ran, even though GX549 on its own [REDACTED] [REDACTED] that year, is strong evidence that reasonable consumers were not deceived by GX549 or any of the other challenged advertisements that ran in Tax Year 2021 (*see* PFF ¶¶632, 637, 639, 641-647).

331. A screenshot from GX549 is pictured below.



(GX549 (Intuit)).

Response to Finding No. 331:

The Proposed Finding is incomplete and misleading because Complaint Counsel have omitted critical information for evaluating the advertisement. (CCFF ¶331; GX549 (Intuit)). The Proposed Finding does not include additional disclosures that would have been shown to consumers along with the image reproduced above. Not captured in the Proposed Finding is the fact that the image is part of a display advertisement that was paired with text stating, “Simple

tax returns only.” (GX Summary 002 (FTC) at ‘Data-Online_Ad_Combined’ row 4571; RX1030 (Intuit) at row 2526). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

The Proposed Finding is also incomplete because it fails to recognize that consumers clicking on the advertisement would be taken directly to the landing page on the TurboTax website for TurboTax Free Edition, where they would see detailed information about the free offer’s qualifications. (PFF ¶253; Johnson (Intuit) Tr. 595-596). Indeed, Complaint Counsel and their witnesses recognized that the TurboTax website repeatedly disclosed the qualifications of free TurboTax offers and provided detailed information about those qualifications. (PFF ¶¶369-370). For example, Complaint Counsel’s own 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 the free TurboTax offers. (PFF ¶790). Reasonable consumers understood that display ads such as GX549 link to a website when clicked (here, the TurboTax website) that includes more information about the advertised free offer, and by linking directly to the TurboTax website, the advertisement incorporated the detailed information on the TurboTax website. (PFF ¶254; *see also* CCF ¶455 (“The TurboTax website is ... integrated into TurboTax’s free advertising.”)).

Moreover, the Proposed Finding does not support an inference that the challenged ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The advertisement includes a “TurboTax Free Edition” logo and states prominently, “Simple tax returns only.” (GX549 (FTC)). By identifying the specific TurboTax SKU being advertised, the ad informed consumers that the

offer does not apply to all TurboTax products. (*See* PFF ¶¶317, 321). And by stating that the offer was available for “Simple tax returns only,” the ad informed consumers that the free offer was not available to everyone, and that eligibility was contingent on the complexity of the consumer’s tax returns. (PFF ¶322; *see also* PFF ¶¶130-145). Complaint Counsel have offered no evidence that *all* components of the ad were not visible to consumers (*see* PFF ¶255), nor could they given the prominence of that content and the benchmarking analysis showing that the disclosures were comparable to disclosures in other companies’ ads (*see* PFF ¶¶257-259).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel assert were conveyed. Instead, the undisputed testimony from Intuit’s executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (*See* PFF ¶¶167-177, 190, 192-202, 405, 852, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel have not offered any evidence that this ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the qualifications included in the ad would prevent consumers from being misled by the ad. (*See* PFF ¶¶260-264, 302-322, 328-330, 334). Even without those disclosures, consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

332. GX550, which Intuit produced bearing Bates number INTUIT-FTC-PART3-000000188 and with the original file name ty21-920-csrf_gm-MariahTablet_1200x627.jpg, is an

online TurboTax ad for TY 2021 that, according to Intuit's data at GX434, [REDACTED] [REDACTED]. (GX550 (Intuit); GX434 (Intuit); GX Summary 002 (Complaint Counsel) at 'Summary-Online_Ads' row 647; Baburek (Complaint Counsel) Tr. 318–23).

Response to Finding No. 332:

The Proposed Finding is misleading because GX550 is not an “online TurboTax ad.” It is a display advertisement for a specific TurboTax SKU, TurboTax Free Edition. (GX550 (Intuit)).

Intuit otherwise has no specific response except to note that the number of impressions or clicks an ad received is not evidence that the ad conveyed any of the claims asserted by Complaint Counsel, that reasonable consumers were likely to be deceived, or that the claims were material to reasonable consumers. The dissemination data offered in the Proposed Finding illustrates that reasonable consumers were *unlikely* to be deceived. That Complaint Counsel have identified only 26 even potentially relevant consumer complaints from Tax Year 2021 (*see* CCF ¶¶677) when GX550 ran, even though GX550 on its own [REDACTED] [REDACTED] that year, is strong evidence that reasonable consumers were not deceived by GX550 or any of the other challenged advertisements that ran in Tax Year 2021 (*see* PFF ¶¶632, 637, 639, 641-647).

333. A screenshot from GX550 is pictured below.



(GX550 (Intuit)).

Response to Finding No. 333:

The Proposed Finding is incomplete and misleading because Complaint Counsel have omitted critical information for evaluating the advertisement. (CCFF ¶333; GX550 (Intuit)). The Proposed Finding does not include additional disclosures that would have been shown to consumers along with the image reproduced above. Not captured in the Proposed Finding is the fact that the image is part of a display advertisement that was paired with text stating, “Simple tax returns only.” (GX Summary 002 (FTC) at ‘Data-Online_Ad_Combined’ row 4587; RX1030 (Intuit) at row 385). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

The Proposed Finding is also incomplete because it fails to recognize that consumers clicking on the advertisement would be taken directly to the landing page on the TurboTax website for TurboTax Free Edition, where they would see detailed information about the free

offer's qualifications. (PFF ¶253; Johnson (Intuit) Tr. 595-596). Indeed, Complaint Counsel and their witnesses recognized that the TurboTax website repeatedly disclosed the qualifications of free TurboTax offers and provided detailed information about those qualifications. (PFF ¶¶369-370). For example, Complaint Counsel's own 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 the free TurboTax offers. (PFF ¶790). Reasonable consumers understood that display ads such as GX550 link to a website when clicked (here, the TurboTax website) that includes more information about the advertised free offer, and by linking directly to the TurboTax website, the advertisement incorporated the detailed information on the TurboTax website. (PFF ¶254; *see also* CCF ¶455 ("The TurboTax website is ... integrated into TurboTax's free advertising.")).

Moreover, the Proposed Finding does not support an inference that the challenged ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The advertisement includes a "TurboTax Free Edition" logo and states prominently, "Simple tax returns only." (GX550 (FTC)). By identifying the specific TurboTax SKU being advertised, the ad informed consumers that the offer does not apply to all TurboTax products. (*See* PFF ¶¶317, 321). And by stating that the offer was available for "Simple tax returns only," the ad informed consumers that the free offer was not available to everyone, and that eligibility was contingent on the complexity of the consumer's tax returns. (PFF ¶322; *see also* PFF ¶¶130-145). Complaint Counsel have offered no evidence that *all* components of the ad were not visible to consumers (*see* PFF ¶255), nor could they given the prominence of that content and the benchmarking analysis showing that the disclosures were comparable to disclosures in other companies' ads (*see* PFF ¶¶257-259).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel assert were conveyed. Instead, the undisputed testimony from Intuit's executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (See PFF ¶¶167-177, 190, 192-202, 405, 852, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel have not offered any evidence that this ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the qualifications included in the ad would prevent consumers from being misled by the ad. (See PFF ¶¶260-264, 302-322, 328-330, 334). Even without those disclosures, consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

334. GX551, which Intuit produced bearing Bates number INTUIT-FTC-PART3-000000198 and with the original file name ty21-192-zrof_gm-SpinningZeros_970x250.jpg, is an online TurboTax ad for TY 2021 that, according to Intuit's data at GX434, [REDACTED]. (GX551 (Intuit); GX434 (Intuit); GX Summary 002 (Complaint Counsel) at 'Summary-Online_Ads' row 376, row 377; Baburek (Complaint Counsel) Tr. 318-23).

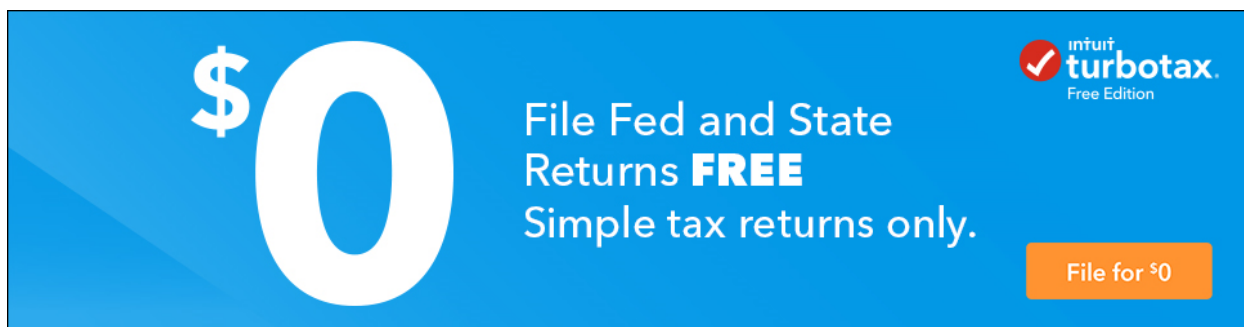
Response to Finding No. 334:

The Proposed Finding is misleading because GX551 is not an "online TurboTax ad." It is a display advertisement for a specific TurboTax SKU, TurboTax Free Edition. (GX551 (Intuit)).

Intuit otherwise has no specific response except to note that the number of impressions or clicks an ad received is not evidence that the ad conveyed any of the claims asserted by

Complaint Counsel, that reasonable consumers were likely to be deceived, or that the claims were material to reasonable consumers. The dissemination data offered in the Proposed Finding illustrates that reasonable consumers were *unlikely* to be deceived. That Complaint Counsel have identified only 26 even potentially relevant consumer complaints from Tax Year 2021 (*see* CCF ¶¶677) when GX551 ran, even though GX551 on its own [REDACTED] [REDACTED] that year, is strong evidence that reasonable consumers were not deceived by GX551 or any of the other challenged advertisements that ran in Tax Year 2021 (*see* PFF ¶¶632, 637, 639, 641-647).

335. A screenshot from GX551 is pictured below.



(GX551 (Intuit)).

Response to Finding No. 335:

The Proposed Finding is incomplete because it fails to recognize that consumers clicking on the advertisement would be taken directly to the landing page of the TurboTax website for TurboTax Free Edition, where they would see detailed information about the free offer's qualifications. (PFF ¶253; Johnson (Intuit) Tr. 595-596). Indeed, Complaint Counsel and their witnesses recognized that the TurboTax website repeatedly disclosed the qualifications of free TurboTax offers and provided detailed information about those qualifications. (PFF ¶¶369-370). For example, Complaint Counsel's own 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 the free TurboTax offers. (PFF ¶790). Reasonable consumers understood that display ads such as GX551 link to a website when clicked (here, the TurboTax website) that includes more information about the advertised free offer, and by linking directly to the TurboTax website, the advertisement incorporated the detailed information on the TurboTax website. (PFF ¶254; *see also* CCF ¶455 (“The TurboTax website is ... integrated into TurboTax’s free advertising.”)). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

Moreover, the Proposed Finding does not support an inference that the challenged ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The advertisement includes a “TurboTax Free Edition” logo and states prominently in the same size font as or in larger font than the other text in the ad, “Simple tax returns only.” (GX551 (FTC)). By identifying the specific TurboTax SKU being advertised, the ad informed consumers that the offer does not apply to all TurboTax products. (*See* PFF ¶¶317, 321). And by stating that the offer was available for “Simple tax returns only,” the ad informed consumers that the free offer was not available to everyone, and that eligibility was contingent on the complexity of the consumer’s tax returns. (PFF ¶322; *see also* PFF ¶¶130-145). Complaint Counsel have offered no evidence that *all* components of the ad were not visible to consumers (*see* PFF ¶255), nor could they given the prominence of that content and the benchmarking analysis showing that the disclosures were comparable to disclosures in other companies’ ads (*see* PFF ¶¶257-259).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel assert were conveyed. Instead, the undisputed

testimony from Intuit's executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (See PFF ¶¶167-177, 190, 192-202, 405, 852, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel have not offered any evidence that this ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the qualifications included in the ad would prevent consumers from being misled by the ad. (See PFF ¶¶260-264, 302-322, 328-330, 334). Even without those disclosures, consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

336. GX552, which Intuit produced bearing Bates number INTUIT-FTC-PART3-000000199 and with the original file name ty21-191-zrof_gm-FreeRearrange_970x250.jpg, is an online TurboTax ad for TY 2021 that, according to Intuit's data at GX434, [REDACTED] [REDACTED]. (GX552 (Intuit); GX434 (Intuit); GX Summary 002 (Complaint Counsel) at 'Summary-Online_Ads' row 375; Baburek (Complaint Counsel) Tr. 318–23).

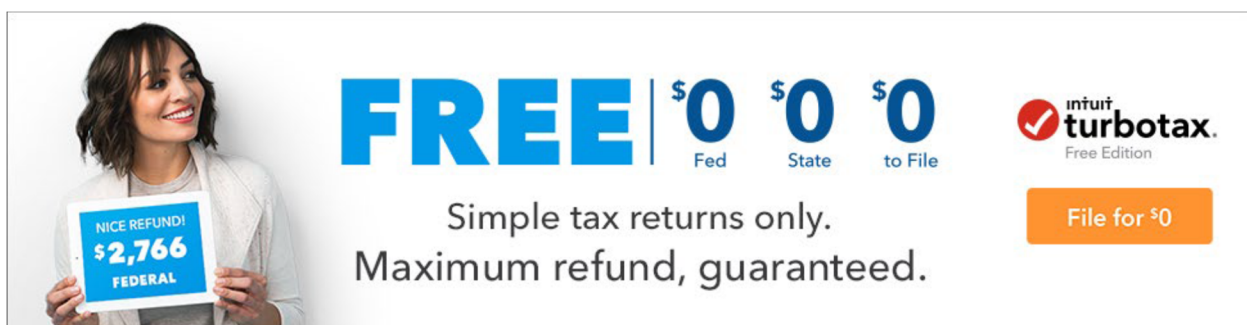
Response to Finding No. 336:

The Proposed Finding is misleading because GX552 is not an “online TurboTax ad.” It is a display advertisement for a specific TurboTax SKU, TurboTax Free Edition. (GX552 (Intuit)).

Intuit otherwise has no specific response except to note that the number of impressions or clicks an ad received is not evidence that the ad conveyed any of the claims asserted by Complaint Counsel, that reasonable consumers were likely to be deceived, or that the claims were material to reasonable consumers. The dissemination data offered in the Proposed Finding

illustrates that reasonable consumers were *unlikely* to be deceived. That Complaint Counsel have identified only 26 even potentially relevant consumer complaints from Tax Year 2021 (*see* CCF ¶677) when GX552 ran, even though GX552 on its own [REDACTED] [REDACTED] that year, is strong evidence that reasonable consumers were not deceived by GX552 or any of the other challenged advertisements that ran in Tax Year 2021 (*see* PFF ¶¶632, 637, 639, 641-647).

337. A screenshot from GX552 is pictured below.



(GX552 (Intuit)).

Response to Finding No. 337:

The Proposed Finding is incomplete because it fails to recognize that consumers clicking on the advertisement would be taken directly to the landing page on the TurboTax website for TurboTax Free Edition, where they would see detailed information about the free offer's qualifications. (PFF ¶253). Reasonable consumers understood that display ads such as GX552 link to a website when clicked (here, the TurboTax website) that includes more information about the advertised free offer, and by linking directly to the TurboTax website, the advertisement incorporated the detailed information on the TurboTax website. (PFF ¶254; *see also* CCF ¶455 (“The TurboTax website is ... integrated into TurboTax’s free advertising.”)). In determining the claims conveyed by an advertisement and whether it was likely to mislead

reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

Moreover, the Proposed Finding does not support an inference that the challenged ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The advertisement includes a “TurboTax Free Edition” logo and states prominently, “Simple tax returns only.” (GX552 (FTC)). By identifying the specific TurboTax SKU being advertised, the ad informed consumers that the offer does not apply to all TurboTax products. (See PFF ¶¶317, 321). And by stating that the offer was available for “Simple tax returns only,” the ad informed consumers that the free offer was not available to everyone, and that eligibility was contingent on the complexity of the consumer’s tax returns. (PFF ¶322; *see also* PFF ¶¶130-145). Complaint Counsel have offered no evidence that *all* components of the ad were not visible to consumers (*see* PFF ¶255), nor could they given the prominence of that content and the benchmarking analysis showing that the disclosures were comparable to disclosures in other companies’ ads (*see* PFF ¶¶257-259).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel assert were conveyed. Instead, the undisputed testimony from Intuit’s executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (See PFF ¶¶167-177, 190, 192-202, 405, 852, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel have not offered any evidence that this ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence

establishes that the qualifications included in the ad would prevent consumers from being misled by the ad. (See PFF ¶¶260-264, 302-322, 328-330, 334). Even without those disclosures, consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

338. GX553, which Intuit produced bearing Bates number INTUIT-FTC-PART3-000000200 and with the original file name ty21-401-zrof_gm-SpinningZeros_300x250.jpg, is an online TurboTax ad for TY 2021 that, according to Intuit's data at GX434, [REDACTED] (GX553 (Intuit); GX434 (Intuit); GX Summary 002 (Complaint Counsel) at 'Summary-Online_Ads' row 412; Baburek (Complaint Counsel) Tr. 318-23).

Response to Finding No. 338:

The Proposed Finding is misleading because GX553 is not an "online TurboTax ad." It is a display advertisement for a specific TurboTax SKU, TurboTax Free Edition. (GX553 (Intuit)).

Intuit otherwise has no specific response except to note that the number of impressions or clicks an ad received is not evidence that the ad conveyed any of the claims asserted by Complaint Counsel, that reasonable consumers were likely to be deceived, or that the claims were material to reasonable consumers. The dissemination data offered in the Proposed Finding illustrates that reasonable consumers were *unlikely* to be deceived. That Complaint Counsel have identified only 26 even potentially relevant consumer complaints from Tax Year 2021 (see CCF ¶677) when GX553, even though GX553 on its own [REDACTED] [REDACTED] that year, is strong evidence that reasonable consumers were not deceived by GX553 or any of the other challenged advertisements that ran in Tax Year 2021 (see PFF ¶¶632, 637, 639, 641-647).

339. A screenshot from GX553 is pictured below.



(GX553 (Intuit)).

Response to Finding No. 339:

The Proposed Finding is incomplete because it fails to recognize that consumers clicking on the advertisement would be taken directly to the landing page on the TurboTax website for TurboTax Free Edition, where they would see detailed information about the free offer's qualifications. (PFF ¶253; Johnson (Intuit) Tr. 595-596). Indeed, Complaint Counsel and their witnesses recognized that the TurboTax website repeatedly disclosed the qualifications of free TurboTax offers and provided detailed information about those qualifications. (PFF ¶¶369-370). For example, Complaint Counsel's own 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 the free TurboTax offers. (PFF ¶790). Reasonable consumers understood that display ads such as GX553 link to a website when clicked (here, the TurboTax website) that includes more information about the advertised free offer, and by linking directly to the TurboTax website, the advertisement incorporated the detailed information on the TurboTax website. (PFF ¶254; *see also* CCF ¶455 ("The TurboTax website is ... integrated into TurboTax's free advertising.")). In determining the claims conveyed by an advertisement

and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

Moreover, the Proposed Finding does not support an inference that the challenged ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The advertisement includes a “TurboTax Free Edition” logo and states prominently, “Simple tax returns only.” (GX553 (FTC)). By identifying the specific TurboTax SKU being advertised, the ad informed consumers that the offer does not apply to all TurboTax products. (See PFF ¶¶317, 321). And by stating that the offer was available for “Simple tax returns only,” the ad informed consumers that the free offer was not available to everyone, and that eligibility was contingent on the complexity of the consumer’s tax returns. (PFF ¶322; *see also* PFF ¶¶130-145). Complaint Counsel have offered no evidence that *all* components of the ad were not visible to consumers (*see* PFF ¶255), nor could they given the prominence of that content and the benchmarking analysis showing that the disclosures were comparable to disclosures in other companies’ ads (*see* PFF ¶¶257-259).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel assert were conveyed. Instead, the undisputed testimony from Intuit’s executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (See PFF ¶¶167-177, 190, 192-202, 405, 852, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel have not offered any evidence that this ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence

establishes that the qualifications included in the ad would prevent consumers from being misled by the ad. (See PFF ¶¶260-264, 302-322, 328-330, 334). Even without those disclosures, consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

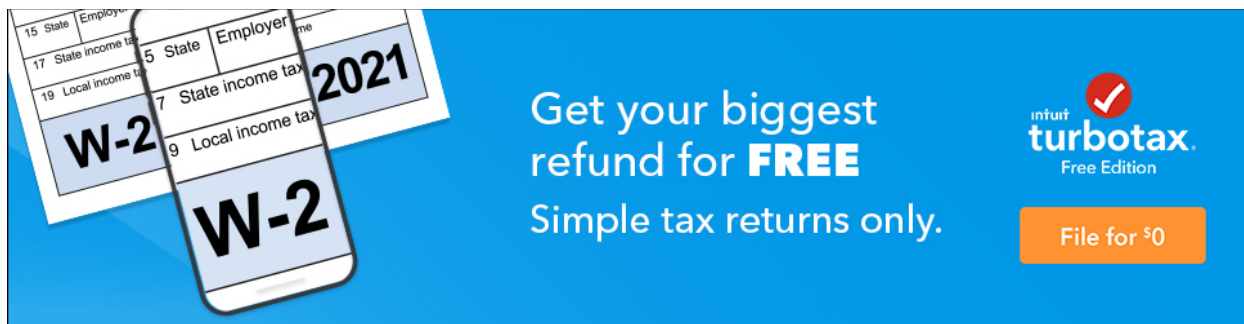
340. GX554, which Intuit produced bearing Bates number INTUIT-FTC-PART3-000000202 and with the original file name ty21-193-w2f_gm-SnapTapDone_970x250.jpg, is an online TurboTax ad for TY 2021 that, according to Intuit's data at GX434, [REDACTED] (GX554 (Intuit); GX434 (Intuit); GX Summary 002 (Complaint Counsel) at 'Summary-Online_Ads' row 378, row 379; Baburek (Complaint Counsel) Tr. 318–23).

Response to Finding No. 340:

The Proposed Finding is misleading because GX554 is not an “online TurboTax ad.” It is a display advertisement for a specific TurboTax SKU, TurboTax Free Edition. (GX554 (Intuit)).

Intuit otherwise has no specific response except to note that the number of impressions or clicks an ad received is not evidence that the ad conveyed any of the claims asserted by Complaint Counsel, that reasonable consumers were likely to be deceived, or that the claims were material to reasonable consumers. The dissemination data offered in the Proposed Finding illustrates that reasonable consumers were *unlikely* to be deceived. That Complaint Counsel have identified only 26 even potentially relevant consumer complaints from Tax Year 2021 (see CCF ¶677) when GX554 ran, even though GX554 on its own [REDACTED] [REDACTED] that year, is strong evidence that reasonable consumers were not deceived by GX554 or any of the other challenged advertisements that ran in Tax Year 2021 (see PFF ¶¶632, 637, 639, 641-647).

341. A screenshot from GX554 is pictured below.



(GX554 (Intuit)).

Response to Finding No. 341:

The Proposed Finding is incomplete because it fails to recognize that consumers clicking on the advertisement would be taken directly to the landing page on the TurboTax website for TurboTax Free Edition, where they would see detailed information about the free offer’s qualifications. (PFF ¶¶253; Johnson (Intuit) Tr. 595-596). Indeed, Complaint Counsel and their witnesses recognized that the TurboTax website repeatedly disclosed the qualifications of free TurboTax offers and provided detailed information about those qualifications. (PFF ¶¶369-370). For example, Complaint Counsel’s own 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 the free TurboTax offers. (PFF ¶790). Reasonable consumers understood that display ads such as GX554 link to a website when clicked (here, the TurboTax website) that includes more information about the advertised free offer, and by linking directly to the TurboTax website, the advertisement incorporated the detailed information on the TurboTax website. (PFF ¶254; *see also* CCF ¶455 (“The TurboTax website is ... integrated into TurboTax’s free advertising.”)). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

Moreover, the Proposed Finding does not support an inference that the challenged ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The advertisement includes a “TurboTax Free Edition” logo and states prominently in the same or similar font size as the other text in the ad, “Simple tax returns only.” (GX554 (FTC)). By identifying the specific TurboTax SKU being advertised, the ad informed consumers that the offer does not apply to all TurboTax products. (See PFF ¶¶317, 321). And by stating that the offer was available for “Simple tax returns only,” the ad informed consumers that the free offer was not available to everyone, and that eligibility was contingent on the complexity of the consumer’s tax returns. (PFF ¶322; *see also* PFF ¶¶130-145). Complaint Counsel have offered no evidence that *all* components of the ad were not visible to consumers (*see* PFF ¶255), nor could they given the prominence of that content and the benchmarking analysis showing that the disclosures were comparable to disclosures in other companies’ ads (*see* PFF ¶¶257-259).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel assert were conveyed. Instead, the undisputed testimony from Intuit’s executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (See PFF ¶¶167-177, 190, 192-202, 405, 852, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel have not offered any evidence that this ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the qualifications included in the ad would prevent consumers from being misled

by the ad. (See PFF ¶¶260-264, 302-322, 328-330, 334). Even without those disclosures, consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

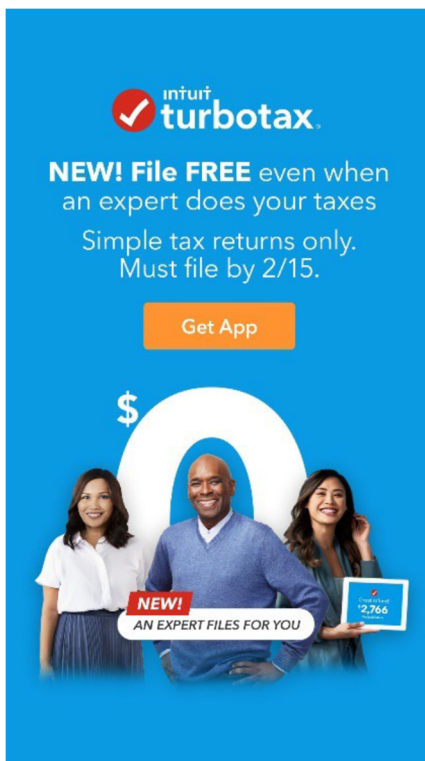
342. GX555, which Intuit produced bearing Bates number INTUIT-FTC-PART3-000000204 and with the original file name ty21-688-mvpb_ttlfsbo-MVPBlue_1080x1920.jpg, is an online TurboTax ad for TY 2021 that, according to Intuit's data at GX434, [REDACTED]. (GX555 (Intuit); GX434 (Intuit); GX Summary 002 (Complaint Counsel) at 'Summary-Online_Ads' row 535; Baburek (Complaint Counsel) Tr. 318-23).

Response to Finding No. 342:

The Proposed Finding is misleading because GX555 is not an "online TurboTax ad." It is a display advertisement a specific TurboTax Live Full Service free offer. (GX555 (Intuit)).

Intuit otherwise has no specific response except to note that the number of impressions or clicks an ad received is not evidence that the ad conveyed any of the claims asserted by Complaint Counsel, that reasonable consumers were likely to be deceived by the ad, or that the claims were material to reasonable consumers. The dissemination data offered in the Proposed Finding illustrates that reasonable consumers were *unlikely* to be deceived. That Complaint Counsel have identified only 26 even potentially relevant consumer complaints from Tax Year 2021 (see CCF ¶677) when GX555 ran, even though GX555 on its own [REDACTED] that year, is strong evidence that reasonable consumers were not deceived by GX555 or any of the other challenged advertisements that ran in Tax Year 2021 (see PFF ¶¶632, 637, 639, 641-647).

343. A screenshot from GX555 is pictured below.



(GX555 (Intuit)).

Response to Finding No. 343:

The Proposed Finding is incomplete because it fails to recognize that consumers clicking on the advertisement would be taken directly to the TurboTax website, where they would see detailed information about the qualifications for the free offers for specific TurboTax DIY, Live Assisted, and Live Full Service SKUs. (PFF ¶¶253; Johnson (Intuit) Tr. 595-596; Rubin (Intuit) Tr. 1563-1564). Indeed, Complaint Counsel and their witnesses recognized that the TurboTax website repeatedly disclosed the qualifications of free TurboTax offers and provided detailed information about those qualifications. (PFF ¶¶369-370). For example, Complaint Counsel's own 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 the free TurboTax offers. (PFF ¶790). Reasonable consumers understood that display ads such as GX555 link to a website when clicked (here, the TurboTax website) that includes more

information about the advertised free offer, and by linking directly to the TurboTax website, the advertisement incorporated the detailed information on the TurboTax website. (PFF ¶254; *see also* CCF ¶455 (“The TurboTax website is ... integrated into TurboTax’s free advertising.”)). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

Moreover, the Proposed Finding does not support an inference that the challenged ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The advertisement states prominently in the same or larger size font as other text in the ad, “Simple tax returns only.” (GX555 (FTC)). By stating that the offer was available for “Simple tax returns only,” the ad informed consumers that the free offer was not available to everyone, and that eligibility was contingent on the complexity of the consumer’s tax returns. (PFF ¶322; *see also* PFF ¶¶130-145). Complaint Counsel have offered no evidence that *all* components of the ad were not visible to consumers (*see* PFF ¶255), nor could they given the prominence of that content and the benchmarking analysis showing that the disclosures were comparable to disclosures in other companies’ ads (*see* PFF ¶¶257-259).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel assert were conveyed. Instead, the undisputed testimony from Intuit’s executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (*See* PFF ¶¶167-177, 190, 192-202, 405, 852, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel have not offered any evidence that this ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the qualifications included in the ad would prevent consumers from being misled by the ad. (See PFF ¶¶260-264, 302-322, 328-330, 334). Even without those disclosures, consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

344. GX556, which Intuit produced bearing Bates number INTUIT-FTC-PART3-000000205 and with the original file name ty21-434-zrof_gm-FreeRearrange_1000x1000.jpg, is an online TurboTax ad for TY 2021 that, according to Intuit's data at GX434, [REDACTED] (GX556 (Intuit); GX434 (Intuit); GX Summary 002 (Complaint Counsel) at 'Summary-Online_Ads' row 434; Baburek (Complaint Counsel) Tr. 318-23).

Response to Finding No. 344:

The Proposed Finding is misleading because GX556 is not an "online TurboTax ad." It is a display advertisement for a specific TurboTax SKU, TurboTax Free Edition. (GX556 (Intuit)).

Intuit otherwise has no specific response except to note that the number of impressions or clicks an ad received is not evidence that the ad conveyed any of the claims asserted by Complaint Counsel, that reasonable consumers were likely to be deceived, or that the claims were material to reasonable consumers. The dissemination data offered in the Proposed Finding illustrates that reasonable consumers were *unlikely* to be deceived. That Complaint Counsel have identified only 26 even potentially relevant consumer complaints from Tax Year 2021 (see CCF ¶677) when GX556 ran, even though GX556 on its own [REDACTED]

█ that year, is strong evidence that reasonable consumers were not deceived by GX556 or any of the other challenged advertisements that ran in Tax Year 2021 (see PFF ¶¶632, 637, 639, 641-647).

345. A screenshot from GX556 is pictured below.



(GX556 (Intuit)).

Response to Finding No. 345:

The Proposed Finding is incomplete because it fails to recognize that consumers clicking on the advertisement would be taken directly to the landing page on the TurboTax website for TurboTax Free Edition, where they would see detailed information about the free offer's qualifications. (PFF ¶253; Johnson (Intuit) Tr. 595-596). Indeed, Complaint Counsel and their witnesses recognized that the TurboTax website repeatedly disclosed the qualifications of free TurboTax offers and provided detailed information about those qualifications. (PFF ¶¶369-370). For example, Complaint Counsel's own 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 the free TurboTax offers. (PFF ¶790). Reasonable consumers understood that display ads such as GX556 link to a website once clicked (here, the TurboTax website) that includes more information about the advertised free offer, and by linking directly to the TurboTax website, the advertisement incorporated the detailed information on the TurboTax website. (PFF ¶254; *see also* CCF ¶455 (“The TurboTax website is ... integrated into TurboTax’s free advertising.”)). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

Moreover, the Proposed Finding does not support an inference that the challenged ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The advertisement includes the “TurboTax Free Edition” logo and states prominently in the same or larger size font as other text in the ad, “Simple tax returns only.” (GX556 (FTC)). By identifying the specific TurboTax SKU being advertised, the ad informed consumers that the offer does not apply to all TurboTax products. (*See* PFF ¶¶317, 321). And by stating that the offer was available for “Simple tax returns only,” the ad informed consumers that the free offer was not available to everyone, and that eligibility was contingent on the complexity of the consumer’s tax returns. (PFF ¶322; *see also* PFF ¶¶130-145). Complaint Counsel have offered no evidence that *all* components of the ad were not visible to consumers (*see* PFF ¶255), nor could they given the prominence of that content and the benchmarking analysis showing that the disclosures were comparable to disclosures in other companies’ ads (*see* PFF ¶¶257-259).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel assert were conveyed. Instead, the undisputed testimony from Intuit's executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (See PFF ¶¶167-177, 190, 192-202, 405, 852, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel have not offered any evidence that this ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the qualifications included in the ad would prevent consumers from being misled by the ad. (See PFF ¶¶260-264, 302-322, 328-330, 334). Even without those disclosures, consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

346. GX557, which Intuit produced bearing Bates number INTUIT-FTC-PART3-000000208 and with the original file name ty21-090-numf_gm-Pennant_1x1.mp4, is an online TurboTax ad for TY 2021 that, according to Intuit's data at GX434, [REDACTED]. (GX557 (Intuit); GX434 (Intuit); GX Summary 002 (Complaint Counsel) at 'Summary-Online_Ads' row 317; Baburek (Complaint Counsel) Tr. 318-23).

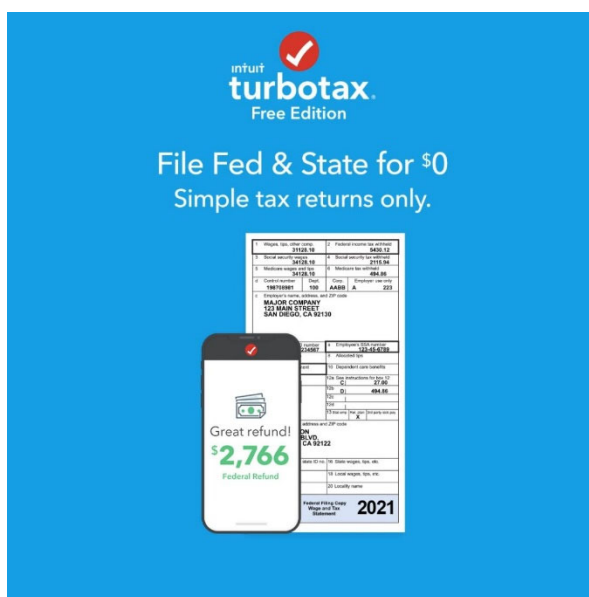
Response to Finding No. 346:

The Proposed Finding is misleading because GX557 is not an "online TurboTax ad." It is a display advertisement for a specific TurboTax SKU, TurboTax Free Edition. (GX557 (Intuit)).

Intuit otherwise has no specific response except to note that the number of impressions or clicks an ad received is not evidence that the ad conveyed any of the claims asserted by

Complaint Counsel, that reasonable consumers were likely to be deceived, or that the claims were material to reasonable consumers. The dissemination data offered in the Proposed Finding illustrates that reasonable consumers were *unlikely* to be deceived. That Complaint Counsel have identified only 26 even potentially relevant consumer complaints from Tax Year 2021 (*see* CCF ¶¶677) when GX557 ran, even though GX557 on its own [REDACTED] that year, is strong evidence that reasonable consumers were not deceived by GX557 or any of the other challenged advertisements that ran in Tax Year 2021 (*see* PFF ¶¶632, 637, 639, 641-647).

347. A screenshot from GX557 is pictured below.



(GX557 (Intuit)).

Response to Finding No. 347:

The Proposed Finding is incomplete and misleading because it is just a snippet of the full display video ad that actually ran and Complaint Counsel have omitted critical information for evaluating the advertisement. (CCFF ¶347; GX557 (Intuit)). Consumers did not view the challenged advertisement as a single, static image. Not captured in the Proposed Finding is the fact that the TurboTax Free Edition logo appears on screen throughout the entire ad, that the

reference to the free offer only appears halfway through the ad, or that the “Simple tax returns only” language appears alongside every reference to the free offer. (GX557 (Intuit)). The Proposed Finding also does not include additional disclosures that would have been shown to consumers along with the image reproduced above. The image is part of a display advertisement that was paired with text stating, “Simple tax returns only.” (GX Summary 002 (FTC) at ‘Data-Online_Ad_Combined’ row 4598; RX1030 (Intuit) at row 5261). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

The Proposed Finding is also incomplete because it fails to recognize that consumers clicking on the advertisement would be taken directly to the app store on their phone where they could download the TurboTax app, where they would see detailed information about the free offer’s qualifications. (PFF ¶253; Johnson (Intuit) Tr. 595-596). Indeed, Complaint Counsel and their witnesses recognized that the TurboTax website repeatedly disclosed the qualifications of free TurboTax offers and provided detailed information about those qualifications. (PFF ¶¶369-370). For example, Complaint Counsel’s own 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 the free TurboTax offers. (PFF ¶790). Reasonable consumers understood that display ads such as GX557 link to a website when clicked (here, the TurboTax website) that includes more information about the advertised free offer, and by linking directly to the TurboTax website, the advertisement incorporated the detailed information on the TurboTax website. (PFF ¶254; *see also* CCF ¶455 (“The TurboTax website is ... integrated into TurboTax’s free advertising.”)).

Moreover, the Proposed Finding does not support an inference that the challenged ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The advertisement includes the “TurboTax Free Edition” logo throughout the entire video and states prominently, “Simple tax returns only.” (GX557 (FTC)). By identifying the specific TurboTax SKU being advertised, the ad informed consumers that the offer does not apply to all TurboTax products. (*See* PFF ¶¶317, 321). And by stating that the offer was available for “Simple tax returns only,” the ad informed consumers that the free offer was not available to everyone, and that eligibility was contingent on the complexity of the consumer’s tax returns. (PFF ¶322; *see also* PFF ¶¶130-145). Complaint Counsel have offered no evidence that *all* components of the ad were not visible to consumers (*see* PFF ¶255), nor could they given the prominence of that content and the benchmarking analysis showing that the disclosures were comparable to disclosures in other companies’ ads (*see* PFF ¶¶257-259).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel assert were conveyed. Instead, the undisputed testimony from Intuit’s executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (*See* PFF ¶¶167-177, 190, 192-202, 405, 852, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel have not offered any evidence that this ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the qualifications included in the ad would prevent consumers from being misled by the ad. (*See* PFF ¶¶260-264, 302-322, 328-330, 334). Even without those disclosures,

consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

348. GX558, which Intuit produced bearing Bates number INTUIT-FTC-PART3-000000213 and with the original file name ty21-470-w2f_gm-W2Magnify_10_16x9.mp4, is an online TurboTax ad for TY 2021 that, according to Intuit's data at GX434, [REDACTED] (GX558 (Intuit); GX434 (Intuit); GX Summary 002 (Complaint Counsel) at 'Summary-Online_Ads' row 441; Baburek (Complaint Counsel) Tr. 318–23).

Response to Finding No. 348:

The Proposed Finding is misleading because GX558 is not an “online TurboTax ad.” It is a display advertisement for a specific TurboTax SKU, TurboTax Free Edition. (GX558 (Intuit)).

Intuit otherwise has no specific response except to note that the number of impressions or clicks an ad received is not evidence that the ad conveyed any of the claims asserted by Complaint Counsel, that reasonable consumers were likely to be deceived, or that the claims were material to reasonable consumers. The dissemination data offered in the Proposed Finding illustrates that reasonable consumers were unlikely to be deceived. That Complaint Counsel have identified only 26 even potentially relevant consumer complaints from Tax Year 2021 (*see* CCF ¶677) when GX558 ran, even though GX558 on its own [REDACTED] that year, is strong evidence that reasonable consumers were not deceived by GX558 or any of the other challenged advertisements that ran in Tax Year 2021 (*see* PFF ¶¶632, 637, 639, 641-647).

349. A screenshot from GX558 is pictured below.

The advertisement features a smartphone in the foreground displaying a 'Great refund! \$2,766 Federal Refund' message. The background is a blue gradient with a white 2021 Wage and Tax Statement form. The form includes the following information:

| | | | |
|---|-----------------------------|--------------------------------|-------------------------|
| 1 Wages, tips, other comp. | 3128.10 | 2 Federal income tax withheld | 5430.12 |
| 3 Social security wages | 34128.10 | 4 Social security tax withheld | 2115.94 |
| 5 Medicare wages and tips | 34128.10 | 6 Medicare tax withheld | 494.86 |
| d Control number | 198708981 | Dept. | 100 |
| | | Corp. | AABB |
| | | Employer use only | 223 |
| c Employer's name, address, and ZIP code | | | |
| MAJOR COMPANY 123 MAIN STREET SAN DIEGO, CA 92130 | | | |
| D number | 234567 | a Employee's SSA number | 123-45-6789 |
| | | b Allocated tips | |
| 9 | | 10 Dependent care benefits | |
| 12a | See instructions for box 12 | | |
| | C1 | | 27.00 |
| 12b | D1 | | 494.86 |
| 12c | | | |
| 12d | | | |
| 13 Stat emp | Ret. plan | 13d | 13d party sick pay |
| | X | | |
| address and ZIP code | | | |
| ON BLVD. CA 92122 | | | |
| state ID no. | 16 | State wages, tips, etc. | |
| | | 18 | Local wages, tips, etc. |
| | | 20 | Locality name |
| Federal Filing Copy Wage and Tax Statement | | | 2021 |

Text on the right side of the advertisement:

File Fed & State for \$0
Simple tax returns only.

Download the app now.

intuit
turbotax
Free Edition

(GX558 (Intuit)).

Response to Finding No. 349:

The Proposed Finding is incomplete and misleading because it is just a snippet of the full display video ad that actually ran and Complaint Counsel have omitted critical information for evaluating the advertisement. (CCFF ¶349; GX558 (Intuit)). Consumers did not view the challenged advertisement as a single, static image. Not captured in the Proposed Finding is the voiceover stating, “Simple tax returns only,” the fact that the TurboTax Free Edition logo appears on screen throughout the entire ad, that the reference to the free offer only appears halfway through the ad, that the “Simple tax returns only” written disclosure accompanies every written reference to the free offer. (GX558 (Intuit)). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

The Proposed Finding is also incomplete because it fails to recognize that consumers clicking on the advertisement would be taken directly to the landing page on the TurboTax

website for TurboTax Free Edition, where they would see detailed information about the free offer's qualifications. (PFF ¶253; Johnson (Intuit) Tr. 595-596). Indeed, Complaint Counsel and their witnesses recognized that the TurboTax website repeatedly disclosed the qualifications of free TurboTax offers and provided detailed information about those qualifications. (PFF ¶¶369-370). For example, Complaint Counsel's own 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 the free TurboTax offers. (PFF ¶790). Reasonable consumers understood that display ads such as GX558 link to a website when clicked (here, the TurboTax website) that includes more information about the advertised free offer, and by linking directly to the TurboTax website, the advertisement incorporated the detailed information on the TurboTax website. (PFF ¶254; *see also* CCF ¶455 ("The TurboTax website is ... integrated into TurboTax's free advertising.")).

Moreover, the Proposed Finding does not support an inference that the challenged ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The advertisement includes the "TurboTax Free Edition" logo throughout the entire video, and states "Simple tax returns only" both in a voiceover and in writing in a font size the same as or larger than other text in the ad. (GX558 (FTC)). By identifying the specific TurboTax SKU being advertised, the ad informed consumers that the offer does not apply to all TurboTax products. (*See* PFF ¶¶317, 321). And by stating that the offer was available for "Simple tax returns only," the ad informed consumers that the free offer was not available to everyone, and that eligibility was contingent on the complexity of the consumer's tax returns. (PFF ¶322; *see also* PFF ¶¶130-145). Complaint Counsel have offered no evidence that *all* components of the ad were not visible or audible to consumers (*see*

PPF ¶¶255-256), nor could they given the prominence of that content and the benchmarking analysis showing that the disclosures were comparable to disclosures in other companies' ads (*see* PFF ¶¶257-259).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel assert were conveyed. Instead, the undisputed testimony from Intuit's executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (*See* PFF ¶¶167-177, 190, 192-202, 405, 852, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel have not offered any evidence that this ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the qualifications included in the ad would prevent consumers from being misled by the ad. (*See* PFF ¶¶260-264, 302-322, 328-330, 334). Even without those disclosures, consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PPF ¶¶470-527).

350. GX559, which Intuit produced bearing Bates number INTUIT-FTC-PART3-000000216 and with the original file name ty21-487-csrf_gm-CelebrationDance_10_9x16.mp4, is an online TurboTax ad for TY 2021 that, according to Intuit's data at GX434, [REDACTED]. (GX559 (Intuit); GX434 (Intuit); GX Summary 002 (Complaint Counsel) at 'Summary-Online_Ads' row 453; Baburek (Complaint Counsel) Tr. 318-23).

Response to Finding No. 350:

The Proposed Finding is misleading because GX559 is not an “online TurboTax ad.” It is a display advertisement for a specific TurboTax SKU, TurboTax Free Edition. (GX559 (Intuit)).

Intuit otherwise has no specific response except to note that the number of impressions or clicks an ad received is not evidence that the ad conveyed any of the claims asserted by Complaint Counsel, that reasonable consumers were likely to be deceived, or that the claims were material to reasonable consumers. The dissemination data offered in the Proposed Finding illustrates that reasonable consumers were *unlikely* to be deceived. That Complaint Counsel have identified only 26 even potentially relevant consumer complaints from Tax Year 2021 (*see* CCFE ¶¶677) when GX559 ran, even though GX559 on its own [REDACTED] [REDACTED] that year, is strong evidence that reasonable consumers were not deceived by GX559 or any of the other challenged advertisements that ran in Tax Year 2021 (*see* PFF ¶¶632, 637, 639, 641-647).

351. Screenshots from GX559 are pictured below.



(GX559 (Intuit)).

Response to Finding No. 351:

The Proposed Finding is incomplete and misleading because it is just a snippet of the full display video ad that actually ran and Complaint Counsel have omitted critical information for evaluating the advertisement. (CCFF ¶351; GX559 (Intuit)). Consumers did not view the challenged advertisement as a single, static image. Not captured in the Proposed Finding is the fact that the TurboTax Free Edition logo appeared on the screen for the duration of the ad, that the “Simple tax returns only” appeared on screen alongside every free claim, or that the free offer was not shown for most of the ad. In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

The Proposed Finding is also incomplete because it fails to recognize that consumers clicking on the advertisement would be taken directly to the landing page on the TurboTax website for TurboTax Free Edition, where they would see detailed information about the free

offer's qualifications. (PFF ¶253; Johnson (Intuit) Tr. 595-596). Indeed, Complaint Counsel and their witnesses recognized that the TurboTax website repeatedly disclosed the qualifications of free TurboTax offers and provided detailed information about those qualifications. (PFF ¶¶369-370). For example, Complaint Counsel's own 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 the free TurboTax offers. (PFF ¶790). Reasonable consumers understood that display ads such as GX559 link to a website when clicked (here, the TurboTax website) that includes more information about the advertised free offer, and by linking directly to the TurboTax website, the advertisement incorporated the detailed information on the TurboTax website. (PFF ¶254; *see also* CCF ¶455 ("The TurboTax website is ... integrated into TurboTax's free advertising.")).

Moreover, the Proposed Finding does not support an inference that the challenged ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The advertisement includes the "TurboTax Free Edition" logo throughout the entire video and states prominently in a font size the same as or larger than other text in the ad, "Simple tax returns only." (GX559 (FTC)). By identifying the specific TurboTax SKU being advertised, the ad informed consumers that the offer does not apply to all TurboTax products. (*See* PFF ¶¶317, 321). And by stating that the offer was available for "Simple tax returns only," the ad informed consumers that the free offer was not available to everyone, and that eligibility was contingent on the complexity of the consumer's tax returns. (PFF ¶322; *see also* PFF ¶¶130-145). Complaint Counsel have offered no evidence that *all* components of the ad were not visible to consumers (*see* PFF ¶255), nor could they given the

prominence of that content and the benchmarking analysis showing that the disclosures were comparable to disclosures in other companies' ads (*see* PFF ¶¶257-259).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel assert were conveyed. Instead, the undisputed testimony from Intuit's executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (*See* PFF ¶¶167-177, 190, 192-202, 405, 852, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel have not offered any evidence that this ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the qualifications included in the ad would prevent consumers from being misled by the ad. (*See* PFF ¶¶260-264, 302-322, 328-330, 334). Even without those disclosures, consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

352. GX560, which Intuit produced bearing Bates number INTUIT-FTC-PART3-000000240 and with the original file name ty21-629-3zer_tlfsbo-ThreeZeroes_1200x628.jpg, is an online TurboTax ad for TY 2021 that, according to Intuit's data at GX434, [REDACTED] (GX560 (Intuit); GX434 (Intuit); GX Summary 002 (Complaint Counsel) at 'Summary-Online_Ads' row 496; Baburek (Complaint Counsel) Tr. 318–23).

Response to Finding No. 352:

The Proposed Finding is misleading because GX560 is not an “online TurboTax ad.” It is a display advertisement for free offers for specific TurboTax DIY, Live Assisted, and Live Full Service SKUs . (GX560 (Intuit)).

Intuit otherwise has no specific response except to note that the number of impressions or clicks an ad received is not evidence that the ad conveyed any of the claims asserted by Complaint Counsel, that reasonable consumers were likely to be deceived, or that the claims were material to reasonable consumers. The dissemination data offered in the Proposed Finding illustrates that reasonable consumers were *unlikely* to be deceived. That Complaint Counsel have identified only 26 even potentially relevant consumer complaints from Tax Year 2021 (*see* CCF ¶677) when GX560 ran, even though GX560 on its own [REDACTED] that year, is strong evidence that reasonable consumers were not deceived by GX560 or any of the other challenged advertisements that ran in Tax Year 2021 (*see* PFF ¶¶632, 637, 639, 641-647).

353. A screenshot from GX560 is pictured below.



(GX560 (Intuit)).

Response to Finding No. 353:

The Proposed Finding is incomplete and misleading because Complaint Counsel have omitted critical information for evaluating the advertisement. (CCFF ¶353; GX560 (Intuit)). The Proposed Finding does not include additional disclosures that would have been shown to consumers along with the image reproduced above. Not captured in the Proposed Finding is the fact that the image is part of a display advertisement that was paired with text stating, “Simple tax returns only. For a limited time.” (GX Summary 002 (FTC) at ‘Data-Online_Ad_Combined’ row 4599; RX1030 (Intuit) at row 5165). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

The Proposed Finding is also incomplete because it fails to recognize that consumers clicking on the advertisement would be taken directly to the TurboTax website, where they would see detailed information about the qualifications for the free offers for specific TurboTax DIY, Live Assisted, and Live Full Service SKUs. (PFF ¶253; Johnson (Intuit) Tr. 595-596; Rubin (Intuit) Tr. 1563-1564). Indeed, Complaint Counsel and their witnesses recognized that the TurboTax website repeatedly disclosed the qualifications of free TurboTax offers and provided detailed information about those qualifications. (PFF ¶¶369-370). For example, Complaint Counsel’s own 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 the free TurboTax offers. (PFF ¶790). Reasonable consumers understood that display ads such as GX560 link to a website when clicked (here, the TurboTax website) that includes more information about the advertised free offer, and by linking directly to the TurboTax website, the advertisement incorporated the detailed information on the TurboTax

website. (PFF ¶254; *see also* CCF ¶455 (“The TurboTax website is ... integrated into TurboTax’s free advertising.”)).

Moreover, the Proposed Finding does not support an inference that the challenged ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The advertisement states in large text that there are “Three Ways to File Free,” conveying that not every TurboTax SKU is free. (GX560 (FTC)). The advertisement states prominently in a font size the same as or larger than other text in the ad, “Simple tax returns only. Must file by 2/15.” (GX560 (FTC)). By stating that the offer was available for “Simple tax returns only,” the ad informed consumers that the free offer was not available to everyone, and that eligibility was contingent on the complexity of the consumer’s tax returns. (PFF ¶322; *see also* PFF ¶¶130-145). Complaint Counsel have offered no evidence that *all* components of the ad were not visible to consumers (*see* PFF ¶255), nor could they given the prominence of that content and the benchmarking analysis showing that the disclosures were comparable to disclosures in other companies’ ads (*see* PFF ¶¶257-259).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel assert were conveyed. Instead, the undisputed testimony from Intuit’s executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (*See* PFF ¶¶167-177, 190, 192-202, 405, 852, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel have not offered any evidence that this ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence

establishes that the qualifications included in the ad would prevent consumers from being misled by the ad. (See PFF ¶¶260-264, 302-322, 328-330, 334). Even without those disclosures, consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

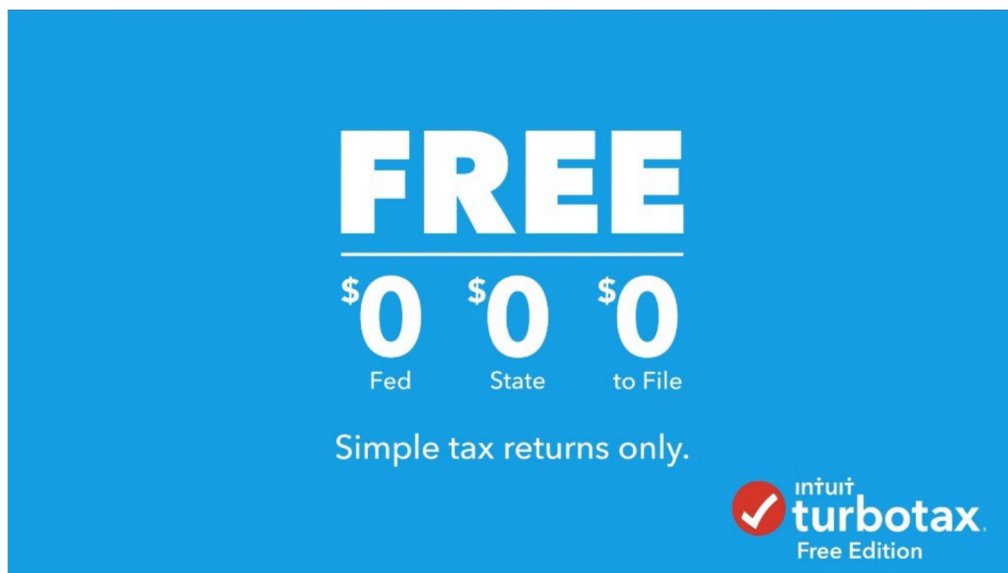
354. GX561, which Intuit produced bearing Bates number INTUIT-FTC-PART3-000000252 and with the original file name ty21-178-numf_gm-FoamFinger_16x9.mp4, is an online TurboTax ad for TY 2021 that, according to Intuit's data at GX434, [REDACTED]. (GX561 (Intuit); GX434 (Intuit); GX Summary 002 (Complaint Counsel) at 'Summary-Online_Ads' row 372; Baburek (Complaint Counsel) Tr. 318–23).

Response to Finding No. 354:

The Proposed Finding is misleading because GX561 is not an “online TurboTax ad.” It is a display advertisement for a specific TurboTax SKU, TurboTax Free Edition. (GX561 (Intuit)).

Intuit otherwise has no specific response except to note that the number of impressions or clicks an ad received is not evidence that the ad conveyed any of the claims asserted by Complaint Counsel, that reasonable consumers were likely to be deceived by the ad, or that the claims were material to reasonable consumers. The dissemination data offered in the Proposed Finding illustrates that reasonable consumers were *unlikely* to be deceived. That Complaint Counsel have identified only 26 even potentially relevant consumer complaints from Tax Year 2021 (see CCF ¶677) when GX561 ran, even though GX561 on its own [REDACTED] that year, is strong evidence that reasonable consumers were not deceived by GX561 or any of the other challenged advertisements that ran in Tax Year 2021 (see PFF ¶¶632, 637, 639, 641-647).

355. A screenshot from GX561 is pictured below.



(GX561 (Intuit)).

Response to Finding No. 355:

The Proposed Finding is incomplete and misleading because it is just a snippet of the full display video ad that actually ran and Complaint Counsel have omitted critical information for evaluating the advertisement. (CCFF ¶355; GX561 (Intuit)). Consumers did not view the challenged advertisement as a single, static image. Not captured in the Proposed Finding is the fact that the TurboTax Free Edition logo appeared on the screen for the duration of the ad, or that the “Simple tax returns only” appeared on screen in large font alongside every free claim. The Proposed Finding also does not include additional disclosures that would have been shown to consumers along with the image reproduced above. The image is part of a display advertisement that was paired with text stating, “Simple tax returns only.” (GX Summary 002 (FTC) at ‘Data-Online_Ad_Combined’ row 4600; RX1030 (Intuit) at row 5209). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

The Proposed Finding is also incomplete because it fails to recognize that consumers clicking on the advertisement would be taken directly to the app store on their phone where they could download the TurboTax app, where they would see detailed information about the free offer's qualifications. (PFF ¶253; Johnson (Intuit) Tr. 595-596). Indeed, Complaint Counsel and their witnesses recognized that the TurboTax website repeatedly disclosed the qualifications of free TurboTax offers and provided detailed information about those qualifications. (PFF ¶¶369-370). For example, Complaint Counsel's own 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 the free TurboTax offers. (PFF ¶790). Reasonable consumers understood that display ads such as GX561 link to a website when clicked (here, the TurboTax website) that includes more information about the advertised free offer, and by linking directly to the TurboTax website, the advertisement incorporated the detailed information on the TurboTax website. (PFF ¶254; *see also* CCF ¶455 ("The TurboTax website is ... integrated into TurboTax's free advertising.")).

Moreover, the Proposed Finding does not support an inference that the challenged ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The advertisement includes the "TurboTax Free Edition" logo and states prominently in a font size the same as or larger than other text in the ad, "Simple tax returns only." (GX561 (FTC)). By identifying the specific TurboTax SKU being advertised, the ad informed consumers that the offer does not apply to all TurboTax products. (*See* PFF ¶¶317, 321). And by stating that the offer was available for "Simple tax returns only," the ad informed consumers that the free offer was not available to everyone, and that eligibility was contingent on the complexity of the consumer's tax returns. (PFF ¶322; *see*

also PFF ¶¶130-145). Complaint Counsel have offered no evidence that *all* components of the ad were not visible to consumers (*see* PFF ¶255), nor could they given the prominence of that content and the benchmarking analysis showing that the disclosures were comparable to disclosures in other companies' ads (*see* PFF ¶¶257-259).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel assert were conveyed. Instead, the undisputed testimony from Intuit's executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (*See* PFF ¶¶167-177, 190, 192-202, 405, 852, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel have not offered any evidence that this ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the qualifications included in the ad would prevent consumers from being misled by the ad. (*See* PFF ¶¶260-264, 302-322, 328-330, 334). Even without those disclosures, consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

356. GX562, which Intuit produced bearing Bates number INTUIT-FTC-PART3-000000260 and with the original file name ty21-494-mmfm_gm-MapMillions_6_9x16.mp4, is an online TurboTax ad for TY 2021 that, according to Intuit's data at GX434, [REDACTED]. (GX562 (Intuit); GX434 (Intuit); GX Summary 002 (Complaint Counsel) at 'Summary-Online_Ads' row 459; Baburek (Complaint Counsel) Tr. 318-23).

Response to Finding No. 356:

The Proposed Finding is misleading because GX562 is not an “online TurboTax ad.” It is a display advertisement for a specific TurboTax SKU, TurboTax Free Edition. (GX562 (Intuit)).

Intuit otherwise has no specific response except to note that the number of impressions or clicks an ad received is not evidence that the ad conveyed any of the claims asserted by Complaint Counsel, that reasonable consumers were likely to be deceived by the ad, or that the claims were material to reasonable consumers. The dissemination data offered in the Proposed Finding illustrates that reasonable consumers were *unlikely* to be deceived. That Complaint Counsel have identified only 26 even potentially relevant consumer complaints from Tax Year 2021 (*see* CCF ¶¶677) when GX562 ran, even though GX562 on its own [REDACTED] [REDACTED] that year, is strong evidence that reasonable consumers were not deceived by GX562 or any of the other challenged advertisements that ran in Tax Year 2021 (*see* PFF ¶¶632, 637, 639, 641-647).

357. A screenshot from GX562 is pictured below.



(GX562 (Intuit)).

Response to Finding No. 357:

The Proposed Finding is incomplete and misleading because it is just a snippet of the full display video ad that actually ran and Complaint Counsel have omitted critical information for evaluating the advertisement. (CCFF ¶357; GX562 (Intuit)). Consumers did not view the challenged advertisement as a single, static image. Not captured in the Proposed Finding is the fact that the TurboTax Free Edition logo appeared on the screen for the duration of the ad, or that the “Simple tax returns only” appeared on screen in large font alongside every free claim. In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

The Proposed Finding is also incomplete because it fails to recognize that consumers clicking on the advertisement would be taken directly to the landing page on the TurboTax website for TurboTax Free Edition, where they would see detailed information about the free offer’s qualifications. (PFF ¶253; Johnson (Intuit) Tr. 595-596). Indeed, Complaint Counsel and their witnesses recognized that the TurboTax website repeatedly disclosed the qualifications of free TurboTax offers and provided detailed information about those qualifications. (PFF ¶¶369-370). For example, Complaint Counsel’s own 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 the free TurboTax offers. (PFF ¶790). Reasonable consumers understood that display ads such as GX562 link to a website when clicked (here, the TurboTax website) that includes more information about the advertised free offer, and by linking directly to the TurboTax website, the advertisement incorporated the detailed information on the TurboTax website. (PFF ¶254; *see also* CCFF ¶455 (“The TurboTax website is ... integrated into TurboTax’s free advertising.”)).

Moreover, the Proposed Finding does not support an inference that the challenged ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The advertisement includes the “TurboTax Free Edition” logo throughout the entire video and states prominently in a font size the same as or larger than other text in the ad, “Simple tax returns only.” (GX562 (FTC)). By identifying the specific TurboTax SKU being advertised, the ad informed consumers that the offer does not apply to all TurboTax products. (See PFF ¶¶317, 321). And by stating that the offer was available for “Simple tax returns only,” the ad informed consumers that the free offer was not available to everyone, and that eligibility was contingent on the complexity of the consumer’s tax returns. (PFF ¶322; *see also* PFF ¶¶130-145). Complaint Counsel have offered no evidence that *all* components of the ad were not visible to consumers (*see* PFF ¶255), nor could they given the prominence of that content and the benchmarking analysis showing that the disclosures were comparable to disclosures in other companies’ ads (*see* PFF ¶¶257-259).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel assert were conveyed. Instead, the undisputed testimony from Intuit’s executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (See PFF ¶¶167-177, 190, 192-202, 405, 852, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel have not offered any evidence that this ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the qualifications included in the ad would prevent consumers from being misled

by the ad. (See PFF ¶¶260-264, 302-322, 328-330, 334). Even without those disclosures, consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

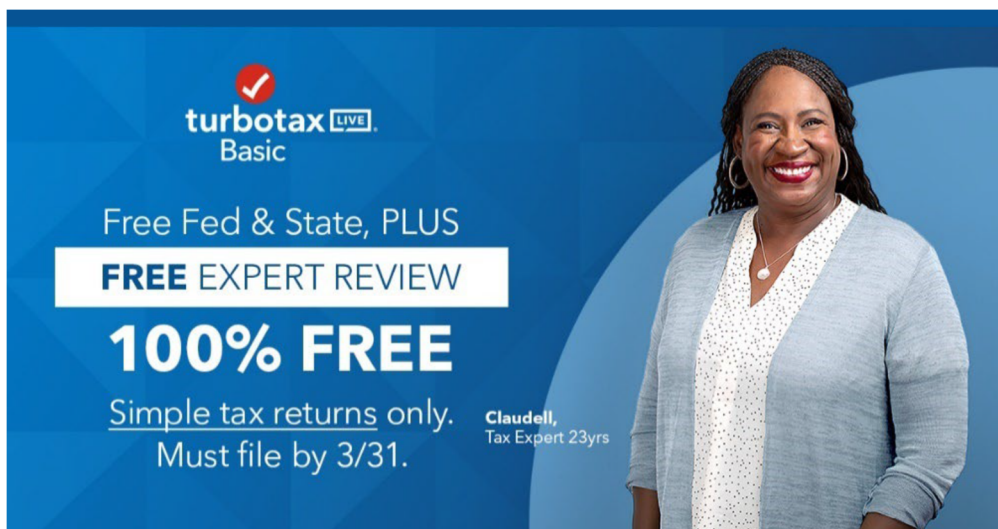
358. GX564, which Intuit produced bearing Bates number INTUIT-FTC-PART3-000000294 and with the original file name ty21-372-exp_ttlbo-OfferControl_1200x627.jpg, is an online TurboTax ad for TY 2021 that, according to Intuit's data at GX434, [REDACTED]. (GX564 (Intuit); GX434 (Intuit); GX Summary 002 (Complaint Counsel) at 'Summary-Online_Ads' row 394; Baburek (Complaint Counsel) Tr. 318-23).

Response to Finding No. 358:

The Proposed Finding is misleading because GX564 is not an "online TurboTax ad." It is a display advertisement for a specific TurboTax SKU, TurboTax Live Basic. (GX564 (Intuit)).

Intuit otherwise has no specific response except to note that the number of impressions or clicks an ad received is not evidence that the ad conveyed any of the claims asserted by Complaint Counsel, that reasonable consumers were likely to be deceived by the ad, or that the claims were material to reasonable consumers. The dissemination data offered in the Proposed Finding illustrates that reasonable consumers were *unlikely* to be deceived. That Complaint Counsel have identified only 26 even potentially relevant consumer complaints from Tax Year 2021 (see CCF ¶¶677) when GX564 ran, even though GX564 on its own [REDACTED] [REDACTED] that year, is strong evidence that reasonable consumers were not deceived by GX564 or any of the other challenged advertisements that ran in Tax Year 2021 (see PFF ¶¶632, 637, 639, 641-647).

359. A screenshot from GX564 is pictured below.



(GX564 (Intuit)).

Response to Finding No. 359:

The Proposed Finding is incomplete and misleading because Complaint Counsel have omitted critical information for evaluating the advertisement. (CCFF ¶359; GX564 (Intuit)). The Proposed Finding does not include additional disclosures that would have been shown to consumers along with the image reproduced above. Not captured in the Proposed Finding is the fact that the image is part of a display advertisement that was paired with text stating, “100% Free for simple tax returns only: Unlimited live tax advice - when you need it.” (GX Summary 002 (FTC) at ‘Data-Online_Ad_Combined’ row 4601; RX1030 (Intuit) at row 5195). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

The Proposed Finding is also incomplete because it fails to recognize that consumers clicking on the advertisement would be taken directly to the landing page on the TurboTax website for the free TurboTax Live Basic offer, where they would see detailed information about the free offer’s qualifications. (PFF ¶253; Rubin (Intuit) Tr. 1563-1564). Indeed, Complaint

Counsel and their witnesses recognized that the TurboTax website repeatedly disclosed the qualifications of free TurboTax offers and provided detailed information about those qualifications. (PFF ¶¶369-370). For example, Complaint Counsel’s own 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 the free TurboTax offers. (PFF ¶790). Reasonable consumers understood that display ads such as GX564 link to a website when clicked on (here, the TurboTax website) that includes more information about the advertised free offer, and by linking directly to the TurboTax website, the advertisement incorporated the detailed information on the TurboTax website. (PFF ¶254; *see also* CCF ¶455 (“The TurboTax website is ... integrated into TurboTax’s free advertising.”)).

Moreover, the Proposed Finding does not support an inference that the challenged ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The advertisement includes the “TurboTax Live Basic” logo and states prominently in a font size the same as or larger than other text in the ad, “Simple tax returns only. Must file by 3/31.” (GX564 (FTC)). By identifying the specific TurboTax SKU being advertised, the ad informed consumers that the offer does not apply to all TurboTax products. (*See* PFF ¶¶317, 321). And by stating that the offer was available for “Simple tax returns only” with the text underlined for emphasis, the ad informed consumers that the free offer was not available to everyone, and that eligibility was contingent on the complexity of the consumer’s tax returns. (PFF ¶322; *see also* PFF ¶¶130-145). Complaint Counsel have offered no evidence that *all* components of the ad were not visible to consumers (*see* PFF ¶255), nor could they given the prominence of that content and the benchmarking analysis showing that the disclosures were comparable to disclosures in other companies’ ads (*see* PFF ¶¶257-259).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel assert were conveyed. Instead, the undisputed testimony from Intuit's executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (See PFF ¶¶167-177, 190, 192-202, 405, 852, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel have not offered any evidence that this ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the qualifications included in the ad would prevent consumers from being misled by the ad. (See PFF ¶¶260-264, 302-322, 328-330, 334). Even without those disclosures, consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

360. GX565, which Intuit produced bearing Bates number INTUIT-FTC-PART3-000000295 and with the original file name ty21-371-mvpr_tfsbo-MVPRed_1200x627.jpg, is an online TurboTax ad for TY 2021 that, according to Intuit's data at GX434, [REDACTED]. (GX565 (Intuit); GX434 (Intuit); GX Summary 002 (Complaint Counsel) at 'Summary-Online_Ads' row 393; Baburek (Complaint Counsel) Tr. 318-23).

Response to Finding No. 360:

The Proposed Finding is misleading because GX565 is not an "online TurboTax ad." It is a display advertisement for free offers of specific TurboTax DIY, Live Assisted, and Live Full Service SKUs. (GX565 (Intuit)).

Intuit otherwise has no specific response except to note that the number of impressions or clicks an ad received is not evidence that the ad conveyed any of the claims asserted by Complaint Counsel, that reasonable consumers were likely to be deceived by the ad, or that the claims were material to reasonable consumers. The dissemination data offered in the Proposed Finding illustrates that reasonable consumers were *unlikely* to be deceived. That Complaint Counsel have identified only 26 even potentially relevant consumer complaints from Tax Year 2021 (*see* CCFE ¶677) when GX565 ran, even though GX565 on its own [REDACTED] [REDACTED] that year, is strong evidence that reasonable consumers were not deceived by GX565 or any of the other challenged advertisements that ran in Tax Year 2021 (*see* PFF ¶¶632, 637, 639, 641-647).

361. A screenshot from GX565 is pictured below.



(GX565 (Intuit)).

Response to Finding No. 361:

The Proposed Finding is incomplete and misleading because Complaint Counsel have omitted critical information for evaluating the advertisement. (CCFE ¶361; GX565 (Intuit)). The Proposed Finding does not include additional disclosures that would have been shown to consumers along with the image reproduced above. Not captured in the Proposed Finding is the

fact that the image is part of a display advertisement that was paired with text stating, “Simple tax returns only.” (GX Summary 002 (FTC) at ‘Data-Online_Ad_Combined’ row 4602; RX1030 (Intuit) at row 5195). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

The Proposed Finding is also incomplete because it fails to recognize that consumers clicking on the advertisement would be taken directly to the landing page on the TurboTax website, where they would see detailed information about the qualifications for the free offers for specific TurboTax DIY, Live Assisted, and Live Full Service SKUs. (PFF ¶253; Johnson (Intuit) Tr. 595-596; Rubin (Intuit) Tr. 1563-1564). Indeed, Complaint Counsel and their witnesses recognized that the TurboTax website repeatedly disclosed the qualifications of free TurboTax offers and provided detailed information about those qualifications. (PFF ¶¶369-370). For example, Complaint Counsel’s own 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 the free TurboTax offers. (PFF ¶790). Reasonable consumers understood that display ads such as GX565 link to a website when clicked (here, the TurboTax website) that include more information about the advertised free offer, and by linking directly to the TurboTax website, the advertisement incorporated the detailed information on the TurboTax website. (PFF ¶254; *see also* CCF ¶455 (“The TurboTax website is ... integrated into TurboTax’s free advertising.”)).

Moreover, the Proposed Finding does not support an inference that the challenged ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The advertisement states prominently in a

font size the same as or larger than other text in the ad, “Simple tax returns only. Must File by 2/15.” (GX565 (FTC)). By stating that the offer was available for “Simple tax returns only,” the ad informed consumers that the free offer was not available to everyone, and that eligibility was contingent on the complexity of the consumer’s tax returns. (PFF ¶322; *see also* PFF ¶¶130-145). Complaint Counsel have offered no evidence that *all* components of the ad were not visible to consumers (*see* PFF ¶255), nor could they given the prominence of that content and the benchmarking analysis showing that the disclosures were comparable to disclosures in other companies’ ads (*see* PFF ¶¶257-259).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel assert were conveyed. Instead, the undisputed testimony from Intuit’s executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (*See* PFF ¶¶167-177, 190, 192-202, 405, 852, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel have not offered any evidence that this ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the qualifications included in the ad would prevent consumers from being misled by the ad. (*See* PFF ¶¶260-264, 302-322, 328-330, 334). Even without those disclosures, consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

362. GX566, which Intuit produced bearing Bates number INTUIT-FTC-PART3-000000297 and with the original file name ty21-435-csrf_gm-FreeRearrange_1080x1920.jpg, is an online TurboTax ad for TY 2021 that, according to Intuit's data at GX434, [REDACTED]. (GX566 (Intuit); GX434 (Intuit); GX Summary 002 (Complaint Counsel) at 'Summary-Online_Ads' row 435; Baburek (Complaint Counsel) Tr. 318–23).

Response to Finding No. 362:

The Proposed Finding is misleading because GX550 is not an “online TurboTax ad.” It is a display advertisement for a specific TurboTax SKU, TurboTax Free Edition. (GX550 (Intuit)).

Intuit otherwise has no specific response except to note that the number of impressions or clicks an ad received is not evidence that the ad conveyed any of the claims asserted by Complaint Counsel, that reasonable consumers were likely to be deceived by the ad, or that the claims were material to reasonable consumers. The dissemination data offered in the Proposed Finding illustrates that reasonable consumers were *unlikely* to be deceived. That Complaint Counsel have identified only 26 even potentially relevant consumer complaints from Tax Year 2021 (*see* CCF ¶¶677) when GX566 ran, even though GX566 on its own [REDACTED] [REDACTED] that year, is strong evidence that reasonable consumers were not deceived by GX566 or any of the other challenged advertisements that ran in Tax Year 2021 (*see* PFF ¶¶632, 637, 639, 641-647).

363. A screenshot from GX566 is pictured below.



intuit
turbotax
Free Edition

FREE | \$0 Fed | \$0 State | \$0 to File

Simple tax returns only.

File for \$0

Maximum refund, guaranteed.



(GX566 (Intuit)).

Response to Finding No. 363:

The Proposed Finding is incomplete because it fails to recognize that consumers clicking on the advertisement would be taken directly to the landing page on the TurboTax website for TurboTax Free Edition, where they would see detailed information about the free offer's qualifications. (PFF ¶253; Johnson (Intuit) Tr. 595-596). Indeed, Complaint Counsel and their witnesses recognized that the TurboTax website repeatedly disclosed the qualifications of free TurboTax offers and provided detailed information about those qualifications. (PFF ¶¶369-370). For example, Complaint Counsel's own 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 the free TurboTax offers. (PFF ¶790). Reasonable

consumers understood that display ads such as GX566 link to a website when clicked (here, the TurboTax website) that includes more information about the advertised free offer, and by linking directly to the TurboTax website, the advertisement incorporated the detailed information on the TurboTax website. (PFF ¶254; *see also* CCF ¶455 (“The TurboTax website is ... integrated into TurboTax’s free advertising.”)). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

Moreover, the Proposed Finding does not support an inference that the challenged ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The advertisement includes the “TurboTax Free Edition” logo and states prominently, “Simple tax returns only.” (GX566 (FTC)). By identifying the specific TurboTax SKU being advertised, the ad informed consumers that the offer does not apply to all TurboTax products. (*See* PFF ¶¶317, 321). And by stating that the offer was available for “Simple tax returns only,” the ad informed consumers that the free offer was not available to everyone, and that eligibility was contingent on the complexity of the consumer’s tax returns. (PFF ¶322; *see also* PFF ¶¶130-145). Complaint Counsel have offered no evidence that *all* components of the ad were not visible to consumers (*see* PFF ¶255), nor could they given the prominence of that content and the benchmarking analysis showing that the disclosures were comparable to disclosures in other companies’ ads (*see* PFF ¶¶257-259).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel assert were conveyed. Instead, the undisputed testimony from Intuit’s executives establishes that Intuit did not intend for any of the ads to claim

that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (See PFF ¶¶167-177, 190, 192-202, 405, 852, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel have not offered any evidence that this ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the qualifications included in the ad would prevent consumers from being misled by the ad. (See PFF ¶¶260-264, 302-322, 328-330, 334). Even without those disclosures, consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

364. GX567, which Intuit produced bearing Bates number INTUIT-FTC-PART3-000000309 and with the original file name ty21-717-mvpr_ttlfsbo-MVPCarousel1_627x627.jpg, is an online TurboTax ad for TY 2021 that, according to Intuit's data at GX434, [REDACTED]. (GX567 (Intuit); GX434 (Intuit); GX Summary 002 (Complaint Counsel) at 'Summary-Online_Ads' row 565; Baburek (Complaint Counsel) Tr. 318-23).

Response to Finding No. 364:

The Proposed Finding is misleading because GX567 is not an "online TurboTax ad." It is a display advertisement for free offers for specific TurboTax DIY, Live Assisted, and Live Full Service SKUs. (GX567 (Intuit)).

Intuit otherwise has no specific response except to note that the number of impressions or clicks an ad received is not evidence that the ad conveyed any of the claims asserted by Complaint Counsel, that reasonable consumers were likely to be deceived by the ad, or that the claims were material to reasonable consumers. The dissemination data offered in the Proposed

Finding illustrates that reasonable consumers were *unlikely* to be deceived. That Complaint Counsel have identified only 26 even potentially relevant consumer complaints from Tax Year 2021 (see CCF ¶¶677) when GX567 ran, even though GX567 on its own [REDACTED] [REDACTED] that year, proves that reasonable consumers were not deceived by GX567 (see PFF ¶¶632, 637, 639, 641-647).

365. A screenshot from GX567 is pictured below.



(GX567 (Intuit)).

Response to Finding No. 365:

The Proposed Finding is incomplete because it is just a snippet of the ad that actually ran. (See CCF ¶¶365; GX567 (Intuit); RX1551 (Intuit)). Complaint Counsel have omitted critical information for evaluating the advertisement. The Proposed Finding does not include additional disclosures that would have been shown to consumers along with the image reproduced above. This image is part of a display advertisement that was paired with text stating, “From do it yourself to we do it for you, Free. Only from TurboTax. Simple tax returns only. Must file by

2/15.” (RX1551 (Intuit) at cell 2D). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶9, 16, 681 PFF ¶¶241, 313, 320, 334).

The Proposed Finding is also incomplete because it fails to recognize that consumers clicking on the advertisement would be taken directly to the landing page on the TurboTax website, where they would see detailed information about the qualifications for the free offers for specific TurboTax DIY, Live Assisted, and Live Full Service SKUs. (PFF ¶253; Johnson (Intuit) Tr. 595-596; Rubin (Intuit) Tr. 1563-1564). Indeed, Complaint Counsel and their witnesses recognized that the TurboTax website repeatedly disclosed the qualifications of free TurboTax offers and provided detailed information about those qualifications. (PFF ¶¶369-370). For example, Complaint Counsel’s own 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 the free TurboTax offers. (PFF ¶790). Reasonable consumers understood that display ads such as GX567 link to a website when clicked (here, the TurboTax website) that includes more information about the advertised free offer, and by linking directly to the TurboTax website, the advertisement incorporated the detailed information on the TurboTax website. (PFF ¶254; *see also* CCF ¶455 (“The TurboTax website is ... integrated into TurboTax’s free advertising.”)).

Moreover, the Proposed Finding does not support an inference that the challenged ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The advertisement as shown to consumers stated, “Simple tax returns only.” (RX1551 (Intuit)). By stating that the offer was available for “Simple tax returns only,” the ad informed consumers that the free offer was not available to

everyone, and that eligibility was contingent on the complexity of the consumer's tax returns. (PFF ¶¶322; *see also* PFF ¶¶130-145). Complaint Counsel have offered no evidence that *all* components of the ad were not visible to consumers (*see* PFF ¶255), nor could they given the prominence of that content and the benchmarking analysis showing that the disclosures were comparable to disclosures in other companies' ads (*see* PFF ¶¶257-259).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel assert were conveyed. Instead, the undisputed testimony from Intuit's executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (*See* PFF ¶¶167-177, 190, 192-202, 405, 852, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel have not offered any evidence that this ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the qualifications included in the ad would prevent consumers from being misled by the ad. (*See* PFF ¶¶260-264, 302-322, 328-330, 334). Even without those disclosures, consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

366. GX568, which Intuit produced bearing Bates number INTUIT-FTC-PART3-000000311 and with the original file name ty21-380-mvpr_MVPRed_1200x628.jpg, is an online TurboTax ad for TY 2021 that, according to Intuit's data at GX434, [REDACTED] (GX568 (Intuit); GX434 (Intuit); GX Summary 002 (Complaint Counsel) at 'Summary-Online_Ads' row 396; Baburek (Complaint Counsel) Tr. 318-23).

Response to Finding No. 366:

The Proposed Finding is misleading because GX568 is not an “online TurboTax ad.” It is a display advertisement for free offers for specific TurboTax DIY, Live Assisted, and Live Full Service SKUs. (GX568 (Intuit)).

Intuit otherwise has no specific response except to note that the number of impressions or clicks an ad received is not evidence that the ad conveyed any of the claims asserted by Complaint Counsel, that reasonable consumers were likely to be deceived by the ad, or that the claims were material to reasonable consumers. The dissemination data offered in the Proposed Finding illustrates that reasonable consumers were *unlikely* to be deceived. That Complaint Counsel have identified only 26 even potentially relevant consumer complaints from Tax Year 2021 (*see* CCF ¶¶677) when GX568 ran, even though GX568 on its own [REDACTED] [REDACTED] that year, is strong evidence that reasonable consumers were not deceived by GX568 or any of the other challenged advertisements that ran in Tax Year 2021 (*see* PFF ¶¶632, 637, 639, 641-647).

367. A screenshot from GX568 is pictured below.



(GX568 (Intuit)).

Response to Finding No. 367:

The Proposed Finding is incomplete and misleading because Complaint Counsel have omitted critical information for evaluating the advertisement. (CCFF ¶367; GX568 (Intuit)). The Proposed Finding does not include additional disclosures that would have been shown to consumers along with the image reproduced above. Not captured in the Proposed Finding is the fact that the image is part of a display advertisement that was paired with text stating, “Simple tax returns only.” (GX Summary 002 (FTC) at ‘Data-Online_Ad_Combined’ row 4603; RX1030 (Intuit) at row 5192). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

The Proposed Finding is also incomplete because it fails to recognize that consumers clicking on the advertisement would be taken directly to the landing page on the TurboTax website, where they would see detailed information about the qualifications for the free offers for specific TurboTax DIY, Live Assisted, and Live Full Service SKUs. (PFF ¶253; Johnson (Intuit) Tr. 595-596; Rubin (Intuit) Tr. 1563-1564). Indeed, Complaint Counsel and their witnesses recognized that the TurboTax website repeatedly disclosed the qualifications of free TurboTax offers and provided detailed information about those qualifications. (PFF ¶¶369-370). For example, Complaint Counsel’s own 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 the free TurboTax offers. (PFF ¶790). Reasonable consumers understood that display ads such as GX568 link to a website when clicked (here, the TurboTax website) that includes more information about the advertised free offer, and by linking directly to the TurboTax website, the advertisement incorporated the detailed information on the

TurboTax website. (PFF ¶254; *see also* CCF ¶455 (“The TurboTax website is ... integrated into TurboTax’s free advertising.”)).

Moreover, the Proposed Finding does not support an inference that the challenged ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The advertisement states prominently, “Simple tax returns only.” (GX568 (FTC)). By stating that the offer was available for “Simple tax returns only,” the ad informed consumers that the free offer was not available to everyone, and that eligibility was contingent on the complexity of the consumer’s tax returns. (PFF ¶322; *see also* PFF ¶¶130-145). Complaint Counsel have offered no evidence that *all* components of the ad were not visible to consumers (*see* PFF ¶255), nor could they given the prominence of that content and the benchmarking analysis showing that the disclosures were comparable to disclosures in other companies’ ads (*see* PFF ¶¶257-259).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel assert were conveyed. Instead, the undisputed testimony from Intuit’s executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (*See* PFF ¶¶167-177, 190, 192-202, 405, 852, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel have not offered any evidence that this ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the qualifications included in the ad would prevent consumers from being misled by the ad. (*See* PFF ¶¶260-264, 302-322, 328-330, 334). Even without those disclosures,

consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

368. GX569, which Intuit produced bearing Bates number INTUIT-FTC-PART3-000000312 and with the original file name ty21-381-exp_ttlbo-OfferControl_1200x628.jpg, is an online TurboTax ad for TY 2021 that, according to Intuit's data at GX434, [REDACTED] [REDACTED]. (GX569 (Intuit); GX434 (Intuit); GX Summary 002 (Complaint Counsel) at 'Summary-Online_Ads' row 397; Baburek (Complaint Counsel) Tr. 318–23).

Response to Finding No. 368:

The Proposed Finding is misleading because GX569 is not an “online TurboTax ad.” It is a display advertisement for a specific TurboTax SKU, TurboTax Live Basic. (GX569 (Intuit)).

Intuit otherwise has no specific response except to note that the number of impressions or clicks an ad received is not evidence that the ad conveyed any of the claims asserted by Complaint Counsel, that reasonable consumers were likely to be deceived by the ad, or that the claims were material to reasonable consumers. The dissemination data offered in the Proposed Finding illustrates that reasonable consumers were *unlikely* to be deceived. That Complaint Counsel have identified only 26 even potentially relevant consumer complaints from Tax Year 2021 (*see* CCF ¶677) when GX569 ran, even though GX569 on its own [REDACTED] [REDACTED] that year, is strong evidence that reasonable consumers were not deceived by GX569 or any of the other challenged advertisements that ran in Tax Year 2021 (*see* PFF ¶¶632, 637, 639, 641-647).

369. A screenshot from GX569 is pictured below.



(GX569 (Intuit)).

Response to Finding No. 369:

The Proposed Finding is incomplete and misleading because Complaint Counsel have omitted critical information for evaluating the advertisement. (CCFF ¶369; GX569 (Intuit)). The Proposed Finding does not include additional disclosures that would have been shown to consumers along with the image reproduced above. Not captured in the Proposed Finding is the fact that the image is part of a display advertisement that was paired with text stating, “100% Free for simple tax returns only: Unlimited live tax advice - when you need it.” (GX Summary 002 (FTC) at ‘Data-Online_Ad_Combined’ row 4604; RX1030 (Intuit) at row 5191). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

The Proposed Finding is incomplete because it fails to recognize that consumers clicking on the advertisement would be taken directly to the landing page on the TurboTax website for the free TurboTax Live Basic offer, where they would see detailed information about the free offer’s qualifications. (PFF ¶253; Rubin (Intuit) Tr. 1563-1564). Indeed, Complaint Counsel and their

witnesses recognized that the TurboTax website repeatedly disclosed the qualifications of free TurboTax offers and provided detailed information about those qualifications. (PFF ¶¶369-370). For example, Complaint Counsel’s own 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 the free TurboTax offers. (PFF ¶790). Reasonable consumers understood that display ads such as GX569 link to a website when clicked (here, the TurboTax website) that includes more information about the advertised free offer, and by linking directly to the TurboTax website, the advertisement incorporated the detailed information on the TurboTax website. (PFF ¶254; *see also* CCF ¶455 (“The TurboTax website is ... integrated into TurboTax’s free advertising.”)).

Moreover, the Proposed Finding does not support an inference that the challenged ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The advertisement includes the “TurboTax Live Basic” logo and states prominently in a font size the same as or larger than other text in the ad, “Simple tax returns only. Must file by 3/31.” (GX569 (FTC)). By identifying the specific TurboTax SKU being advertised, the ad informed consumers that the offer does not apply to all TurboTax products. (*See* PFF ¶¶317, 321). And by stating that the offer was available for “Simple tax returns only” with underlining for emphasis, the ad informed consumers that the free offer was not available to everyone, and that eligibility was contingent on the complexity of the consumer’s tax returns. (PFF ¶322; *see also* PFF ¶¶130-145). Complaint Counsel have offered no evidence that *all* components of the ad were not visible to consumers (*see* PFF ¶255), nor could they given the prominence of that content and the benchmarking analysis showing that the disclosures were comparable to disclosures in other companies’ ads (*see* PFF ¶¶257-259).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel assert were conveyed. Instead, the undisputed testimony from Intuit's executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (See PFF ¶¶167-177, 190, 192-202, 405, 852, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel have not offered any evidence that this ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the qualifications included in the ad would prevent consumers from being misled by the ad. (See PFF ¶¶260-264, 302-322, 328-330, 334). Even without those disclosures, consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

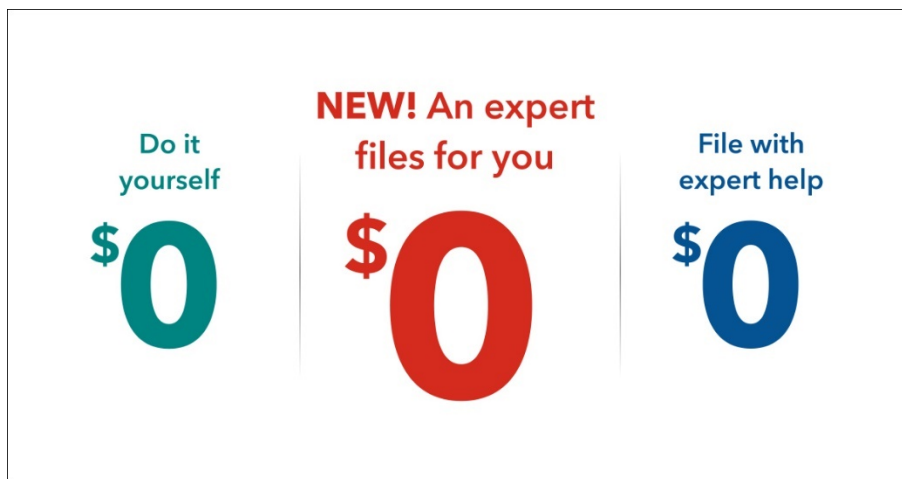
370. GX570, which Intuit produced bearing Bates number INTUIT-FTC-PART3-000000316 and with the original file name ty21-698-3zer_ttlfsbo-ThreeZeroesNoLogoText_1200x628.jpg, is an online TurboTax ad for TY 2021 that, according to Intuit's data at GX434, [REDACTED] (GX570 (Intuit); GX434 (Intuit); GX Summary 002 (Complaint Counsel) at 'Summary-Online_Ads' row 545; Baburek (Complaint Counsel) Tr. 318-23).

Response to Finding No. 370:

The Proposed Finding is misleading because GX570 is not an "online TurboTax ad." It is a display advertisement for free offers for specific TurboTax DIY, Live Assisted, and Live Full Service SKUs. (GX570 (Intuit)).

Intuit otherwise has no specific response except to note that the number of impressions or clicks an ad received is not evidence that the ad conveyed any of the claims asserted by Complaint Counsel, that reasonable consumers were likely to be deceived by the ad, or that the claims were material to reasonable consumers. The dissemination data offered in the Proposed Finding illustrates that reasonable consumers were *unlikely* to be deceived. That Complaint Counsel have identified only 26 even potentially relevant consumer complaints from Tax Year 2021 (*see* CCF ¶¶677) when GX570 ran, even though GX570 on its own [REDACTED] [REDACTED] that year, is strong evidence that reasonable consumers were not deceived by GX570 or any of the other challenged advertisements that ran in Tax Year 2021 (*see* PFF ¶¶632, 637, 639, 641-647).

371. A screenshot from GX570 is pictured below.



(GX570 (Intuit)).

Response to Finding No. 371:

The Proposed Finding is incomplete and misleading because Complaint Counsel have omitted critical information for evaluating the advertisement. The Proposed Finding does not include additional disclosures that would have been shown to consumers along with the image reproduced above. This image is part of a display advertisement that was paired with text

stating, “Do it yourself, or we do it for you, free w/TurboTax. Simple taxes only. Offer ends 3/31.” (GX Summary 002 (FTC) at ‘Data-Online_Ad_Combined’ row 5696; RX1030 (Intuit) at row 1370). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

The Proposed Finding is also incomplete because it fails to recognize that consumers clicking on the advertisement would be taken directly to the landing page of the TurboTax website, where they would see detailed information about the qualifications for the free offers for specific TurboTax DIY, Live Assisted, and Live Full Service SKUs. (PFF ¶253; Johnson (Intuit) Tr. 595-596; Rubin (Intuit) Tr. 1563-1564). Indeed, Complaint Counsel and their witnesses recognized that the TurboTax website repeatedly disclosed the qualifications of free TurboTax offers and provided detailed information about those qualifications. (PFF ¶¶369-370). For example, Complaint Counsel’s own 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 the free TurboTax offers. (PFF ¶790). Reasonable consumers understood that display ads such as GX570 link to a website when clicked (here, the TurboTax website) that includes more information about the advertised free offer, and by linking directly to the TurboTax website, the advertisement incorporated the detailed information on the TurboTax website. (PFF ¶254; *see also* CCF ¶455 (“The TurboTax website is ... integrated into TurboTax’s free advertising.”)).

Moreover, the Proposed Finding does not support an inference that the challenged ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The text of the advertisement, which

Complaint Counsel omitted from the Proposed Finding (CCFF ¶371), stated prominently, “Simple taxes only.” (GX Summary 002 (FTC) at ‘Data-Online_Ad_Combined’ row 5696; RX1030 (Intuit) at row 1370). By stating that the offer was available for “Simple taxes only,” the ad informed consumers that the free offer was not available to everyone, and that eligibility was contingent on the complexity of the consumer’s tax returns. (PFF ¶322; *see also* PFF ¶¶130-145). Complaint Counsel have offered no evidence that *all* components of the ad were not visible to consumers (*see* PFF ¶255), nor could they given the prominence of that content and the benchmarking analysis showing that the disclosures were comparable to disclosures in other companies’ ads (*see* PFF ¶¶257-259).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel assert were conveyed. Instead, the undisputed testimony from Intuit’s executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (*See* PFF ¶¶167-177, 190, 192-202, 405, 852, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel have not offered any evidence that this ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the qualifications included in the ad would prevent consumers from being misled by the ad. (*See* PFF ¶¶260-264, 302-322, 328-330, 334). Even without those disclosures, consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information

about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

372. GX571, which Intuit produced bearing Bates number INTUIT-FTC-PART3-000000317 and with the original file name ty21-724-bust_ttlfsbo-SpinningZeros_1000x1000.jpg, is an online TurboTax ad for TY 2021 that, according to Intuit's data at GX434, [REDACTED]. (GX571 (Intuit); GX434 (Intuit); GX Summary 002 (Complaint Counsel) at 'Summary-Online_Ads' row 569; Baburek (Complaint Counsel) Tr. 318–23).

Response to Finding No. 372:

The Proposed Finding is misleading because GX571 is not an “online TurboTax ad.” It is a display advertisement for free offers for specific TurboTax DIY, Live Assisted, and Live Full Service SKUs. (GX571 (Intuit)).

Intuit otherwise has no specific response except to note that the number of impressions or clicks an ad received is not evidence that the ad conveyed any of the claims asserted by Complaint Counsel, that reasonable consumers were likely to be deceived by the ad, or that the claims were material to reasonable consumers. The dissemination data offered in the Proposed Finding illustrates that reasonable consumers were *unlikely* to be deceived. That Complaint Counsel have identified only 26 even potentially relevant consumer complaints from Tax Year 2021 (*see* CCF ¶677) when GX571 ran, even though GX571 on its own [REDACTED] that year, is strong evidence that reasonable consumers were not deceived by GX571 or any of the other challenged advertisements that ran in Tax Year 2021 (*see* PFF ¶¶632, 637, 639, 641-647).

373. A screenshot from GX571 is pictured below.



(GX571 (Intuit)).

Response to Finding No. 373:

The Proposed Finding is incomplete because Complaint Counsel have omitted critical information for evaluating the advertisement. The Proposed Finding does not include additional disclosures that would have been shown to consumers along with the image reproduced above. This image is part of a display advertisement that was paired with text stating, “Simple tax returns. File by 3/31.” (GX Summary 002 (FTC) at ‘Data-Online_Ad_Combined’ row 5450; RX1030 (Intuit) at row 1124). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

The Proposed Finding is also incomplete because it fails to recognize that consumers clicking on the advertisement would be taken directly to the TurboTax landing page on the website, where they would see detailed information about the qualifications for the free offers for

specific TurboTax DIY, Live Assisted, and Live Full Service SKUs. (PFF ¶¶253; Johnson (Intuit) Tr. 595-596; Rubin (Intuit) Tr. 1563-1564). Indeed, Complaint Counsel and their witnesses recognized that the TurboTax website repeatedly disclosed the qualifications of free TurboTax offers and provided detailed information about those qualifications. (PFF ¶¶369-370). For example, Complaint Counsel’s own 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 the free TurboTax offers. (PFF ¶790). Reasonable consumers understood that display ads such as GX571 link to a website when clicked (here, the TurboTax website) that includes more information about the advertised free offer, and by linking directly to the TurboTax website, the advertisement incorporated the detailed information on the TurboTax website. (PFF ¶254; *see also* CCF ¶455 (“The TurboTax website is ... integrated into TurboTax’s free advertising.”)).

Moreover, the Proposed Finding does not support an inference that the challenged ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The advertisement states in large text that there are “3 Ways to File Free,” conveying that not every TurboTax SKU is free. (GX571 (FTC)). The text of the advertisement, which Complaint Counsel left out of Proposed Finding, stated prominently, “Simple tax returns. File by 3/31.” (GX Summary 002 (FTC) at ‘Data-Online_Ad_Combined’ row 5450; RX1030 (Intuit) at row 1124). By identifying the specific TurboTax SKU being advertised, the ad informed consumers that the offer does not apply to all TurboTax products. (*See* PFF ¶¶317, 321). And by stating that the offer was available for “Simple tax returns only,” the ad informed consumers that the free offer was not available to everyone, and that eligibility was contingent on the complexity of the consumer’s tax returns.

(PFF ¶¶322; *see also* PFF ¶¶130-145). Complaint Counsel have offered no evidence that *all* components of the ad were not visible to consumers (*see* PFF ¶255), nor could they given the prominence of that content and the benchmarking analysis showing that the disclosures were comparable to disclosures in other companies' ads (*see* PFF ¶¶257-259).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel assert were conveyed. Instead, the undisputed testimony from Intuit's executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (*See* PFF ¶¶167-177, 190, 192-202, 405, 852, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel have not offered any evidence that this ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the qualifications included in the ad would prevent consumers from being misled by the ad. (*See* PFF ¶¶260-264, 302-322, 328-330, 334). Even without those disclosures, consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

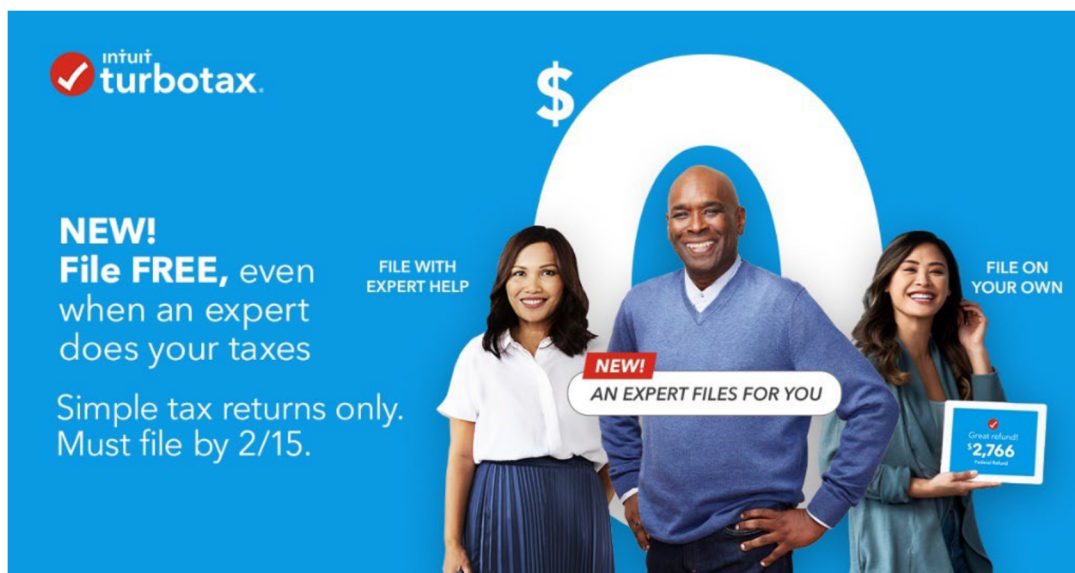
374. GX572, which Intuit produced bearing Bates number INTUIT-FTC-PART3-000000318 and with the original file name ty21-708-mvpb_ttlfsbo-MVPBlue_1200x627.jpg, is an online TurboTax ad for TY 2021 that, according to Intuit's data at GX434 [REDACTED]. (GX572 (Intuit); GX434 (Intuit); GX Summary 002 (Complaint Counsel) at 'Summary-Online_Ads' row 555; Baburek (Complaint Counsel) Tr. 318–23).

Response to Finding No. 374:

The Proposed Finding is misleading because GX572 is not an “online TurboTax ad.” It is a display advertisement for free offers for specific TurboTax DIY, Live Assisted, and Live Full Service SKUs. (GX572 (Intuit)).

Intuit otherwise has no specific response except to note that the number of impressions or clicks an ad received is not evidence that the ad conveyed any of the claims asserted by Complaint Counsel, that reasonable consumers were likely to be deceived by the ad, or that the claims were material to reasonable consumers. The dissemination data offered in the Proposed Finding illustrates that reasonable consumers were *unlikely* to be deceived. That Complaint Counsel have identified only 26 even potentially relevant consumer complaints from Tax Year 2021 (*see* CCF ¶¶677) when GX572 ran, even though GX572 on its own [REDACTED] [REDACTED] that year, is strong evidence that reasonable consumers were not deceived by GX572 or any of the other challenged advertisements that ran in Tax Year 2021 (*see* PFF ¶¶632, 637, 639, 641-647).

375. A screenshot from GX572 is pictured below.



(GX572 (Intuit)).

Response to Finding No. 375:

The Proposed Finding is incomplete and misleading because Complaint Counsel have omitted critical information for evaluating the advertisement. (GX572 (Intuit)). The Proposed Finding does not include additional disclosures that would have been shown to consumers along with the image reproduced above. Not captured in the Proposed Finding is the fact that the image is part of a display advertisement that was paired with text stating, “Simple tax returns only. Offer ends soon! Must file by 3/31.” (GX Summary 002 (FTC) at ‘Data-Online_Ad_Combined’ row 4808; RX1030 (Intuit) at row 1258). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

The Proposed Finding is also incomplete because it fails to recognize that consumers clicking on the advertisement would be taken directly to the landing page on the TurboTax website, where they would see detailed information about the qualifications for the free offers for specific TurboTax DIY, Live Assisted, and Live Full Service SKUs. (PFF ¶253; Johnson (Intuit) Tr. 595-596; Rubin (Intuit) Tr. 1563-1564). Indeed, Complaint Counsel and their witnesses recognized that the TurboTax website repeatedly disclosed the qualifications of free TurboTax offers and provided detailed information about those qualifications. (PFF ¶¶369-370). For example, Complaint Counsel’s own 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 the free TurboTax offers. (PFF ¶790). Reasonable consumers understood that display ads such as GX572 link to a website when clicked (here, the TurboTax website) that includes more information about the advertised free offer, and by linking directly to the TurboTax website, the advertisement incorporated the detailed information on the

TurboTax website. (PFF ¶254; *see also* CCF ¶455 (“The TurboTax website is ... integrated into TurboTax’s free advertising.”)).

Moreover, the Proposed Finding does not support an inference that the challenged ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The advertisement states prominently in a font size the same as or larger than other text in the ad, “Simple tax returns only. Must file by 2/15.” (GX572 (FTC)). By stating that the offer was available for “Simple tax returns only,” the ad informed consumers that the free offer was not available to everyone, and that eligibility was contingent on the complexity of the consumer’s tax returns. (PFF ¶322; *see also* PFF ¶¶130-145). Complaint Counsel have offered no evidence that *all* components of the ad were not visible to consumers (*see* PFF ¶255), nor could they given the prominence of that content and the benchmarking analysis showing that the disclosures were comparable to disclosures in other companies’ ads (*see* PFF ¶¶257-259).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel assert were conveyed. Instead, the undisputed testimony from Intuit’s executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (*See* PFF ¶¶167-177, 190, 192-202, 405, 852, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel have not offered any evidence that this ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the qualifications included in the ad would prevent consumers from being misled

by the ad. (See PFF ¶¶260-264, 302-322, 328-330, 334). Even without those disclosures, consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

376. GX573, which Intuit produced bearing Bates number INTUIT-FTC-PART3-000000319 and with the original file name ty21-709-3zer_ttlfsbo-ThreeZeroes_1200x627.jpg, is an online TurboTax ad for TY 2021 that, according to Intuit's data at GX434, [REDACTED] (GX573 (Intuit); GX434 (Intuit); GX Summary 002 (Complaint Counsel) at 'Summary-Online_Ads' row 556; Baburek (Complaint Counsel) Tr. 318-23).

Response to Finding No. 376:

The Proposed Finding is misleading because GX573 is not an "online TurboTax ad." It is a display advertisement for free offers for specific TurboTax DIY, Live Assisted, and Live Full Service SKUs. (GX573 (Intuit)).

Intuit otherwise has no specific response except to note that the number of impressions or clicks an ad received is not evidence that the ad conveyed any of the claims asserted by Complaint Counsel, that reasonable consumers were likely to be deceived by the ad, or that the claims were material to reasonable consumers. The dissemination data offered in the Proposed Finding illustrates that reasonable consumers were *unlikely* to be deceived. That Complaint Counsel have identified only 26 even potentially relevant consumer complaints from Tax Year 2021 (see CCF ¶677) when GX573 ran, even though GX573 on its own [REDACTED] that year, is strong evidence that reasonable consumers were not deceived by GX573 or any of the other challenged advertisements that ran in Tax Year 2021 (see PFF ¶¶632, 637, 639, 641-647).

377. A screenshot from GX573 is pictured below.



(GX573 (Intuit)).

Response to Finding No. 377:

The Proposed Finding is incomplete and misleading because Complaint Counsel have omitted critical information for evaluating the advertisement. (CCFF ¶377; GX573 (Intuit)). The Proposed Finding does not include additional disclosures that would have been shown to consumers along with the image reproduced above. Not captured in the Proposed Finding is the fact that the image is part of a display advertisement that was paired with text stating, “Simple tax returns only. Must file by 3/31.” (GX Summary 002 (FTC) at ‘Data-Online_Ad_Combined’ row 5568; RX1030 (Intuit) at row 1231). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

The Proposed Finding is also incomplete because it fails to recognize that consumers clicking on the advertisement would be taken directly to the landing page on the TurboTax website, where they would see detailed information about the qualifications for the free offers for specific TurboTax DIY, Live Assisted, and Live Full Service SKUs. (PFF ¶253; Johnson (Intuit) Tr. 595-596; Rubin (Intuit) Tr. 1563-1564). Indeed, Complaint Counsel and their witnesses recognized that the TurboTax website repeatedly disclosed the qualifications of free TurboTax

offers and provided detailed information about those qualifications. (PFF ¶¶369-370). For example, Complaint Counsel’s own 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 the free TurboTax offers. (PFF ¶790). Reasonable consumers understood that display ads such as GX573 link to a website when clicked (here, the TurboTax website) that includes more information about the advertised free offer, and by linking directly to the TurboTax website, the advertisement incorporated the detailed information on the TurboTax website. (PFF ¶254; *see also* CCF ¶455 (“The TurboTax website is ... integrated into TurboTax’s free advertising.”)).

Moreover, the Proposed Finding does not support an inference that the challenged ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The advertisement states in large text that there are “Three Ways to File Free,” conveying that not every TurboTax SKU is free. (GX573 (FTC)). The advertisement states prominently, “Simple tax returns only. Must file by 2/15.” (GX573 (FTC)). By stating that the offer was available for “Simple tax returns only,” the ad informed consumers that the free offer was not available to everyone, and that eligibility was contingent on the complexity of the consumer’s tax returns. (PFF ¶322; *see also* PFF ¶¶130-145). Complaint Counsel have offered no evidence that *all* components of the ad were not visible to consumers (*see* PFF ¶255), nor could they given the prominence of that content and the benchmarking analysis showing that the disclosures were comparable to disclosures in other companies’ ads (*see* PFF ¶¶257-259).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel assert were conveyed. Instead, the undisputed

testimony from Intuit's executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (See PFF ¶¶167-177, 190, 192-202, 405, 852, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel have not offered any evidence that this ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the qualifications included in the ad would prevent consumers from being misled by the ad. (See PFF ¶¶260-264, 302-322, 328-330, 334). Even without those disclosures, consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

378. GX574, which Intuit produced bearing Bates number INTUIT-FTC-PART3-000000323 and with the original file name ty21-754-fsf_gm-FullServiceFocused_970x250.jpg, is an online TurboTax ad for TY 2021 that, according to Intuit's data at GX434, [REDACTED] (GX574 (Intuit); GX434 (Intuit); GX Summary 002 (Complaint Counsel) at 'Summary-Online_Ads' row 593; Baburek (Complaint Counsel) Tr. 318-23).

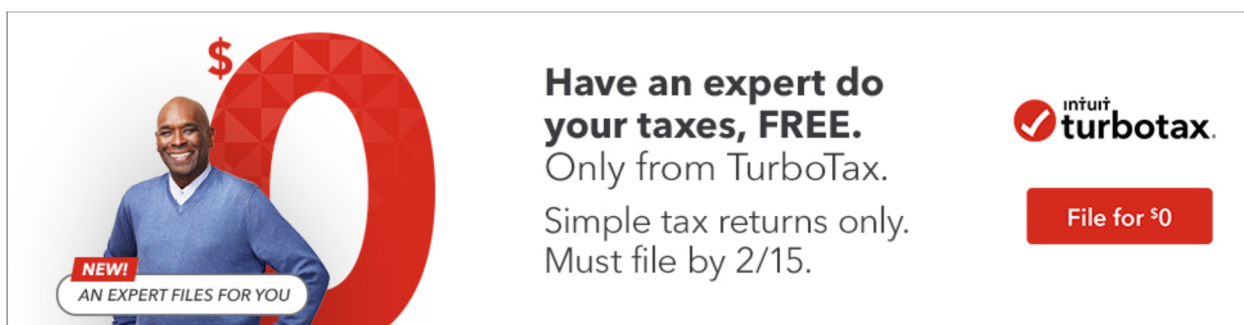
Response to Finding No. 378:

The Proposed Finding is misleading because GX574 is not an "online TurboTax ad." It is a display advertisement a specific TurboTax Live free offer. (GX574 (Intuit)).

Intuit otherwise has no specific response except to note that the number of impressions or clicks an ad received is not evidence that the ad conveyed any of the claims asserted by Complaint Counsel, that reasonable consumers were likely to be deceived by the ad, or that the claims were material to reasonable consumers. The dissemination data offered in the Proposed

Finding illustrates that reasonable consumers were *unlikely* to be deceived. That Complaint Counsel have identified only 26 even potentially relevant consumer complaints from Tax Year 2021 (see CCFE ¶¶677) when GX574 ran, even though GX574 on its own [REDACTED] [REDACTED] that year, is strong evidence that reasonable consumers were not deceived by GX574 or any of the other challenged advertisements that ran in Tax Year 2021 (see PFF ¶¶632, 637, 639, 641-647).

379. A screenshot from GX574 is pictured below.



(GX574 (Intuit)).

Response to Finding No. 379:

The Proposed Finding is incomplete because it fails to recognize that consumers clicking on the advertisement would be taken directly to the TurboTax website, where they would see detailed information about the free offer’s qualifications. (PFF ¶¶253; Johnson (Intuit) Tr. 595-596; Rubin (Intuit) Tr. 1563-1564). Indeed, Complaint Counsel and their witnesses recognized that the TurboTax website repeatedly disclosed the qualifications of free TurboTax offers and provided detailed information about those qualifications. (PFF ¶¶369-370). For example, Complaint Counsel’s own 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 the free TurboTax offers. (PFF ¶790). Reasonable consumers understood that display ads such as GX574 link to a website when clicked (here, the TurboTax

website) that includes more information about the advertised free offer, and by linking directly to the TurboTax website, the advertisement incorporated the detailed information on the TurboTax website. (PFF ¶254; *see also* CCF ¶455 (“The TurboTax website is ... integrated into TurboTax’s free advertising.”)). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

Moreover, the Proposed Finding does not support an inference that the challenged ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The advertisement states prominently in a font size the same as or larger than other text in the ad, “Simple tax returns only. Must file by 2/15.” (GX574 (FTC)). By stating that the offer was available for “Simple tax returns only,” the ad informed consumers that the free offer was not available to everyone, and that eligibility was contingent on the complexity of the consumer’s tax returns. (PFF ¶322; *see also* PFF ¶¶130-145). Complaint Counsel have offered no evidence that *all* components of the ad were not visible to consumers (*see* PFF ¶255), nor could they given the prominence of that content and the benchmarking analysis showing that the disclosures were comparable to disclosures in other companies’ ads (*see* PFF ¶¶257-259).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel assert were conveyed. Instead, the undisputed testimony from Intuit’s executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (*See* PFF ¶¶167-177, 190, 192-202, 405, 852, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel have not offered any evidence that this ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the qualifications included in the ad would prevent consumers from being misled by the ad. (See PFF ¶¶260-264, 302-322, 328-330, 334). Even without those disclosures, consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

380. GX575, which Intuit produced bearing Bates number INTUIT-FTC-PART3-000000331 and with the original file name ty21-728-mvpb_ttlfsbo-MVPBlue_1080x1920.jpg, is an online TurboTax ad for TY 2021 that, according to Intuit's data at GX434, [REDACTED] (GX575 (Intuit); GX434 (Intuit); GX Summary 002 (Complaint Counsel) at 'Summary-Online_Ads' row 572; Baburek (Complaint Counsel) Tr. 318-23).

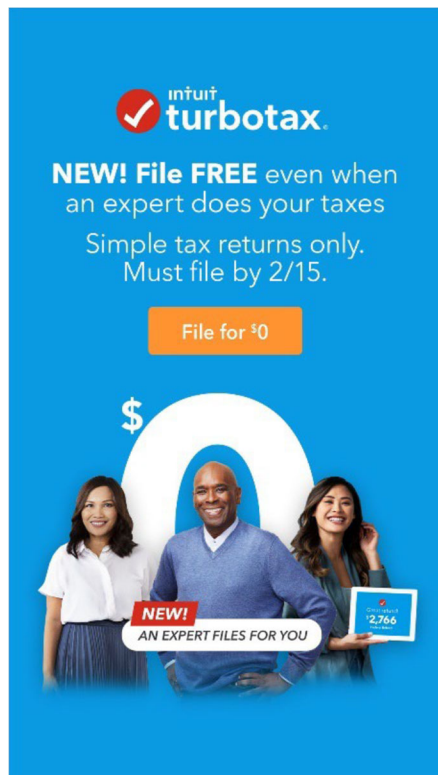
Response to Finding No. 380:

The Proposed Finding is misleading because GX575 is not an "online TurboTax ad." It is a display advertisement a specific TurboTax Live free offer. (GX575 (Intuit)).

Intuit otherwise has no specific response except to note that the number of impressions or clicks an ad received is not evidence that the ad conveyed any of the claims asserted by Complaint Counsel, that reasonable consumers were likely to be deceived by the ad, or that the claims were material to reasonable consumers. The dissemination data offered in the Proposed Finding illustrates that reasonable consumers were *unlikely* to be deceived. That Complaint Counsel have identified only 26 even potentially relevant consumer complaints from Tax Year 2021 (see CCF ¶677) when GX575 ran, even though GX575 on its own [REDACTED]

██████████ that year, is strong evidence that reasonable consumers were not deceived by GX575 or any of the other challenged advertisements that ran in Tax Year 2021 (see PFF ¶¶632, 637, 639, 641-647).

381. A screenshot from GX575 is pictured below.



(GX575 (Intuit)).

Response to Finding No. 381:

The Proposed Finding is incomplete because it fails to recognize that consumers clicking on the advertisement would be taken directly to the landing page on the TurboTax website, where they would see detailed information about the free offer's qualifications. (PFF ¶253; Johnson (Intuit) Tr. 595-596; Rubin (Intuit) Tr. 1563-1564). Indeed, Complaint Counsel and their witnesses recognized that the TurboTax website repeatedly disclosed the qualifications of free TurboTax offers and provided detailed information about those qualifications. (PFF ¶¶369-370). For example, Complaint Counsel's own 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 the free TurboTax offers. (PFF ¶790). Reasonable consumers understood that display ads such as GX575 link to a website when clicked (here, the TurboTax website) that includes more information about the advertised free offer, and by linking directly to the TurboTax website, the advertisement incorporated the detailed information on the TurboTax website. (PFF ¶254; *see also* CCF ¶455 (“The TurboTax website is ... integrated into TurboTax’s free advertising.”)). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

Moreover, the Proposed Finding does not support an inference that the challenged ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The advertisement states prominently in a font size the same as or larger than other text in the ad, “Simple tax returns only. Must file by 2/15.” (GX575 (FTC)). By stating that the offer was available for “Simple tax returns only,” the ad informed consumers that the free offer was not available to everyone, and that eligibility was contingent on the complexity of the consumer’s tax returns. (PFF ¶322; *see also* PFF ¶¶130-145). Complaint Counsel have offered no evidence that *all* components of the ad were not visible to consumers (*see* PFF ¶255), nor could they given the prominence of that content and the benchmarking analysis showing that the disclosures were comparable to disclosures in other companies’ ads (*see* PFF ¶¶257-259).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel assert were conveyed. Instead, the undisputed testimony from Intuit’s executives establishes that Intuit did not intend for any of the ads to claim

that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (See PFF ¶¶167-177, 190, 192-202, 405, 852, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel have not offered any evidence that this ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the qualifications included in the ad would prevent consumers from being misled by the ad. (See PFF ¶¶260-264, 302-322, 328-330, 334). Even without those disclosures, consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

382. GX576, which Intuit produced bearing Bates number INTUIT-FTC-PART3-000000332 and with the original file name ty21-662-mvpr_ttlfsbo-MVPCarousel1_800x800.jpg, is an online TurboTax ad for TY 2021 that, according to Intuit's data at GX434, [REDACTED]. (GX576 (Intuit); GX434 (Intuit); GX Summary 002 (Complaint Counsel) at 'Summary-Online_Ads' row 523; Baburek (Complaint Counsel) Tr. 318–23).

Response to Finding No. 382:

The Proposed Finding is misleading because GX576 is not an “online TurboTax ad.” It is a display advertisement for free offers for specific TurboTax DIY, Live Assisted, and Live Full Service SKUs. (GX576 (Intuit)).

Intuit otherwise has no specific response except to note that the number of impressions or clicks an ad received is not evidence that the ad conveyed any of the claims asserted by Complaint Counsel, that reasonable consumers were likely to be deceived by the ad, or that the claims were material to reasonable consumers. The dissemination data offered in the Proposed

Finding illustrates that reasonable consumers were *unlikely* to be deceived. That Complaint Counsel have identified only 26 even potentially relevant consumer complaints from Tax Year 2021 (see CCF ¶¶677) when GX576 run, even though GX576 on its own [REDACTED] [REDACTED] that year, is strong evidence that reasonable consumers were not deceived by GX576 or any of the other challenged advertisements that ran in Tax Year 2021 (see PFF ¶¶632, 637, 639, 641-647).

383. A screenshot from GX576 is pictured below.



(GX576 (Intuit)).

Response to Finding No. 383:

The Proposed Finding is incomplete because it is just a snippet of the ad that actually ran. (CCFF ¶383; GX576 (Intuit); RX1551 (Intuit)). Complaint Counsel have omitted critical information for evaluating the advertisement. The Proposed Finding does not include additional disclosures that would have been shown to consumers along with the image reproduced above. This image is part of a display advertisement that was paired with text stating, “From do it yourself to we do it for you, Free. Only from TurboTax. Simple tax returns only. Must file by

3/31.” (GX Summary 002 (FTC) at ‘Data-Online_Ad_Combined’ row 7130; RX1551 (Intuit) at cell 15D; RX1030 (Intuit) at row 5138). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 681 PFF ¶¶241, 313, 320, 334).

The Proposed Finding is also incomplete because it fails to recognize that consumers clicking on the advertisement would be taken directly to the landing page on the TurboTax website, where they would see detailed information about the qualifications for the free offers. (PFF ¶¶253; Johnson (Intuit) Tr. 595-596; Rubin (Intuit) Tr. 1563-1564). Indeed, Complaint Counsel and their witnesses recognized that the TurboTax website repeatedly disclosed the qualifications of free TurboTax offers and provided detailed information about those qualifications. (PFF ¶¶369-370). For example, Complaint Counsel’s own 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 the free TurboTax offers. (PFF ¶790). Reasonable consumers understood that display ads such as GX576 link to a website when clicked (here, the TurboTax website) that includes more information about the advertised free offer, and by linking directly to the TurboTax website, the advertisement incorporated the detailed information on the TurboTax website. (PFF ¶254; *see also* CCF ¶455 (“The TurboTax website is ... integrated into TurboTax’s free advertising.”)).

Moreover, the Proposed Finding does not support an inference that the challenged ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The text of the advertisement, which Complaint Counsel left out of the Proposed Finding, stated, “Simple tax returns only.” (GX Summary 002 (FTC) at ‘Data-Online_Ad_Combined’ row 5450; RX1551 (Intuit) at cell 15D;

RX1030 (Intuit) at row 5138). By stating that the offer was available for “Simple tax returns only,” the ad informed consumers that the free offer was not available to everyone, and that eligibility was contingent on the complexity of the consumer’s tax returns. (PFF ¶¶322; *see also* PFF ¶¶130-145). Complaint Counsel have offered no evidence that *all* components of the ad were not visible to consumers (*see* PFF ¶¶255), nor could they given the prominence of that content and the benchmarking analysis showing that the disclosures were comparable to disclosures in other companies’ ads (*see* PFF ¶¶257-259).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel assert were conveyed. Instead, the undisputed testimony from Intuit’s executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (*See* PFF ¶¶167-177, 190, 192-202, 405, 852, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel have not offered any evidence that this ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the qualifications included in the ad would prevent consumers from being misled by the ad. (*See* PFF ¶¶260-264, 302-322, 328-330, 334). Even without those disclosures, consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

384. GX580, which Intuit produced bearing Bates number INTUIT-FTC-PART3-000000342 and with the original file name ty21-631-fsf_ttlfsbo-FullService_1200x628.jpg, is an

online TurboTax ad for TY 2021 that, according to Intuit's data at [REDACTED] [REDACTED]. (GX580 (Intuit); GX434 (Intuit); GX Summary 002 (Complaint Counsel) at 'Summary-Online_Ads' row 498; Baburek (Complaint Counsel) Tr. 318–23).

Response to Finding No. 384:

The Proposed Finding is misleading because GX550 is not an “online TurboTax ad.” It is a display advertisement a specific TurboTax Live free offer. (GX580 (Intuit)).

Intuit otherwise has no specific response except to note that the number of impressions or clicks an ad received is not evidence that the ad conveyed any of the claims asserted by Complaint Counsel, that reasonable consumers were likely to be deceived by the ad, or that the claims were material to reasonable consumers. The dissemination data offered in the Proposed Finding illustrates that reasonable consumers were *unlikely* to be deceived. That Complaint Counsel have identified only 26 even potentially relevant consumer complaints from Tax Year 2021 (*see* CCF ¶¶677) when GX580 ran, even though GX580 on its own [REDACTED] [REDACTED] that year, is strong evidence that reasonable consumers were not deceived by GX580 or any of the other challenged advertisements that ran in Tax Year 2021 (*see* PFF ¶¶632, 637, 639, 641-647).

385. A screenshot from GX580 is pictured below.



**Have an expert do
your taxes, FREE.**

New from TurboTax.

Simple tax returns only.
Must file by 2/15.



(GX580 (Intuit)).

Response to Finding No. 385:

The Proposed Finding is incomplete because it fails to recognize that consumers clicking on the advertisement would be taken directly to the landing page on the TurboTax website, where they would see detailed information about the free offer's qualifications. (PFF ¶253; Johnson (Intuit) Tr. 595-596; Rubin (Intuit) Tr. 1563-1564). Indeed, Complaint Counsel and their witnesses recognized that the TurboTax website repeatedly disclosed the qualifications of free TurboTax offers and provided detailed information about those qualifications. (PFF ¶¶369-370). For example, Complaint Counsel's own 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 the free TurboTax offers. (PFF ¶790). Reasonable consumers understood that display ads such as GX580 link to a website when clicked (here, the TurboTax website) that includes more information about the advertised free offer, and by linking directly to the TurboTax website, the advertisement incorporated the detailed information on the TurboTax website. (PFF ¶254; *see also* CCF ¶455 ("The TurboTax website is ... integrated into TurboTax's free advertising.")). In determining the claims conveyed by an advertisement

and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

Moreover, the Proposed Finding does not support an inference that the challenged ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The advertisement states prominently in a font size the same as or larger than other text in the ad, “Simple tax returns only. Must file by 2/15.” (GX580 (FTC)). By stating that the offer was available for “Simple tax returns only,” the ad informed consumers that the free offer was not available to everyone, and that eligibility was contingent on the complexity of the consumer’s tax returns. (PFF ¶322; *see also* PFF ¶¶130-145). Complaint Counsel have offered no evidence that *all* components of the ad were not visible to consumers (*see* PFF ¶255), nor could they given the prominence of that content and the benchmarking analysis showing that the disclosures were comparable to disclosures in other companies’ ads (*see* PFF ¶¶257-259).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel assert were conveyed. Instead, the undisputed testimony from Intuit’s executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (*See* PFF ¶¶167-177, 190, 192-202, 405, 852, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel have not offered any evidence that this ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the qualifications included in the ad would prevent consumers from being misled

by the ad. (See PFF ¶¶260-264, 302-322, 328-330, 334). Even without those disclosures, consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

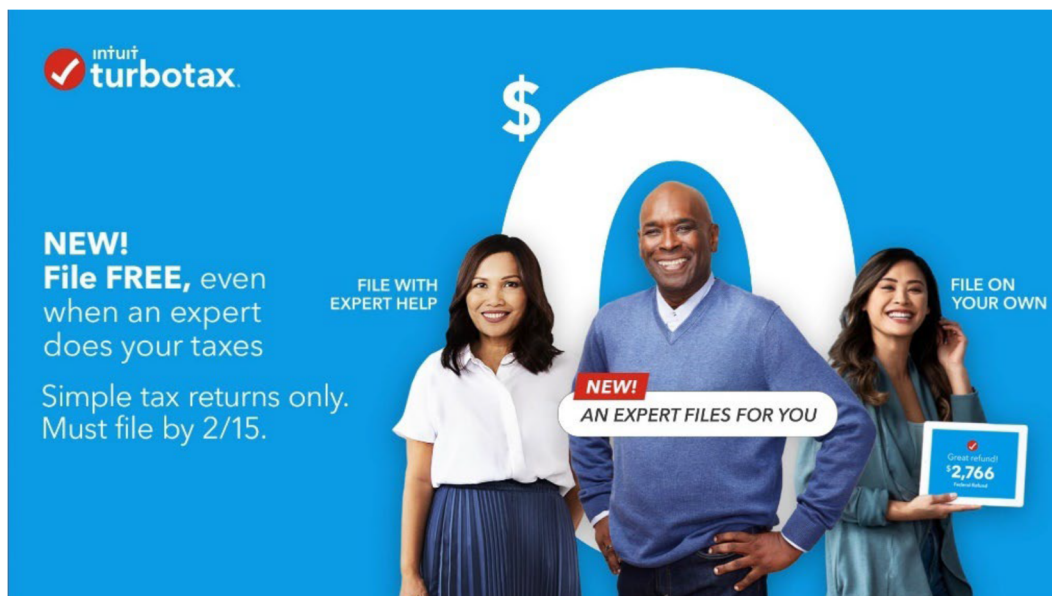
386. GX581, which Intuit produced bearing Bates number INTUIT-FTC-PART3-000000344 and with the original file name ty21-715-mvpb_ttlfsbo-MVPBlue_16x9.mp4, is an online TurboTax ad for TY 2021 that, according to Intuit's data at GX434, [REDACTED]. (GX581 (Intuit); GX434 (Intuit); GX Summary 002 (Complaint Counsel) at 'Summary-Online_Ads' row 562; Baburek (Complaint Counsel) Tr. 318-23).

Response to Finding No. 386:

The Proposed Finding is misleading because GX581 is not an "online TurboTax ad." It is a display advertisement for free offers for specific TurboTax DIY, Live Assisted, and Live Full Service SKUs. (GX581 (Intuit)).

Intuit otherwise has no specific response except to note that the number of impressions or clicks an ad received is not evidence that the ad conveyed any of the claims asserted by Complaint Counsel, that reasonable consumers were likely to be deceived by the ad, or that the claims were material to reasonable consumers. The dissemination data offered in the Proposed Finding illustrates that reasonable consumers were *unlikely* to be deceived. That Complaint Counsel have identified only 26 even potentially relevant consumer complaints from Tax Year 2021 (see CCF ¶677) when GX581 ran, even though GX581 on its own [REDACTED] [REDACTED] that year, is strong evidence that reasonable consumers were not deceived by GX581 or any of the other challenged advertisements that ran in Tax Year 2021 (see PFF ¶¶632, 637, 639, 641-647).

387. A screenshot from GX581 is pictured below.



(GX581 (Intuit)).

Response to Finding No. 387:

The Proposed Finding is incomplete and misleading because it is just a snippet of the full video display ad that actually ran and Complaint Counsel have omitted critical information for evaluating the advertisement. (CCFF ¶387; GX581 (Intuit)). Consumers did not view the challenged advertisement as a single, static image. Not captured in the Proposed Finding is the voiceover stating that the free offers were for “Simple tax returns only” and explaining that there were three options to file for free using TurboTax. The Proposed Finding also does not include additional disclosures that would have been shown to consumers along with the image reproduced above. Not captured in the Proposed Finding is the fact that the image is part of a display advertisement that was paired with text stating, “Simple tax returns only. Must file by 3/31.” (GX Summary 002 (FTC) at ‘Data-Online_Ad_Combined’ row 5597; RX1030 (Intuit) at row 1141). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

The Proposed Finding is also incomplete because it fails to recognize that consumers clicking on the advertisement would be taken directly to the landing page on the TurboTax website, where they would see detailed information about the qualifications for the free offers for specific TurboTax DIY, Live Assisted, and Live Full Service SKUs. (PFF ¶253; Johnson (Intuit) Tr. 595-596; Rubin (Intuit) Tr. 1563-1564). Indeed, Complaint Counsel and their witnesses recognized that the TurboTax website repeatedly disclosed the qualifications of free TurboTax offers and provided detailed information about those qualifications. (PFF ¶¶369-370). For example, Complaint Counsel's own 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 the free TurboTax offers. (PFF ¶790). Reasonable consumers understood that display ads such as GX581 link to a website when clicked (here, the TurboTax website) that includes more information about the advertised free offer, and by linking directly to the TurboTax website, the advertisement incorporated the detailed information on the TurboTax website. (PFF ¶254; *see also* CCF ¶455 ("The TurboTax website is ... integrated into TurboTax's free advertising.")).

Moreover, the Proposed Finding does not support an inference that the challenged ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The advertisement includes a voiceover that states, "Simple tax returns only. Must file by 2/15." The advertisement also contains a written disclosure that states prominently in a font size the same as or larger than other text in the ad, "Simple tax returns only. Must file by 2/15." (GX581 (FTC)). By stating that the offer was available for "Simple tax returns only," the ad informed consumers that the free offer was not available to everyone, and that eligibility was contingent on the complexity of the consumer's tax

returns. (PFF ¶322; *see also* PFF ¶¶130-145). Complaint Counsel have offered no evidence that *all* components of the ad were not visible or audible to consumers (*see* PFF ¶¶255-256), nor could they given the prominence of that content and the benchmarking analysis showing that the disclosures were comparable to disclosures in other companies' ads (*see* PFF ¶¶257-259).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel assert were conveyed. Instead, the undisputed testimony from Intuit's executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (*See* PFF ¶¶167-177, 190, 192-202, 405, 852, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel have not offered any evidence that this ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the qualifications included in the ad would prevent consumers from being misled by the ad. (*See* PFF ¶¶260-264, 302-322, 328-330, 334). Even without those disclosures, consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

388. GX582, which Intuit produced bearing Bates number INTUIT-FTC-PART3-000000345 and with the original file name ty21-640-bust_ttlfsbo-SpinningZeros_9x16.mp4, is an online TurboTax ad for TY 2021 that, according to Intuit's data at GX434, [REDACTED]. (GX582 (Intuit); GX434 (Intuit); GX Summary 002 (Complaint Counsel) at 'Summary-Online_Ads' row 507; Baburek (Complaint Counsel) Tr. 318–23).

Response to Finding No. 388:

The Proposed Finding is misleading because GX582 is not an “online TurboTax ad.” It is a display advertisement a specific TurboTax Live free offer. (GX5582 (Intuit)).

Intuit otherwise has no specific response except to note that the number of impressions or clicks an ad received is not evidence that the ad conveyed any of the claims asserted by Complaint Counsel, that reasonable consumers were likely to be deceived by the ad, or that the claims were material to reasonable consumers. The dissemination data offered in the Proposed Finding illustrates that reasonable consumers were *unlikely* to be deceived. That Complaint Counsel have identified only 26 even potentially relevant consumer complaints from Tax Year 2021 (*see* CCF ¶¶677) when GX582 ran, even though GX582 on its own [REDACTED] [REDACTED] that year, is strong evidence that reasonable consumers were not deceived by GX582 or any of the other challenged advertisements that ran in Tax Year 2021 (*see* PFF ¶¶632, 637, 639, 641-647).

389. A screenshot from GX582 is pictured below.



(GX582 (Intuit)).

Response to Finding No. 389:

The Proposed Finding is incomplete and misleading because it is just a snippet of the full video display ad that actually ran and Complaint Counsel have omitted critical information for evaluating the advertisement. (CCFF ¶389; GX582 (Intuit)). Consumers did not view the challenged advertisement as a single, static image. Not captured in the Proposed Finding is the voiceover stating that the free offers were for “Simple tax returns only” and explaining that there were three options to file for free using TurboTax. In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

The Proposed Finding is also incomplete because it fails to recognize that consumers clicking on the advertisement would be taken directly to the landing page on the TurboTax website, where they would see detailed information about the free offer’s qualifications. (PFF ¶253; Johnson (Intuit) Tr. 595-596; Rubin (Intuit) Tr. 1563-1564). Indeed, Complaint Counsel and their witnesses recognized that the TurboTax website repeatedly disclosed the qualifications of free TurboTax offers and provided detailed information about those qualifications. (PFF ¶¶369-370). For example, Complaint Counsel’s own 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 the free TurboTax offers. (PFF ¶790). Reasonable consumers understood that display ads such as GX582 link to a website when clicked (here, the TurboTax website) that includes more information about the advertised free offer, and by linking directly to the TurboTax website, the advertisement incorporated the detailed information on the TurboTax website. (PFF ¶254; *see also* CCFF ¶455 (“The TurboTax website is ... integrated into TurboTax’s free advertising.”)).

Moreover, the Proposed Finding does not support an inference that the challenged ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The advertisement states in a voiceover and prominently in writing in a font size the same size as other text in the ad, “Simple tax returns only. Must file by 2/15.” (GX582 (FTC)). By stating that the offer was available for “Simple tax returns only,” the ad informed consumers that the free offer was not available to everyone, and that eligibility was contingent on the complexity of the consumer’s tax returns. (PFF ¶¶322; *see also* PFF ¶¶130-145). Complaint Counsel have offered no evidence that *all* components of the ad were not visible or audible to consumers (*see* PFF ¶¶255-256), nor could they given the prominence of that content and the benchmarking analysis showing that the disclosures were comparable to disclosures in other companies’ ads (*see* PFF ¶¶257-259).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel assert were conveyed. Instead, the undisputed testimony from Intuit’s executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (*See* PFF ¶¶167-177, 190, 192-202, 405, 852, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel have not offered any evidence that this ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the qualifications included in the ad would prevent consumers from being misled by the ad. (*See* PFF ¶¶260-264, 302-322, 328-330, 334). Even without those disclosures, consumers understand that free tax-preparation offers are qualified, that their ability to qualify

for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

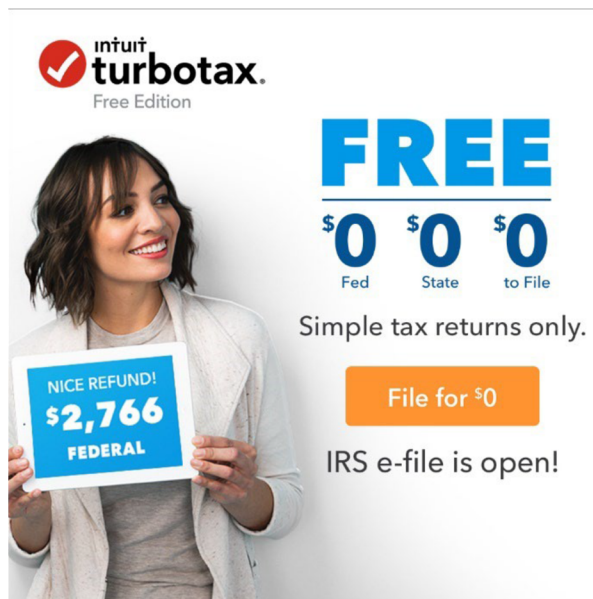
390. GX584, which Intuit produced bearing Bates number INTUIT-FTC-PART3-000000359 and with the original file name ty21-928-zrof_gm-FreeRearrange_1000x1000.jpg, is an online TurboTax ad for TY 2021 that, according to Intuit's data at GX434, [REDACTED] [REDACTED]. (GX584 (Intuit); GX434 (Intuit); GX Summary 002 (Complaint Counsel) at 'Summary-Online_Ads' row 655; Baburek (Complaint Counsel) Tr. 318–23).

Response to Finding No. 390:

The Proposed Finding is misleading because GX584 is not an “online TurboTax ad.” It is a display advertisement for a specific TurboTax SKU, TurboTax Free Edition. (GX584 (Intuit)).

Intuit otherwise has no specific response except to note that the number of impressions or clicks an ad received is not evidence that the ad conveyed any of the claims asserted by Complaint Counsel, that reasonable consumers were likely to be deceived by the ad, or that the claims were material to reasonable consumers. The dissemination data offered in the Proposed Finding illustrates that reasonable consumers were *unlikely* to be deceived. That Complaint Counsel have identified only 26 even potentially relevant consumer complaints from Tax Year 2021 (*see* CCF ¶677) when GX584 ran, even though GX584 on its own [REDACTED] [REDACTED] that year, is strong evidence that reasonable consumers were not deceived by GX584 or any of the other challenged advertisements that ran in Tax Year 2021 (*see* PFF ¶¶632, 637, 639, 641-647).

391. A screenshot from GX584 is pictured below.



(GX584 (Intuit)).

Response to Finding No. 391:

The Proposed Finding is incomplete because it fails to recognize that consumers clicking on the advertisement would be taken directly to the landing page on the TurboTax website for TurboTax Free Edition, where they would see detailed information about the free offer’s qualifications. (PFF ¶253; Johnson (Intuit) Tr. 595-596). Indeed, Complaint Counsel and their witnesses recognized that the TurboTax website repeatedly disclosed the qualifications of free TurboTax offers and provided detailed information about those qualifications. (PFF ¶¶369-370). For example, Complaint Counsel’s own 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 the free TurboTax offers. (PFF ¶790). Reasonable consumers understood that display ads such as GX584 link to a website when clicked (here, the TurboTax website) that includes more information about the advertised free offer, and by linking directly to the TurboTax website, the advertisement incorporated the detailed information on the TurboTax website. (PFF ¶254; *see also* CCF ¶455 (“The TurboTax website is ... integrated

into TurboTax's free advertising.")). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

Moreover, the Proposed Finding does not support an inference that the challenged ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The advertisement includes the "TurboTax Free Edition" logo and states prominently, "Simple tax returns only." (GX584 (FTC)). By identifying the specific TurboTax SKU being advertised, the ad informed consumers that the offer does not apply to all TurboTax products. (*See* PFF ¶¶317, 321). And by stating that the offer was available for "Simple tax returns only," the ad informed consumers that the free offer was not available to everyone, and that eligibility was contingent on the complexity of the consumer's tax returns. (PFF ¶322; *see also* PFF ¶¶130-145). Complaint Counsel have offered no evidence that *all* components of the ad were not visible to consumers (*see* PFF ¶255), nor could they given the prominence of that content and the benchmarking analysis showing that the disclosures were comparable to disclosures in other companies' ads (*see* PFF ¶¶257-259).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel assert were conveyed. Instead, the undisputed testimony from Intuit's executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (*See* PFF ¶¶167-177, 190, 192-202, 405, 852, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel have not offered any evidence that this ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that

TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the qualifications included in the ad would prevent consumers from being misled by the ad. (See PFF ¶¶260-264, 302-322, 328-330, 334). Even without those disclosures, consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

392. GX585, which Intuit produced bearing Bates number INTUIT-FTC-PART3-000000373 and with the original file name ty21-882-w2f_gm_XRayEfileFast_970x250.jpg, is an online TurboTax ad for TY 2021 that, according to Intuit's data at GX434, [REDACTED] (GX585 (Intuit); GX434 (Intuit); GX Summary 002 (Complaint Counsel) at 'Summary-Online_Ads' row 621; Baburek (Complaint Counsel) Tr. 318–23).

Response to Finding No. 392:

The Proposed Finding is misleading because GX585 is not an “online TurboTax ad.” It is a display advertisement for a specific TurboTax SKU, TurboTax Free Edition. (GX585 (Intuit)).

Intuit otherwise has no specific response except to note that the number of impressions or clicks an ad received is not evidence that the ad conveyed any of the claims asserted by Complaint Counsel, that reasonable consumers were likely to be deceived by the ad, or that the claims were material to reasonable consumers. The dissemination data offered in the Proposed Finding illustrates that reasonable consumers were *unlikely* to be deceived. That Complaint Counsel have identified only 26 even potentially relevant consumer complaints from Tax Year 2021 (see CCF ¶677) when GX585 ran, even though GX585 on its own [REDACTED] [REDACTED] that year, is strong evidence that reasonable consumers were not deceived by GX585 or any of the other challenged advertisements that ran in Tax Year 2021 (see PFF ¶¶632, 637, 639, 641-647).

393. A screenshot from GX585 is pictured below.



(GX585 (Intuit)).

Response to Finding No. 393:

The Proposed Finding is incomplete because it fails to recognize that consumers clicking on the advertisement would be taken directly to the landing page on the TurboTax website for TurboTax Free Edition, where they would see detailed information about the free offer’s qualifications. (PFF ¶253; Johnson (Intuit) Tr. 595-596). Indeed, Complaint Counsel and their witnesses recognized that the TurboTax website repeatedly disclosed the qualifications of free TurboTax offers and provided detailed information about those qualifications. (PFF ¶¶369-370). For example, Complaint Counsel’s own 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 the free TurboTax offers. (PFF ¶790). Reasonable consumers understood that display ads such as GX585 link to a website when clicked (here, the TurboTax website) that includes more information about the advertised free offer, and by linking directly to the TurboTax website, the advertisement incorporated the detailed information on the TurboTax website. (PFF ¶254; *see also* CCF ¶455 (“The TurboTax website is ... integrated into TurboTax’s free advertising.”)). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

Moreover, the Proposed Finding does not support an inference that the challenged ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The advertisement includes the “TurboTax Free Edition” logo and states prominently in a font size the same as or larger than other text in the ad, “Simple tax returns only.” (GX585 (FTC)). By identifying the specific TurboTax SKU being advertised, the ad informed consumers that the offer does not apply to all TurboTax products. (See PFF ¶¶317, 321). And by stating that the offer was available for “Simple tax returns only,” the ad informed consumers that the free offer was not available to everyone, and that eligibility was contingent on the complexity of the consumer’s tax returns. (PFF ¶322; see also PFF ¶¶130-145). Complaint Counsel have offered no evidence that *all* components of the ad were not visible to consumers (see PFF ¶255), nor could they given the prominence of that content and the benchmarking analysis showing that the disclosures were comparable to disclosures in other companies’ ads (see PFF ¶¶257-259).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel assert were conveyed. Instead, the undisputed testimony from Intuit’s executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (See PFF ¶¶167-177, 190, 192-202, 405, 852, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel have not offered any evidence that this ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the qualifications included in the ad would prevent consumers from being misled

by the ad. (See PFF ¶¶260-264, 302-322, 328-330, 334). Even without those disclosures, consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

394. GX586, which Intuit produced bearing Bates number INTUIT-FTC-PART3-000000374 and with the original file name ty21-881-w2f_gm_XRayEfile_970x250.jpg, is an online TurboTax ad for TY 2021 that, according to Intuit's data at GX434, [REDACTED] (GX586 (Intuit); GX434 (Intuit); GX Summary 002 (Complaint Counsel) at 'Summary-Online_Ads' row 620; Baburek (Complaint Counsel) Tr. 318-23).

Response to Finding No. 394:

The Proposed Finding is misleading because GX586 is not an "online TurboTax ad." It is a display advertisement for a specific TurboTax SKU, TurboTax Free Edition. (GX586 (Intuit)).

Intuit otherwise has no specific response except to note that the number of impressions or clicks an ad received is not evidence that the ad conveyed any of the claims asserted by Complaint Counsel, that reasonable consumers were likely to be deceived by the ad, or that the claims were material to reasonable consumers. The dissemination data offered in the Proposed Finding illustrates that reasonable consumers were *unlikely* to be deceived. That Complaint Counsel have identified only 26 even potentially relevant consumer complaints from Tax Year 2021 (see CCF ¶¶677) when GX586 ran, even though GX586 on its own [REDACTED] [REDACTED] that year, is strong evidence that reasonable consumers were not deceived by GX586 or any of the other challenged advertisements that ran in Tax Year 2021 (see PFF ¶¶632, 637, 639, 641-647).

395. A screenshot from GX586 is pictured below.

(GX586 (Intuit)).

Response to Finding No. 395:

The Proposed Finding is incomplete because it fails to recognize that consumers clicking on the advertisement would be taken directly to the landing page on the TurboTax website for TurboTax Free Edition, where they would see detailed information about the free offer's qualifications. (PFF ¶¶253; Johnson (Intuit) Tr. 595-596). Indeed, Complaint Counsel and their witnesses recognized that the TurboTax website repeatedly disclosed the qualifications of free TurboTax offers and provided detailed information about those qualifications. (PFF ¶¶369-370). For example, Complaint Counsel's own 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 the free TurboTax offers. (PFF ¶790). Reasonable consumers understood that display ads such as GX586 link to a website when clicked (here, the TurboTax website) that includes more information about the advertised free offer, and by linking directly to the TurboTax website, the advertisement incorporated the detailed information on the TurboTax website. (PFF ¶254; *see also* CCF ¶455 ("The TurboTax website is ... integrated into TurboTax's free advertising.")). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

Moreover, the Proposed Finding does not support an inference that the challenged ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The advertisement includes the “TurboTax Free Edition” logo and states prominently in a font size the same as or larger than other text in the ad, “Simple tax returns only.” (GX586 (FTC)). By identifying the specific TurboTax SKU being advertised, the ad informed consumers that the offer does not apply to all TurboTax products. (See PFF ¶¶317, 321). And by stating that the offer was available for “Simple tax returns only,” the ad informed consumers that the free offer was not available to everyone, and that eligibility was contingent on the complexity of the consumer’s tax returns. (PFF ¶322; see also PFF ¶¶130-145). Complaint Counsel have offered no evidence that *all* components of the ad were not visible to consumers (see PFF ¶255), nor could they given the prominence of that content and the benchmarking analysis showing that the disclosures were comparable to disclosures in other companies’ ads (see PFF ¶¶257-259).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel assert were conveyed. Instead, the undisputed testimony from Intuit’s executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (See PFF ¶¶167-177, 190, 192-202, 405, 852, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel have not offered any evidence that this ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the qualifications included in the ad would prevent consumers from being misled

by the ad. (See PFF ¶¶260-264, 302-322, 328-330, 334). Even without those disclosures, consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

396. GX587, which Intuit produced bearing Bates number INTUIT-FTC-PART3-000000375 and with the original file name ty21-885-comp_ttlfsbo_CompChartBlue_970x250.jpg, is an online TurboTax ad for TY 2021 that, according to Intuit's data at GX434, [REDACTED] [REDACTED]. (GX587 (Intuit); GX434 (Intuit); GX Summary 002 (Complaint Counsel) at 'Summary-Online_Ads' row 622; Baburek (Complaint Counsel) Tr. 318-23).

Response to Finding No. 396:

The Proposed Finding is misleading because GX587 is not an "online TurboTax ad." It is a display advertisement for free offers for specific TurboTax DIY, Live Assisted, and Live Full Service SKUs. (GX587 (Intuit)).

Intuit otherwise has no specific response except to note that the number of impressions or clicks an ad received is not evidence that the ad conveyed any of the claims asserted by Complaint Counsel, that reasonable consumers were likely to be deceived by the ad, or that the claims were material to reasonable consumers. The dissemination data offered in the Proposed Finding illustrates that reasonable consumers were *unlikely* to be deceived. That Complaint Counsel have identified only 26 even potentially relevant consumer complaints from Tax Year 2021 (see CCF ¶677) when GX587 ran, even though GX587 on its own [REDACTED] [REDACTED] that year, is strong evidence that reasonable consumers were not deceived by GX587 or any of the other challenged advertisements that ran in Tax Year 2021 (see PFF ¶¶632, 637, 639, 641-647).

397. A screenshot from GX587 is pictured below.

| | intuit turboTax | H&R Block* |
|---------------------------------|--------------------|------------------|
| Do your own taxes | \$0 Fed & State | \$0 |
| Do your taxes with expert help | \$0 Fed & State | \$39.99 |
| A tax expert does taxes for you | \$0 Fed & State | \$80 Fed only |

*Based on published prices at hrblock.com as of 1/5/2022

NEW! Choose how you file FREE.

Simple tax returns only. Must file by 2/15.

File for \$0

(GX587 (Intuit)).

Response to Finding No. 397:

The Proposed Finding is incomplete because it fails to recognize that consumers clicking on the advertisement would be taken directly to the landing page on the TurboTax website, where they would see detailed information about the qualifications for the free offers for specific TurboTax DIY, Live Assisted, and Live Full Service SKUs. (PFF ¶¶253; Johnson (Intuit) Tr. 595-596; Rubin (Intuit) Tr. 1563-1564). Indeed, Complaint Counsel and their witnesses recognized that the TurboTax website repeatedly disclosed the qualifications of free TurboTax offers and provided detailed information about those qualifications. (PFF ¶¶369-370). For example, Complaint Counsel’s own 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 the free TurboTax offers. (PFF ¶790). Reasonable consumers understood that display ads such as GX587 link to a website when clicked (here, the TurboTax website) that includes more information about the advertised free offer, and by linking directly to the TurboTax website, the advertisement incorporated the detailed information on the TurboTax website. (PFF ¶254; *see also* CCF ¶455 (“The TurboTax website is ... integrated into TurboTax’s free advertising.”)). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

Moreover, the Proposed Finding does not support an inference that the challenged ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The advertisement states prominently in a font size the same as or larger than other text in the ad, “Simple tax returns only. Must file by 2/15.” (GX587 (FTC)). By stating that the offer was available for “Simple tax returns only,” the ad informed consumers that the free offer was not available to everyone, and that eligibility was contingent on the complexity of the consumer’s tax returns. (PFF ¶322; *see also* PFF ¶¶130-145). Complaint Counsel have offered no evidence that *all* components of the ad were not visible to consumers (*see* PFF ¶255), nor could they given the prominence of that content and the benchmarking analysis showing that the disclosures were comparable to disclosures in other companies’ ads (*see* PFF ¶¶257-259).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel assert were conveyed. Instead, the undisputed testimony from Intuit’s executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (*See* PFF ¶¶167-177, 190, 192-202, 405, 852, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel have not offered any evidence that this ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the qualifications included in the ad would prevent consumers from being misled by the ad. (*See* PFF ¶¶260-264, 302-322, 328-330, 334). Even without those disclosures, consumers understand that free tax-preparation offers are qualified, that their ability to qualify

for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

398. GX588, which Intuit produced bearing Bates number INTUIT-FTC-PART3-00000396 and with the original file name ty21-955-numf_gm-FoamFinger_1242x699.jpg, is an online TurboTax ad for TY 2021 that, according to Intuit's data at GX434, [REDACTED] (GX588 (Intuit); GX434 (Intuit); GX Summary 002 (Complaint Counsel) at 'Summary-Online_Ads' row 665; Baburek (Complaint Counsel) Tr. 318–23).

Response to Finding No. 398:

The Proposed Finding is misleading because GX558 is not an “online TurboTax ad.” It is a display advertisement for a specific TurboTax SKU, TurboTax Free Edition. (GX558 (Intuit)).

Intuit otherwise has no specific response except to note that the number of impressions or clicks an ad received is not evidence that the ad conveyed any of the claims asserted by Complaint Counsel, that reasonable consumers were likely to be deceived by the ad, or that the claims were material to reasonable consumers. The dissemination data offered in the Proposed Finding illustrates that reasonable consumers were *unlikely* to be deceived. That Complaint Counsel have identified only 26 even potentially relevant consumer complaints from Tax Year 2021 (*see* CCF ¶677) when G558 ran, even though GX588 on its own [REDACTED] [REDACTED] that year, is strong evidence that reasonable consumers were not deceived by GX588 or any of the other challenged advertisements that ran in Tax Year 2021 (*see* PFF ¶¶632, 637, 639, 641-647).

399. A screenshot from GX588 is pictured below.



(GX588 (Intuit)).

Response to Finding No. 399:

The Proposed Finding is incomplete because it fails to recognize that consumers clicking on the advertisement would be taken directly to the app store on their phone where they could download the TurboTax app, where they would see detailed information about the free offer's qualifications. (PFF ¶253; Johnson (Intuit) Tr. 595-596). Indeed, Complaint Counsel and their witnesses recognized that the TurboTax website repeatedly disclosed the qualifications of free TurboTax offers and provided detailed information about those qualifications. (PFF ¶¶369-370). For example, Complaint Counsel's own 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 the free TurboTax offers. (PFF ¶790). Reasonable consumers understood that display ads such as GX588 link to a website when clicked (here, the TurboTax website) that includes more information about the advertised free offer, and by linking directly to the TurboTax website, the advertisement incorporated the detailed information on the TurboTax website. (PFF ¶254; *see also* CCF ¶455 ("The TurboTax website is ... integrated into TurboTax's free advertising.")). In determining the claims conveyed by an advertisement

and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

Moreover, the Proposed Finding does not support an inference that the challenged ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The advertisement includes the “TurboTax Free Edition” logo and states prominently in a font size the same as other text in the ad, “Simple tax returns only.” (GX588 (FTC)). By identifying the specific TurboTax SKU being advertised, the ad informed consumers that the offer does not apply to all TurboTax products. (See PFF ¶¶317, 321). And by stating that the offer was available for “Simple tax returns only,” the ad informed consumers that the free offer was not available to everyone, and that eligibility was contingent on the complexity of the consumer’s tax returns. (PFF ¶322; *see also* PFF ¶¶130-145). Complaint Counsel have offered no evidence that all components of the ad were not visible to consumers (see PFF ¶255), nor could they given the prominence of that content and the benchmarking analysis showing that the disclosures were comparable to disclosures in other companies’ ads (see PFF ¶¶257-259).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel assert were conveyed. Instead, the undisputed testimony from Intuit’s executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (See PFF ¶¶167-177, 190, 192-202, 405, 852, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel have not offered any evidence that this ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that

TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the qualifications included in the ad would prevent consumers from being misled by the ad. (See PFF ¶¶260-264, 302-322, 328-330, 334). Even without those disclosures, consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

400. GX590, which Intuit produced bearing Bates number INTUIT-FTC-PART3-00000401 and with the original file name ty21-642-3zer_tlfsbo-ThreeZeros_9x16.mp4, is an online TurboTax ad for TY 2021 that, according to Intuit's data at GX434, [REDACTED] (GX590 (Intuit); GX434 (Intuit); GX Summary 002 (Complaint Counsel) at 'Summary-Online_Ads' row 509; Baburek (Complaint Counsel) Tr. 318-23).

Response to Finding No. 400:

The Proposed Finding is misleading because GX590 is not an "online TurboTax ad." It is a display advertisement for free offers for specific TurboTax DIY, Live Assisted, and Live Full Service SKUs. (GX590 (Intuit)).

Intuit otherwise has no specific response except to note that the number of impressions or clicks an ad received is not evidence that the ad conveyed any of the claims asserted by Complaint Counsel, that reasonable consumers were likely to be deceived by the ad, or that the claims were material to reasonable consumers. The dissemination data offered in the Proposed Finding illustrates that reasonable consumers were *unlikely* to be deceived. That Complaint Counsel have identified only 26 even potentially relevant consumer complaints from Tax Year 2021 (*see* CCF ¶677) when GX590 ran, even though GX590 on its own [REDACTED] [REDACTED] that year, is strong evidence that reasonable consumers were not

deceived by GX590 or any of the other challenged advertisements that ran in Tax Year 2021 (*see* PFF ¶¶632, 637, 639, 641-647).

401. A screenshot from GX590 is pictured below.



(GX590 (Intuit)).

Response to Finding No. 401:

The Proposed Finding is incomplete and misleading because it is just a snippet of the full video display ad that actually ran and Complaint Counsel have omitted critical information for evaluating the advertisement. (CCFF ¶401; GX590 (Intuit)). Consumers did not view the challenged advertisement as a single, static image. Not captured in the Proposed Finding is the voiceover stating, “Simple tax returns only,” and explaining that there were three options to file for free using TurboTax, or the fact that the written disclosure “Simple tax returns only” appears on screen throughout the entire ad. (GX590 (Intuit)). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

The Proposed Finding is also incomplete because it fails to recognize that consumers clicking on the advertisement would be taken directly to the landing page on the TurboTax

website, where they would see detailed information about the TurboTax DIY, Live Assisted, and Live Full Service free offer qualifications. (PFF ¶253; Johnson (Intuit) Tr. 595-596; Rubin (Intuit) Tr. 1563-1564). Indeed, Complaint Counsel and their witnesses recognized that the TurboTax website repeatedly disclosed the qualifications of free TurboTax offers and provided detailed information about those qualifications. (PFF ¶¶369-370). For example, Complaint Counsel's own 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 the free TurboTax offers. (PFF ¶790). Reasonable consumers understood that display ads such as GX590 link to a website then clicked (here, the TurboTax website) that includes more information about the advertised free offer, and by linking directly to the TurboTax website, the advertisement incorporated the detailed information on the TurboTax website. (PFF ¶254; *see also* CCF ¶455 ("The TurboTax website is ... integrated into TurboTax's free advertising.")).

Moreover, the Proposed Finding does not support an inference that the challenged ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The advertisement states in large text that there are "Three Ways to File Free," conveying that not every TurboTax SKU is free. (GX590 (FTC)). The advertisement states both verbally and in writing, "Simple tax returns only. Must file by 3/31." (GX590 (FTC)). By stating that the offer was available for "Simple tax returns only," the ad informed consumers that the free offer was not available to everyone, and that eligibility was contingent on the complexity of the consumer's tax returns. (PFF ¶322; *see also* PFF ¶¶130-145). Complaint Counsel have offered no evidence that *all* components of the ad were not visible or audible to consumers (*see* PFF ¶¶255-256), nor could they given the

prominence of that content and the benchmarking analysis showing that the disclosures were comparable to disclosures in other companies' ads (*see* PFF ¶¶257-259).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel assert were conveyed. Instead, the undisputed testimony from Intuit's executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (*See* PFF ¶¶167-177, 190, 192-202, 405, 852, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel have not offered any evidence that this ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the qualifications included in the ad would prevent consumers from being misled by the ad. (*See* PFF ¶¶260-264, 302-322, 328-330, 334). Even without those disclosures, consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

402. GX592, which Intuit produced bearing Bates number INTUIT-FTC-PART3-000000419 and with the original file name ty21-748-bust_ttlfsbo-SpinningZeros_16x9.mp4, is an online TurboTax ad for TY 2021 that, according to Intuit's data at GX434, [REDACTED] (GX592 (Intuit); GX434 (Intuit); GX Summary 002 (Complaint Counsel) at 'Summary-Online_Ads' row 587; Baburek (Complaint Counsel) Tr. 318–23).

Response to Finding No. 402:

The Proposed Finding is misleading because GX592 is not an “online TurboTax ad.” It is a display advertisement a specific TurboTax Live free offer. (GX592 (Intuit)).

Intuit otherwise has no specific response except to note that the number of impressions or clicks an ad received is not evidence that the ad conveyed any of the claims asserted by Complaint Counsel, that reasonable consumers were likely to be deceived by the ad, or that the claims were material to reasonable consumers. The dissemination data offered in the Proposed Finding illustrates that reasonable consumers were *unlikely* to be deceived. That Complaint Counsel have identified only 26 even potentially relevant consumer complaints from Tax Year 2021 (*see* CCFE ¶¶677) when GX592 ran, even though GX592 on its own [REDACTED] [REDACTED] that year, is strong evidence that reasonable consumers were not deceived by GX592 or any of the other challenged advertisements that ran in Tax Year 2021 (*see* PFE ¶¶632, 637, 639, 641-647).

403. A screenshot from GX592 is pictured below.



NEW! File FREE, even when
an expert does your taxes

Simple tax returns only.
Must file by 3/31.

\$0

(GX592 (Intuit)).

Response to Finding No. 403:

The Proposed Finding is incomplete and misleading because it is just a snippet of the full video display ad that actually ran and Complaint Counsel have omitted critical information for evaluating the advertisement. (CCFE ¶403; GX592 (Intuit)). Consumers did not view the challenged advertisement as a single, static image. (GX592 (Intuit)). Not captured in the

Proposed Finding is the voiceover stating, “Simple tax returns only,” and explaining that there were three options to file for free using TurboTax. (GX592 (Intuit)). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

The Proposed Finding is incomplete because it fails to recognize that consumers clicking on the advertisement would be taken directly to the landing page on the TurboTax website, where they would see detailed information about the free offer’s qualifications. (PFF ¶253; Johnson (Intuit) Tr. 595-596; Rubin (Intuit) Tr. 1563-1564). Indeed, Complaint Counsel and their witnesses recognized that the TurboTax website repeatedly disclosed the qualifications of free TurboTax offers and provided detailed information about those qualifications. (PFF ¶¶369-370). For example, Complaint Counsel’s own 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 the free TurboTax offers. (PFF ¶790). Reasonable consumers understood that display ads such as GX592 link to a website when clicked (here, the TurboTax website) that includes more information about the advertised free offer, and by linking directly to the TurboTax website, the advertisement incorporated the detailed information on the TurboTax website. (PFF ¶254; *see also* CCF ¶455 (“The TurboTax website is ... integrated into TurboTax’s free advertising.”)).

Moreover, the Proposed Finding does not support an inference that the challenged ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The advertisement states prominently in the same font size as other text in the ad, “Simple tax returns only. Must file by 3/31.” (GX592

(FTC)). The ad also included a voiceover stating that the free offer was for “Simple tax returns only.” (GX592 (FTC)). By stating that the offer was available for “Simple tax returns only,” the ad informed consumers that the free offer was not available to everyone, and that eligibility was contingent on the complexity of the consumer’s tax returns. (PFF ¶¶322; *see also* PFF ¶¶130-145). Complaint Counsel have offered no evidence that *all* components of the ad were not visible or audible to consumers (*see* PFF ¶¶255-256), nor could they given the prominence of that content and the benchmarking analysis showing that the disclosures were comparable to disclosures in other companies’ ads (*see* PFF ¶¶257-259).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel assert were conveyed. Instead, the undisputed testimony from Intuit’s executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (*See* PFF ¶¶167-177, 190, 192-202, 405, 852, 857, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel have not offered any evidence that this ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the qualifications included in the ad would prevent consumers from being misled by the ad. (*See* PFF ¶¶260-264, 302-322, 328-330, 334). Even without those disclosures, consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

404. GX593, which Intuit produced bearing Bates number INTUIT-FTC-PART3-000000423 and with the original file name ty21-672-3zer_tlfsbo-ThreeZeros_16x9.mp4, is an online TurboTax ad for TY 2021 that, according to Intuit's data at GX434, [REDACTED] (GX593 (Intuit); GX434 (Intuit); GX Summary 002 (Complaint Counsel) at 'Summary-Online_Ads' row 529; Baburek (Complaint Counsel) Tr. 318-23).

Response to Finding No. 404:

The Proposed Finding is misleading because GX593 is not an "online TurboTax ad." It is a display advertisement for free offers for specific TurboTax DIY, Live Assisted, and Live Full Service SKUs. (GX593 (Intuit)).

Intuit otherwise has no specific response except to note that the number of impressions or clicks an ad received is not evidence that the ad conveyed any of the claims asserted by Complaint Counsel, that reasonable consumers were likely to be deceived by the ad, or that the claims were material to reasonable consumers. The dissemination data offered in the Proposed Finding illustrates that reasonable consumers were *unlikely* to be deceived. That Complaint Counsel have identified only 26 even potentially relevant consumer complaints from Tax Year 2021 (*see* CCF ¶¶677) when GX593 ran, even though GX593 on its own [REDACTED] that year, is strong evidence that reasonable consumers were not deceived by GX593 or any of the other challenged advertisements that ran in Tax Year 2021 (*see* PFF ¶¶632, 637, 639, 641-647).

405. A screenshot from GX593 is pictured below.



(GX593 (Intuit)).

Response to Finding No. 405:

The Proposed Finding is incomplete and misleading because it is just a snippet of the full video display ad that actually ran and Complaint Counsel have omitted critical information for evaluating the advertisement. (CCFF ¶405; GX593 (Intuit)). Consumers did not view the challenged advertisement as a single, static image. (GX593 (Intuit)). Not captured in the Proposed Finding is the voiceover stating, “Simple tax returns only” and explaining that there were three options to file for free using TurboTax, or the fact that “Simple tax returns only” appeared on screen throughout the entire ad. (GX593 (Intuit)). The Proposed Finding also does not include additional disclosures that would have been shown to consumers along with the image reproduced above. Not captured in the Proposed Finding is the fact that the image is part of a display advertisement that was paired with text stating, “Simple tax returns only. Must file by 3/31.” (GX Summary 002 (FTC) at ‘Data-Online_Ad_Combined’ row 5605; RX1030 (Intuit) at row 5132). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

The Proposed Finding is also incomplete because it fails to recognize that consumers clicking on the advertisement would be taken directly to the landing page on the TurboTax website, where they would see detailed information about the qualifications for the free offers for specific TurboTax DIY, Live Assisted, and Live Full Service SKUs. (PFF ¶253; Johnson (Intuit) Tr. 595-596; Rubin (Intuit) Tr. 1563-1564). Indeed, Complaint Counsel and their witnesses recognized that the TurboTax website repeatedly disclosed the qualifications of free TurboTax offers and provided detailed information about those qualifications. (PFF ¶¶369-370). For example, Complaint Counsel's own 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 the free TurboTax offers. (PFF ¶790). Reasonable consumers understood that display ads such as GX593 link to a website when clicked (here, the TurboTax website) that includes more information about the advertised free offer, and by linking directly to the TurboTax website, the advertisement incorporated the detailed information on the TurboTax website. (PFF ¶254; *see also* CCF ¶455 ("The TurboTax website is ... integrated into TurboTax's free advertising.")).

Moreover, the Proposed Finding does not support an inference that the challenged ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The advertisement states in large text that there are "Three Ways to File Free," conveying that not every TurboTax SKU is free. (GX593 (FTC)). The advertisement states prominently in writing, throughout the entire video, in a font size the same as or larger than other text in the ad, "Simple tax returns only. Must file by 3/31." (GX593 (FTC)). The ad also includes a voiceover stating, "Simple tax returns only." (GX593 (FTC)). By stating that the offer was available for "Simple tax returns only," the ad informed

consumers that the free offer was not available to everyone, and that eligibility was contingent on the complexity of the consumer's tax returns. (PFF ¶322; *see also* PFF ¶¶130-145). Complaint Counsel have offered no evidence that *all* components of the ad were not visible or audible to consumers (*see* PFF ¶¶255-256), nor could they given the prominence of that content and the benchmarking analysis showing that the disclosures were comparable to disclosures in other companies' ads (*see* PFF ¶¶257-259).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel assert were conveyed. Instead, the undisputed testimony from Intuit's executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (*See* PFF ¶¶167-177, 190, 192-202, 405, 852, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel have not offered any evidence that this ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the qualifications included in the ad would prevent consumers from being misled by the ad. (*See* PFF ¶¶260-264, 302-322, 328-330, 334). Even without those disclosures, consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

406. GX594, which Intuit produced bearing Bates number INTUIT-FTC-PART3-000000451 and with the original file name ty21-707-mvpr_ttlfsbo-MVP_1200x627.jpg, is an online TurboTax ad for TY 2021 that, according to Intuit's data at GX434, [REDACTED]. (GX594 (Intuit); GX434 (Intuit); GX Summary 002 [REDACTED]).

(Complaint Counsel) at ‘Summary-Online_Ads’ row 554; Baburek (Complaint Counsel) Tr. 318–23).

Response to Finding No. 406:

The Proposed Finding is misleading because GX94 is not an “online TurboTax ad.” It is a display advertisement for free offers for specific TurboTax DIY, Live Assisted, and Live Full Service SKUs. (GX594 (Intuit)).

Intuit otherwise has no specific response except to note that the number of impressions or clicks an ad received is not evidence that the ad conveyed any of the claims asserted by Complaint Counsel, that reasonable consumers were likely to be deceived by the ad, or that the claims were material to reasonable consumers. The dissemination data offered in the Proposed Finding illustrates that reasonable consumers were *unlikely* to be deceived. That Complaint Counsel have identified only 26 even potentially relevant consumer complaints from Tax Year 2021 (see CCF ¶¶677) when GX594 ran, even though GX594 on its own [REDACTED] [REDACTED] that year, is strong evidence that reasonable consumers were not deceived by GX594 or any of the other challenged advertisements that ran in Tax Year 2021 (see PFF ¶¶632, 637, 639, 641-647).

407. A screenshot from GX594 is pictured below.



(GX594 (Intuit)).

Response to Finding No. 407:

The Proposed Finding is incomplete and misleading because Complaint Counsel have omitted critical information for evaluating the advertisement. (CCFF ¶407; GX594 (Intuit)). The Proposed Finding does not include additional disclosures that would have been shown to consumers along with the image reproduced above. Not captured in the Proposed Finding is the fact that the image is part of a display advertisement that was paired with text stating, “Simple tax returns only. Must file by 3/31.” (GX Summary 002 (FTC) at ‘Data-Online_Ad_Combined’ row 5606; RX1030 (Intuit) at row 1291). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

The Proposed Finding is also incomplete because it fails to recognize that consumers clicking on the advertisement would be taken directly to the TurboTax website, where they would see detailed information about the free offers’ qualifications. (PFF ¶253; Johnson (Intuit) Tr. 595-596; Rubin (Intuit) Tr. 1563-1564). Indeed, Complaint Counsel and their witnesses recognized that the TurboTax website repeatedly disclosed the qualifications of free TurboTax offers and provided detailed information about those qualifications. (PFF ¶¶369-370). For example, Complaint Counsel’s own 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 the free TurboTax offers. (PFF ¶790). Reasonable consumers understood that display ads such as GX594 link to a website when clicked (here, the TurboTax website) that includes more information about the advertised free offer, and by linking directly to the TurboTax website, the advertisement incorporated the detailed information on the TurboTax website. (PFF ¶254; *see also* CCFF ¶455 (“The TurboTax website is ... integrated into TurboTax’s free advertising.”)).

Moreover, the Proposed Finding does not support an inference that the challenged ad expressly or impliedly claimed that all TurboTax that includes free or that TurboTax would necessarily be free for the consumer when it was not. The advertisement states prominently in a font size the same as or larger than other text in the ad, “Simple tax returns only. Must file by 3/31.” (GX594 (FTC)). By stating that the offer was available for “Simple tax returns only,” the ad informed consumers that the free offer was not available to everyone, and that eligibility was contingent on the complexity of the consumer’s tax returns. (PFF ¶322; *see also* PFF ¶¶130-145). Complaint Counsel have offered no evidence that *all* components of the ad were not visible to consumers (*see* PFF ¶255), nor could they given the prominence of that content and the benchmarking analysis showing that the disclosures were comparable to disclosures in other companies’ ads (*see* PFF ¶¶257-259).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel assert were conveyed. Instead, the undisputed testimony from Intuit’s executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (*See* PFF ¶¶167-177, 190, 192-202, 405, 852, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel have not offered any evidence that this ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the qualifications included in the ad would prevent consumers from being misled by the ad. (*See* PFF ¶¶260-264, 302-322, 328-330, 334). Even without those disclosures, consumers understand that free tax-preparation offers are qualified, that their ability to qualify

for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

408. GX595, which Intuit produced bearing Bates number INTUIT-FTC-PART3-000000461 and with the original file name ty21-598-3zer_ttlfsbo-ThreeZeroes_1200x628.jpg, is an online TurboTax ad for TY 2021 that, according to Intuit's data at GX434, [REDACTED] (GX595 (Intuit); GX434 (Intuit); GX Summary 002 (Complaint Counsel) at 'Summary-Online_Ads' row 478; Baburek (Complaint Counsel) Tr. 318–23).

Response to Finding No. 408:

The Proposed Finding is misleading because GX595 is not an “online TurboTax ad.” It is a display advertisement for free offers for specific TurboTax DIY, Live Assisted, and Live Full Service SKUs. (GX595 (Intuit)).

Intuit otherwise has no specific response except to note that the number of impressions or clicks an ad received is not evidence that the ad conveyed any of the claims asserted by Complaint Counsel, that reasonable consumers were likely to be deceived by the ad, or that the claims were material to reasonable consumers. The dissemination data offered in the Proposed Finding illustrates that reasonable consumers were *unlikely* to be deceived. That Complaint Counsel have identified only 26 even potentially relevant consumer complaints from Tax Year 2021 (*see* CCF ¶¶677) when GX595 ran, even though GX595 on its own [REDACTED] [REDACTED] that year, is strong evidence that reasonable consumers were not deceived by GX595 or any of the other challenged advertisements that ran in Tax Year 2021 (*see* PFF ¶¶632, 637, 639, 641-647).

409. A screenshot from GX595 is pictured below.



(GX595 (Intuit)).

Response to Finding No. 409:

The Proposed Finding is incomplete and misleading because Complaint Counsel have omitted critical information for evaluating the advertisement. (CCFF ¶409; GX595 (Intuit)). The Proposed Finding does not include additional disclosures that would have been shown to consumers along with the image reproduced above. Not captured in the Proposed Finding is the fact that the image is part of a display advertisement that was paired with text stating, “Simple tax returns only. For a limited time.” (GX Summary 002 (FTC) at ‘Data-Online_Ad_Combined’ row 5633; RX1030 (Intuit) at row 5183). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

The Proposed Finding is also incomplete because it fails to recognize that consumers clicking on the advertisement would be taken directly to the landing page on the TurboTax website, where they would see detailed information about the qualifications for the free offers for specific TurboTax DIY, Live Assisted, and Live Full Service SKUs. (PFF ¶253; Johnson (Intuit) Tr. 595-596; Rubin (Intuit) Tr. 1563-1564). Indeed, Complaint Counsel and their witnesses recognized that the TurboTax website repeatedly disclosed the qualifications of free TurboTax offers and provided detailed information about those qualifications. (PFF ¶¶369-370). For

example, Complaint Counsel's own 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 the free TurboTax offers. (PFF ¶790). Reasonable consumers understood that display ads such as GX595 link to a website when clicked (here, the TurboTax website) that includes more information about the advertised free offer, and by linking directly to the TurboTax website, the advertisement incorporated the detailed information on the TurboTax website. (PFF ¶254; *see also* CCF ¶455 ("The TurboTax website is ... integrated into TurboTax's free advertising.")).

Moreover, the Proposed Finding does not support an inference that the challenged ad expressly or impliedly claimed that all TurboTax that includes free or that TurboTax would necessarily be free for the consumer when it was not. The advertisement states in large text that there are "Three Ways to File Free," conveying that not every TurboTax SKU is free. (GX595 (FTC)). The advertisement states prominently in font that is the same size as other text in the ad, "Simple tax returns only. Must file by 3/31." (GX595 (FTC)). By stating that the offer was available for "Simple tax returns only," the ad informed consumers that the free offer was not available to everyone, and that eligibility was contingent on the complexity of the consumer's tax returns. (PFF ¶322; *see also* PFF ¶¶130-145). Complaint Counsel have offered no evidence that *all* components of the ad were not visible to consumers (*see* PFF ¶255), nor could they given the prominence of that content and the benchmarking analysis showing that the disclosures were comparable to disclosures in other companies' ads (*see* PFF ¶¶257-259).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel assert were conveyed. Instead, the undisputed testimony from Intuit's executives establishes that Intuit did not intend for any of the ads to claim

that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (See PFF ¶¶167-177, 190, 192-202, 405, 852, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel have not offered any evidence that this ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the qualifications included in the ad would prevent consumers from being misled by the ad. (See PFF ¶¶260-264, 302-322, 328-330, 334). Even without those disclosures, consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

410. GX596, which Intuit produced bearing Bates number INTUIT-FTC-PART3-000000472 and with the original file name ty21-689-bust_tlfso-SpinningZeros_1080x1920.jpg, is an online TurboTax ad for TY 2021 that, according to Intuit's data at GX434, [REDACTED]. (GX596 (Intuit); GX434 (Intuit); GX Summary 002 (Complaint Counsel) at 'Summary-Online_Ads' row 536; Baburek (Complaint Counsel) Tr. 318-23).

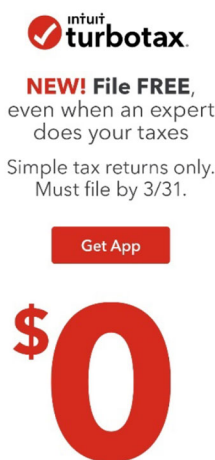
Response to Finding No. 410:

The Proposed Finding is misleading because GX596 is not an "online TurboTax ad." It is a display advertisement a specific TurboTax Live free offer. (GX596 (Intuit)).

Intuit otherwise has no specific response except to note that the number of impressions or clicks an ad received is not evidence that the ad conveyed any of the claims asserted by Complaint Counsel, that reasonable consumers were likely to be deceived by the ad, or that the claims were material to reasonable consumers. The dissemination data offered in the Proposed Finding illustrates that reasonable consumers were *unlikely* to be deceived. That Complaint

Counsel have identified only 26 even potentially relevant consumer complaints from Tax Year 2021 (see CCF ¶¶677) when GX596 ran, even though GX596 on its own [REDACTED] [REDACTED] that year, is strong evidence that reasonable consumers were not deceived by GX596 or any of the other challenged advertisements that ran in Tax Year 2021 (see PFF ¶¶632, 637, 639, 641-647).

411. A screenshot from GX596 is pictured below.



(GX596 (Intuit)).

Response to Finding No. 411:

The Proposed Finding is incomplete because it fails to recognize that consumers clicking on the advertisement would be taken directly to the landing page on the TurboTax website, where they would see detailed information about the free offer’s qualifications. (PFF ¶¶253; Johnson (Intuit) Tr. 595-596; Rubin (Intuit) Tr. 1563-1564). Indeed, Complaint Counsel and their witnesses recognized that the TurboTax website repeatedly disclosed the qualifications of free TurboTax offers and provided detailed information about those qualifications. (PFF ¶¶369-370). For example, Complaint Counsel’s own 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 the free TurboTax offers. (PFF ¶790). Reasonable consumers understood that display ads such as GX596 link to a website when clicked (here, the TurboTax website) that includes more information about the advertised free offer, and by linking directly to the TurboTax website, the advertisement incorporated the detailed information on the TurboTax website. (PFF ¶254; *see also* CCF ¶455 (“The TurboTax website is ... integrated into TurboTax’s free advertising.”)). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

Moreover, the Proposed Finding does not support an inference that the challenged ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The advertisement states prominently in font that is the same size as other text in the ad, “Simple tax returns only. Must file by 3/31.” (GX596 (FTC)). By stating that the offer was available for “Simple tax returns only,” the ad informed consumers that the free offer was not available to everyone, and that eligibility was contingent on the complexity of the consumer’s tax returns. (PFF ¶322; *see also* PFF ¶¶130-145). Complaint Counsel have offered no evidence that *all* components of the ad were not visible to consumers (*see* PFF ¶255), nor could they given the prominence of that content and the benchmarking analysis showing that the disclosures were comparable to disclosures in other companies’ ads (*see* PFF ¶¶257-259).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel assert were conveyed. Instead, the undisputed testimony from Intuit’s executives establishes that Intuit did not intend for any of the ads to claim

that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (See PFF ¶¶167-177, 190, 192-202, 405, 852, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel have not offered any evidence that this ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the qualifications included in the ad would prevent consumers from being misled by the ad. (See PFF ¶¶260-264, 302-322, 328-330, 334). Even without those disclosures, consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

412. GX597, which Intuit produced bearing Bates number INTUIT-FTC-PART3-000000487 and with the original file name ty21-976-soc_ttlfsbo-FauxUGC_9x16.mp4, is an online TurboTax ad for TY 2021 that, according to Intuit's data at GX434, [REDACTED]. (GX597 (Intuit); GX434 (Intuit); GX Summary 002 (Complaint Counsel) at 'Summary-Online_Ads' row 674, row 675; Baburek (Complaint Counsel) Tr. 318-23).

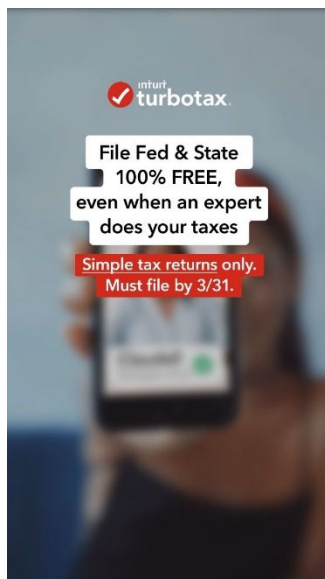
Response to Finding No. 412:

The Proposed Finding is misleading because GX597 is not an "online TurboTax ad." It is a display advertisement a specific TurboTax Live free offer. (GX597 (Intuit)).

Intuit otherwise has no specific response except to note that the number of impressions or clicks an ad received is not evidence that the ad conveyed any of the claims asserted by Complaint Counsel, that reasonable consumers were likely to be deceived by the ad, or that the claims were material to reasonable consumers. The dissemination data offered in the Proposed Finding illustrates that reasonable consumers were *unlikely* to be deceived. That Complaint

Counsel have identified only 26 even potentially relevant consumer complaints from Tax Year 2021 (see CCF ¶¶677) when GX597 ran, even though GX597 on its own [REDACTED] [REDACTED] that year, is strong evidence that reasonable consumers were not deceived by GX597 or any of the other challenged advertisements that ran in Tax Year 2021 (see PFF ¶¶632, 637, 639, 641-647).

413. A screenshot from GX597 is pictured below.



(GX597 (Intuit)).

Response to Finding No. 413:

The Proposed Finding is incomplete and misleading because it is just a snippet of the full video display ad that actually ran and Complaint Counsel have omitted critical information for evaluating the advertisement. (CCFF ¶413; GX597 (Intuit)). Consumers did not view the challenged advertisement as a single, static image. Not captured in the Proposed Finding is the fact that the image is part of a display advertisement that was paired with text stating, “Simple taxes only. Offer ends soon, file by 3/31.” (GX Summary 002 (FTC) at ‘Data-Online_Ad_Combined’ row 7075; RX1030 (Intuit) at row 5083). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the

full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

The Proposed Finding is also incomplete because it fails to recognize that consumers clicking on the advertisement would be taken directly to the landing page on the TurboTax website, where they would see detailed information about the free offer's qualifications. (PFF ¶253; Johnson (Intuit) Tr. 595-596; Rubin (Intuit) Tr. 1563-1564). Indeed, Complaint Counsel and their witnesses recognized that the TurboTax website repeatedly disclosed the qualifications of free TurboTax offers and provided detailed information about those qualifications. (PFF ¶¶369-370). For example, Complaint Counsel's own 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 the free TurboTax offers. (PFF ¶790). Reasonable consumers understood that display ads such as GX597 link to a website when clicked (here, the TurboTax website) that includes more information about the advertised free offers, and by linking directly to the TurboTax website, the advertisement incorporated the detailed information on the TurboTax website. (PFF ¶254; *see also* CCF ¶455 ("The TurboTax website is ... integrated into TurboTax's free advertising.")).

Moreover, the Proposed Finding does not support an inference that the challenged ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The advertisement states prominently in red highlighted text, "Simple tax returns only. Must file by 3/31." (GX597 (FTC)). The ad text displayed with the image also stated, "Simple taxes only." (GX Summary 002 (FTC) at 'Data-Online_Ad_Combined' row 7075; RX1030 (Intuit) at row 5083). By stating that the offer was available for "Simple tax returns only," the ad informed consumers that the free offer was not

available to everyone, and that eligibility was contingent on the complexity of the consumer's tax returns. (PFF ¶¶322; *see also* PFF ¶¶130-145). Complaint Counsel have offered no evidence that *all* components of the ad were not visible and audible to consumers (*see* PFF ¶¶255-256), nor could they given the prominence of that content and the benchmarking analysis showing that the disclosures were comparable to disclosures in other companies' ads (*see* PFF ¶¶257-259).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel assert were conveyed. Instead, the undisputed testimony from Intuit's executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (*See* PFF ¶¶167-177, 190, 192-202, 405, 852, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel have not offered any evidence that this ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the qualifications included in the ad would prevent consumers from being misled by the ad. (*See* PFF ¶¶260-264, 302-322, 328-330, 334). Even without those disclosures, consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

414. GX598, which Intuit produced bearing Bates number INTUIT-FTC-PART3-000000497 and with the original file name ty21-987-expt_ttlfsbo-FAWClauellHandoff_1200x627.jpg, is an online TurboTax ad for TY 2021 that, according to Intuit's data at GX434, [REDACTED] (GX598 (Intuit); GX434 (Intuit); GX Summary 002 (Complaint Counsel) at 'Summary-Online_Ads' row 679; Baburek (Complaint Counsel) Tr. 318-23).

Response to Finding No. 414:

The Proposed Finding is misleading because GX598 is not an “online TurboTax ad.” It is a display advertisement a specific TurboTax Live free offer. (GX598 (Intuit)).

Intuit otherwise has no specific response except to note that the number of impressions or clicks an ad received is not evidence that the ad conveyed any of the claims asserted by Complaint Counsel, that reasonable consumers were likely to be deceived by the ad, or that the claims were material to reasonable consumers. The dissemination data offered in the Proposed Finding illustrates that reasonable consumers were *unlikely* to be deceived. That Complaint Counsel have identified only 26 even potentially relevant consumer complaints from Tax Year 2021 (see CCF ¶¶677) when GX598 ran, even though GX598 on its own [REDACTED] [REDACTED] that year, is strong evidence that reasonable consumers were not deceived by GX598 or any of the other challenged advertisements that ran in Tax Year 2021 (see PFF ¶¶632, 637, 639, 641-647).

415. A screenshot from GX598 is pictured below.



(GX598 (Intuit)).

Response to Finding No. 415:

The Proposed Finding is incomplete and misleading because Complaint Counsel have omitted critical information for evaluating the advertisement. (CCFF ¶415; GX598 (Intuit)). The Proposed Finding does not include additional disclosures that would have been shown to consumers along with the image reproduced above. Not captured in the Proposed Finding is the fact that the image is part of a display advertisement that was paired with text stating, “Simple tax returns only. Must file by 3/31.” (GX Summary 002 (FTC) at ‘Data-Online_Ad_Combined’ row 5636; RX1030 (Intuit) at row 244). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

The Proposed Finding is also incomplete because it fails to recognize that consumers clicking on the advertisement would be taken directly to the landing page on the TurboTax website, where they would see detailed information about the free offer’s qualifications. (PFF ¶253; Johnson (Intuit) Tr. 595-596; Rubin (Intuit) Tr. 1563-1564). Indeed, Complaint Counsel and their witnesses recognized that the TurboTax website repeatedly disclosed the qualifications of free TurboTax offers and provided detailed information about those qualifications. (PFF ¶¶369-370). For example, Complaint Counsel’s own 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 the free TurboTax offers. (PFF ¶790). Reasonable consumers understood that display ads such as GX598 link to a website when clicked (here, the TurboTax website) that includes more information about the advertised free offer, and by linking directly to the TurboTax website, the advertisement incorporated the detailed information on the TurboTax website. (PFF ¶254; *see also* CCFF ¶455 (“The TurboTax website is ... integrated into TurboTax’s free advertising.”)).

Moreover, the Proposed Finding does not support an inference that the challenged ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The advertisement states prominently in font that is the same size as other text in the ad, “Simple tax returns only. Must file by 3/31.” (GX598 (FTC)). By stating that the offer was available for “Simple tax returns only” with emphasis through underlining the text, the ad informed consumers that the free offer was not available to everyone, and that eligibility was contingent on the complexity of the consumer’s tax returns. (PFF ¶322; *see also* PFF ¶¶130-145). Complaint Counsel have offered no evidence that *all* components of the ad were not visible to consumers (*see* PFF ¶255), nor could they given the prominence of that content and the benchmarking analysis showing that the disclosures were comparable to disclosures in other companies’ ads (*see* PFF ¶¶257-259).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel assert were conveyed. Instead, the undisputed testimony from Intuit’s executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (*See* PFF ¶¶167-177, 190, 192-202, 405, 852, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel have not offered any evidence that this ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the qualifications included in the ad would prevent consumers from being misled by the ad. (*See* PFF ¶¶260-264, 302-322, 328-330, 334). Even without those disclosures, consumers understand that free tax-preparation offers are qualified, that their ability to qualify

for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

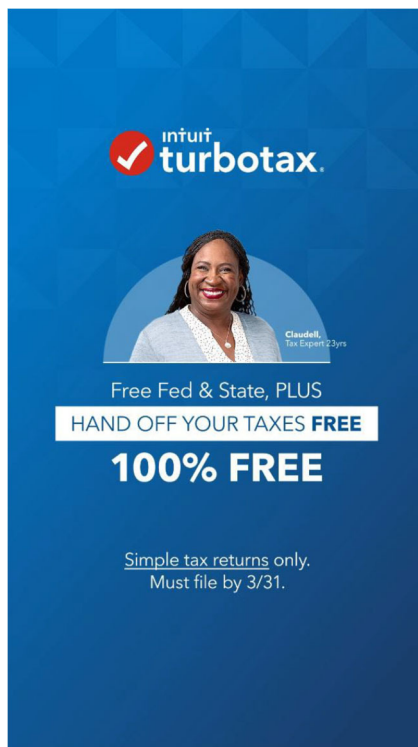
416. GX599, which Intuit produced bearing Bates number INTUIT-FTC-PART3-000000499 and with the original file name ty21-989-expt_ttlfsbo-FAWCludellHandoff_9x16.mp4, is an online TurboTax ad for TY 2021 that, according to Intuit's data at GX434, [REDACTED] [REDACTED]. (GX599 (Intuit); GX434 (Intuit); GX Summary 002 (Complaint Counsel) at 'Summary-Online_Ads' row 680, row 681; Baburek (Complaint Counsel) Tr. 318–23).

Response to Finding No. 416:

The Proposed Finding is misleading because GX599 is not an “online TurboTax ad.” It is a display advertisement a specific TurboTax Live free offer. (GX599 (Intuit)).

Intuit otherwise has no specific response except to note that the number of impressions or clicks an ad received is not evidence that the ad conveyed any of the claims asserted by Complaint Counsel, that reasonable consumers were likely to be deceived by the ad, or that the claims were material to reasonable consumers. The dissemination data offered in the Proposed Finding illustrates that reasonable consumers were *unlikely* to be deceived. That Complaint Counsel have identified only 26 even potentially relevant consumer complaints from Tax Year 2021 (*see* CCF ¶677) when GX599 ran, even though GX599 on its own [REDACTED] [REDACTED] that year, is strong evidence that reasonable consumers were not deceived by GX599 or any of the other challenged advertisements that ran in Tax Year 2021 (*see* PFF ¶¶632, 637, 639, 641-647).

417. A screenshot from GX599 is pictured below.



(GX599 (Intuit)).

Response to Finding No. 417:

The Proposed Finding is incomplete and misleading because it is just a snippet of the full video display ad that actually ran and Complaint Counsel have omitted critical information for evaluating the advertisement. (CCFF ¶¶417; GX599 (Intuit)). Consumers did not view the challenged advertisement as a single, static image. Not captured in the Proposed Finding is the fact that the free claim does not appear until almost halfway through the ad and that the claim is always accompanied by the “Simple tax returns only” disclosure. (GX599 (Intuit)). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

The Proposed Finding is incomplete because it fails to recognize that consumers clicking on the advertisement would be taken directly to the app store on their phone where they could

download the TurboTax app, where they would see detailed information about the free offer's qualifications. (PFF ¶253; Johnson (Intuit) Tr. 595-596; Rubin (Intuit) Tr. 1563-1564). Indeed, Complaint Counsel and their witnesses recognized that the TurboTax website repeatedly disclosed the qualifications of free TurboTax offers and provided detailed information about those qualifications. (PFF ¶¶369-370). For example, Complaint Counsel's own 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 the free TurboTax offers. (PFF ¶790). Reasonable consumers understood that display ads such as GX599 link to a website when clicked (here, the TurboTax website) that includes more information about the advertised free offer, and by linking directly to the TurboTax website, the advertisement incorporated the detailed information on the TurboTax website. (PFF ¶254; *see also* CCF ¶455 ("The TurboTax website is ... integrated into TurboTax's free advertising.")).

Moreover, the Proposed Finding does not support an inference that the challenged ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The advertisement states prominently, "Simple tax returns only. Must file by 3/31." (GX599 (FTC)). By stating that the offer was available for "Simple tax returns only" with emphasis through underlining the text throughout the majority of the video, the ad informed consumers that the free offer was not available to everyone, and that eligibility was contingent on the complexity of the consumer's tax returns. (PFF ¶322; *see also* PFF ¶¶130-145). Complaint Counsel have offered no evidence that *all* components of the ad were not visible to consumers (*see* PFF ¶255), nor could they given the prominence of that content and the benchmarking analysis showing that the disclosures were comparable to disclosures in other companies' ads (*see* PFF ¶¶257-259).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel assert were conveyed. Instead, the undisputed testimony from Intuit's executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (See PFF ¶¶167-177, 190, 192-202, 405, 852, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel have not offered any evidence that this ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the qualifications included in the ad would prevent consumers from being misled by the ad. (See PFF ¶¶260-264, 302-322, 328-330, 334). Even without those disclosures, consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

418. GX600, which Intuit produced bearing Bates number INTUIT-FTC-PART3-000000500 and with the original file name ty21-913-csrf_gm-MariahTablet-EOS_1200x628.jpg, is an online TurboTax ad for TY 2021 that, according to Intuit's data at GX434, [REDACTED] (GX600 (Intuit); GX434 (Intuit); GX Summary 002 (Complaint Counsel) at 'Summary-Online_Ads' row 641; Baburek (Complaint Counsel) Tr. 318-23).

Response to Finding No. 418:

The Proposed Finding is misleading because GX600 is not an "online TurboTax ad." It is a display advertisement for a specific TurboTax SKU, TurboTax Free Edition. (GX600 (Intuit)).

Intuit otherwise has no specific response except to note that the number of impressions or clicks an ad received is not evidence that the ad conveyed any of the claims asserted by

Complaint Counsel, that reasonable consumers were likely to be deceived by the ad, or that the claims were material to reasonable consumers. The dissemination data offered in the Proposed Finding illustrates that reasonable consumers were *unlikely* to be deceived. That Complaint Counsel have identified only 26 even potentially relevant consumer complaints from Tax Year 2021 (see CCFF ¶¶677) when GX600 ran, even though GX600 on its own [REDACTED] [REDACTED] that year, is strong evidence that reasonable consumers were not deceived by GX600 or any of the other challenged advertisements that ran in Tax Year 2021 (see PFF ¶¶632, 637, 639, 641-647).

419. A screenshot from GX600 is pictured below.



(GX600 (Intuit)).

Response to Finding No. 419:

The Proposed Finding is incomplete and misleading because Complaint Counsel have omitted critical information for evaluating the advertisement. (CCFF ¶419; GX600 (Intuit)). The Proposed Finding does not include additional disclosures that would have been shown to consumers along with the image reproduced above. Not captured in the Proposed Finding is the fact that the image is part of a display advertisement that was paired with text stating, “Simple tax returns only” (GX Summary 002 (FTC) at ‘Data-Online_Ad_Combined’ row 6858; RX1030

(Intuit) at row 471). In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

The Proposed Finding is also incomplete it fails to recognize that consumers clicking on the advertisement would be taken directly to the landing page on the TurboTax website for TurboTax Free Edition, where they would see detailed information about the free offer's qualifications. (PFF ¶253; Johnson (Intuit) Tr. 595-596). Indeed, Complaint Counsel and their witnesses recognized that the TurboTax website repeatedly disclosed the qualifications of free TurboTax offers and provided detailed information about those qualifications. (PFF ¶¶369-370). For example, Complaint Counsel's own 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 the free TurboTax offers. (PFF ¶790). Reasonable consumers understood that display ads such as GX600 link to a website when clicked (here, the TurboTax website) that includes more information about the advertised free offer, and by linking directly to the TurboTax website, the advertisement incorporated the detailed information on the TurboTax website. (PFF ¶254; *see also* CCF ¶455 ("The TurboTax website is ... integrated into TurboTax's free advertising.")).

Moreover, the Proposed Finding does not support an inference that the challenged ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The advertisement includes the "TurboTax Free Edition" logo and states prominently, "Simple tax returns only." (GX600 (FTC)). By identifying the specific TurboTax SKU being advertised, the ad informed consumers that the offer does not apply to all TurboTax products. (*See* PFF ¶¶317, 321). And by stating that the

offer was available for “Simple tax returns only,” the ad informed consumers that the free offer was not available to everyone, and that eligibility was contingent on the complexity of the consumer’s tax returns. (PFF ¶322; *see also* PFF ¶¶130-145). Complaint Counsel have offered no evidence that *all* components of the ad were not visible to consumers (*see* PFF ¶255), nor could they given the prominence of that content and the benchmarking analysis showing that the disclosures were comparable to disclosures in other companies’ ads (*see* PFF ¶¶257-259).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel assert were conveyed. Instead, the undisputed testimony from Intuit’s executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (*See* PFF ¶¶167-177, 190, 192-202, 405, 852, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel have not offered any evidence that this ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the qualifications included in the ad would prevent consumers from being misled by the ad. (*See* PFF ¶¶260-264, 302-322, 328-330, 334). Even without those disclosures, consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

420. RX1407 (GX610), which Intuit produced bearing Bates number INTUIT-FTC-PART3-000000525 and with the original file name QTTX1919H_Auctioneer_HD_WEB_TTX_YouTube_TurboTax_06.mp4, is an online TurboTax ad for TY 2021 that, according to Intuit’s data at GX434, [REDACTED]

[REDACTED]. (RX1407 (GX610) (Intuit); GX434 (Intuit); GX Summary 002 (Complaint Counsel) at 'Summary-Online_Ads' row 304; Baburek (Complaint Counsel) Tr. 318–23).

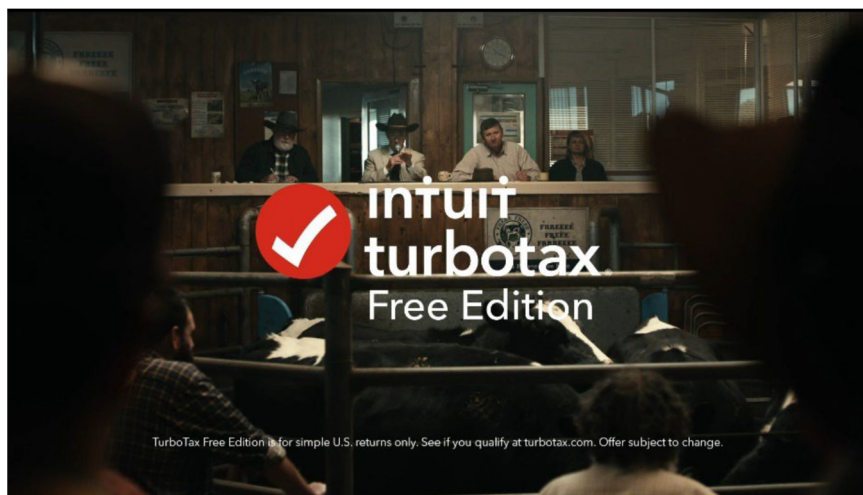
Response to Finding No. 420:

The Proposed Finding is misleading because RX1407 is not an “online TurboTax ad.” It is a brand video advertisement for a specific TurboTax SKU, TurboTax Free Edition. (RX1407 (Intuit); GX146 (Ryan (Intuit) Dep.) at 39).

Intuit otherwise has no specific response except to note that the number of impressions or clicks an ad received is not evidence that the ad conveyed any of the claims asserted by Complaint Counsel, that reasonable consumers were likely to be deceived by the ad, or that the claims were material to reasonable consumers. The dissemination data offered in the Proposed Finding illustrates that reasonable consumers were *unlikely* to be deceived. That Complaint Counsel have identified only 26 even potentially relevant consumer complaints from Tax Year 2021 (*see* CCF ¶¶677) when RX1407 ran, even though RX1407 on its own [REDACTED] [REDACTED] that year, is strong evidence that reasonable consumers were not deceived by RX1407 or any of the other challenged advertisements that ran in Tax Year 2021 (*see* PFF ¶¶632, 637, 639, 641-647).

The challenged ad also has not aired in the last year. Moreover, the binding Consent Order with the attorneys general of all 50 states and the District of Columbia already prohibits Intuit from running this ad or substantially similar ads in the future, and Intuit has disclaimed any intention of running such ads again in the future. (*See* PFF ¶¶225, 810, 824).

421. A screenshot from RX1407 (GX610) is pictured below.



(RX1407 (Intuit)).

Response to Finding No. 421:

The Proposed Finding is misleading because it does not reflect how consumers would have actually seen the ad. The ad would appear much larger, and the text much clearer, to consumers viewing the ad on YouTube, either on a TV or a computer. (See PFF ¶¶229, 232).

The Proposed Finding is also incomplete and misleading because it is just a snippet of the full brand video ad that actually ran and Complaint Counsel have omitted critical information for evaluating the advertisement. (CCFF ¶421; RX1407 (Intuit)). Consumers did not view the challenged advertisement as a single, static image. Not captured in the Proposed Finding is the voiceover included in RX1407 stating that “TurboTax Free Edition is free.” In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

The Proposed Finding is also incomplete because it fails to recognize that consumers clicking on the links accompanying the advertisement would be taken directly to the landing page on the TurboTax website for TurboTax Free Edition, where they would see detailed

information about the SKU's qualifications. (Johnson (Intuit) Tr. 595-596; *see also* PFF ¶253). Indeed, Complaint Counsel and their witnesses recognized that the TurboTax website repeatedly disclosed the qualifications of free TurboTax offers and provided detailed information about those qualifications. (PFF ¶¶369-370). For example, Complaint Counsel's own 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 the free TurboTax offers. (PFF ¶790). Reasonable consumers understood that display ads such as RX1407 (GX610) link to a website when clicked (here, the TurboTax website) that includes more information about the advertised free offer, and by linking directly to the TurboTax website, the advertisement incorporated the detailed information on the TurboTax website. (Golder (Intuit) Tr. 1116-1117; *see also* PFF ¶254; CCF ¶455 ("The TurboTax website is ... integrated into TurboTax's free advertising.")).

Moreover, the Proposed Finding does not support an inference that the challenged ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The advertisement includes a large TurboTax Free Edition logo, states that "TurboTax Free Edition is for simple U.S. returns only," and tells consumers that they can "See if [they] qualify at turbotax.com." (RX1407 (Intuit)). The ad also includes a voiceover stating that the free offer was for a specific TurboTax SKU, "TurboTax Free Edition." (RX1407 (Intuit)). By identifying the specific TurboTax SKU being advertised, the ad informed consumers that the offer does not apply to all TurboTax products. (*See* PFF ¶¶317, 321). Likewise, by stating that "TurboTax Free Edition is for simple U.S. returns only," the ad informed consumers that the free offer was not available to everyone, and that eligibility was contingent on the complexity of the consumer's tax returns. (PFF ¶322; *see*

also PFF ¶¶130-145). And by stating “See if you qualify at turbotax.com,” the ad conveyed to consumers that not every taxpayer qualifies for the TurboTax SKU advertised and told consumers precisely where to go to find additional information about eligibility qualifications. (PFF ¶¶323-325). Complaint Counsel have offered no evidence that *all* components of the ad were not visible or audible to consumers (*see* PFF ¶¶230-231), nor could they given the prominence of that content and the benchmarking analysis showing that the disclosures were comparable to disclosures in other companies’ ads (*see* PFF ¶¶237-240).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel assert were conveyed. Instead, the undisputed testimony from Intuit’s executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (*See* PFF ¶¶167-177, 190, 192-202, 405, 852, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel have not offered any evidence that this ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the qualifications included in the ad would prevent consumers from being misled by the ad. (*See* PFF ¶¶242-246, 302-322, 328-330, 334). Even without those disclosures, consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

422. RX1414 (GX620), which Intuit produced bearing Bates number INTUIT-FTC-PART3-000000535 and with the original file name

QTTX0023000H_Dance_Workout_REV1_WEB_HD_30_LCD20_TurboTax_30.mp4, is an online TurboTax ad for TY 2021 that, according to Intuit's data at GX434, [REDACTED] (RX1414 (GX620) (Intuit); GX434 (Intuit); GX Summary 002 (Complaint Counsel) at 'Summary-Online_Ads' row 234, row 235, row 236, row 237, row 238; Baburek (Complaint Counsel) Tr. 318–23).

Response to Finding No. 422:

The Proposed Finding is misleading because RX1414 is not an “online TurboTax ad.” It is a brand video advertisement for a specific TurboTax SKU, TurboTax Free Edition. (RX1414 (Intuit); GX146 (Ryan (Intuit) Dep.) at 39).

Intuit otherwise has no specific response except to note that the number of impressions or clicks an ad received is not evidence that the ad conveyed any of the claims asserted by Complaint Counsel, that reasonable consumers were likely to be deceived by the ad, or that the claims were material to reasonable consumers. The dissemination data offered in the Proposed Finding illustrates that reasonable consumers were *unlikely* to be deceived. That Complaint Counsel have identified only 26 even potentially relevant consumer complaints from Tax Year 2021 (*see* CCF ¶¶677) when RX1414 ran, even though RX1414 on its own [REDACTED] [REDACTED] that year, is strong evidence that reasonable consumers were not deceived by RX1414 or any of the other challenged advertisements that ran in Tax Year 2021 (*see* PFF ¶¶632, 637, 639, 641-647).

The challenged ad also has not aired in the last year. Moreover, the binding Consent Order with the attorneys general of all 50 states and the District of Columbia already prohibits Intuit from running this ad or substantially similar ads in the future, and Intuit has disclaimed any intention of running such ads again in the future. (*See* PFF ¶¶225, 810, 824).

423. Screenshots from RX1414 (GX620) are pictured below.



(RX1414 (Intuit)).

Response to Finding No. 423:

The Proposed Finding is misleading because it does not reflect how consumers would have actually seen the ad. The ad would appear much larger, and the text much clearer, to consumers viewing the ad on YouTube, either on a TV or a computer. (See PFF ¶¶229, 232).

The Proposed Finding is also incomplete and misleading because it is just a snippet of the full brand video ad that actually ran and Complaint Counsel have omitted critical information for evaluating the advertisement. (CCFF ¶423; RX1414 (Intuit)). Consumers did not view the challenged advertisement as static images. Not captured in the Proposed Finding is the voiceover included in RX1414 stating that “TurboTax Free Edition is free” and “See details at turbotax.com.” In determining the claims conveyed by an advertisement and whether it was

likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

The Proposed Finding is also incomplete because it fails to recognize that consumers clicking on the links accompanying the advertisement would be taken directly to the landing page on the TurboTax website for TurboTax Free Edition, where they would see detailed information about the SKU's qualifications. (Johnson (Intuit) Tr. 595-596; *see also* PFF ¶253). Indeed, Complaint Counsel and their witnesses recognized that the TurboTax website repeatedly disclosed the qualifications of free TurboTax offers and provided detailed information about those qualifications. (PFF ¶¶369-370). For example, Complaint Counsel's own 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 the free TurboTax offers. (PFF ¶790). Reasonable consumers understood that display ads such as RX1414 (GX620) link to a website when clicked (here, the TurboTax website) that includes more information about the advertised free offer, and by linking directly to the TurboTax website, the advertisement incorporated the detailed information on the TurboTax website. (Golder (Intuit) Tr. 1116-1117; *see also* PFF ¶254; CCF ¶455 ("The TurboTax website is ... integrated into TurboTax's free advertising.")).

Moreover, the Proposed Finding does not support an inference that the challenged ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The advertisement includes a large TurboTax Free Edition logo, states that "TurboTax Free Edition is for simple U.S. returns only," and tells consumers that they can "See if [they] qualify at turbotax.com." (RX1414 (Intuit)). The ad also includes a voiceover stating that the free offer was for a specific TurboTax SKU,

“TurboTax Free Edition,” and telling consumers to “See details at turbotax.com.” (RX1414 (Intuit)). By identifying the specific TurboTax SKU being advertised, the ad informed consumers that the offer does not apply to all TurboTax products. (See PFF ¶¶317, 321). Likewise, by stating that “TurboTax Free Edition is for simple U.S. returns only,” the ad informed consumers that the free offer was not available to everyone, and that eligibility was contingent on the complexity of the consumer’s tax returns. (PFF ¶322; *see also* PFF ¶¶130-145). And by stating verbally “See details at turbotax.com” and in writing “See if you qualify at turbotax.com,” the ad conveyed to consumers that not every taxpayer qualifies for the TurboTax SKU advertised and told consumers precisely where to go to find additional information about the offer’s qualifications. (PFF ¶¶323-325). Complaint Counsel have offered no evidence that *all* components of the ad were not visible or audible to consumers (*see* PFF ¶¶230-231), nor could they given the prominence of that content and the benchmarking analysis showing that the disclosures were comparable to disclosures in other companies’ ads (*see* PFF ¶¶237-240).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel assert were conveyed. Instead, the undisputed testimony from Intuit’s executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (*See* PFF ¶¶167-177, 190, 192-202, 405, 852, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel have not offered any evidence that this ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the qualifications included in the ad would prevent consumers from being misled

by the ad. (See PFF ¶¶242-246, 302-322, 328-330, 334). Even without those disclosures, consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

424. RX1119 (GX621), which Intuit produced bearing Bates number INTUIT-FTC-PART3-000000536 and with the original file name QTTX0021000H_Auctioneer_REV1_WEB_HD_15_LCD20_TurboTax_15.mp4, is an online TurboTax ad for TY 2021 that, according to Intuit's data at GX434, [REDACTED]. (RX1119 (GX621) (Intuit); GX434 (Intuit); GX Summary 002 (Complaint Counsel) at 'Summary-Online_Ads' row 229, row 230, row 231, row 232, row 233; Baburek (Complaint Counsel) Tr. 318-23).

Response to Finding No. 424:

The Proposed Finding is misleading because RX1119 is not an “online TurboTax ad.” It is a brand video advertisement for a specific TurboTax SKU, TurboTax Free Edition. (RX1119 (Intuit); GX146 (Ryan (Intuit) Dep.) at 39).

Intuit otherwise has no specific response except to note that the number of impressions or clicks an ad received is not evidence that the ad conveyed any of the claims asserted by Complaint Counsel, that reasonable consumers were likely to be deceived by the ad, or that the claims were material to reasonable consumers. The dissemination data offered in the Proposed Finding illustrates that reasonable consumers were *unlikely* to be deceived. That Complaint Counsel have identified only 26 even potentially relevant consumer complaints from Tax Year 2021 (see CCF ¶¶677) when RX1119 ran, even though RX1119 on its own [REDACTED] that year, is strong evidence that reasonable consumers were not deceived by RX1119 or any of the other challenged advertisements that ran in Tax Year 2021 (see PFF ¶¶632, 637, 639, 641-647).

The challenged ad also has not aired in the last year. Moreover, the binding Consent Order with the attorneys general of all 50 states and the District of Columbia already prohibits Intuit from running this ad or substantially similar ads in the future, and Intuit has disclaimed any intention of running such ads again in the future. (See PFF ¶¶225, 810, 824).

425. Screenshots from RX1119 (GX621) are pictured below.



(RX1119 (Intuit)).

Response to Finding No. 425:

The Proposed Finding is misleading because it does not reflect how consumers would have actually seen the ad. The ad would appear much larger, and the text much clearer, to consumers viewing the ad on YouTube, either on a TV or a computer. (See PFF ¶¶229, 232).

The Proposed Finding is also incomplete and misleading because it is just a snippet of the full brand video ad that actually ran and Complaint Counsel have omitted critical information for

evaluating the advertisement. (CCFF ¶425; RX1119 (Intuit)). Consumers did not view the challenged advertisement as static images. Not captured in the Proposed Finding is the voiceover included on RX1119 stating that “TurboTax Free Edition is free” and “See details at turbotax.com.” In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

The Proposed Finding is also incomplete because it fails to recognize that consumers clicking on the links accompanying the advertisement would be taken directly to the landing page on the TurboTax website for TurboTax Free Edition, where they would see detailed information about the SKU’s qualifications. (Johnson (Intuit) Tr. 595-596; *see also* PFF ¶253). Indeed, Complaint Counsel and their witnesses recognized that the TurboTax website repeatedly disclosed the qualifications of free TurboTax offers and provided detailed information about those qualifications. (PFF ¶¶369-370). For example, Complaint Counsel’s own 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 the free TurboTax offers. (PFF ¶790). Reasonable consumers understood that display ads such as RX1119 (GX621) link to a website (here, the TurboTax website) that includes more information about the advertised free offer, and by linking directly to the TurboTax website, the advertisement incorporated the detailed information on the TurboTax website. (Golder (Intuit) Tr. 1116-1117; *see also* PFF ¶254; CCFF ¶455 (“The TurboTax website is ... integrated into TurboTax’s free advertising.”)).

Moreover, the Proposed Finding does not support an inference that the challenged ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would

necessarily be free for the consumer when it was not. The advertisement includes a large TurboTax Free Edition logo, states that “TurboTax Free Edition is for simple U.S. returns only,” and tells consumers that they can “See if [they] qualify at turbotax.com.” (RX1119 (Intuit)). The ad also includes a voiceover stating that the free offer was for a specific TurboTax SKU, “TurboTax Free Edition,” and telling consumers to “See details at turbotax.com.” (RX1119 (Intuit)). By identifying the specific TurboTax SKU being advertised, the ad informed consumers that the offer does not apply to all TurboTax products. (*See* PFF ¶¶317, 321). Likewise, by stating that “TurboTax Free Edition is for simple U.S. returns only,” the ad informed consumers that the free offer was not available to everyone, and that eligibility was contingent on the complexity of the consumer’s tax returns. (PFF ¶322; *see also* PFF ¶¶130-145). And by stating verbally “See details at turbotax.com” and in writing “See if you qualify at turbotax.com,” the ad conveyed to consumers that not every taxpayer qualifies for the TurboTax SKU advertised and told consumers precisely where to go to find additional information about the offer’s qualifications. (PFF ¶¶323, 325). Complaint Counsel have offered no evidence that *all* components of the ad were not visible and audible to consumers (*see* PFF ¶¶230-231), nor could they given the prominence of that content and the benchmarking analysis showing that the disclosures were comparable to disclosures in other companies’ ads (*see* PFF ¶¶237-240).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel assert were conveyed. Instead, the undisputed testimony from Intuit’s executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (*See* PFF ¶¶167-177, 190, 192-202, 405, 852, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel have not offered any evidence that this ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the qualifications included in the ad would prevent consumers from being misled by the ad. (See PFF ¶¶242-246, 302-322, 328-330, 334). Even without those disclosures, consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

426. RX1415 (GX623), which Intuit produced bearing Bates number INTUIT-FTC-PART3-000000538 and with the original file name QTTX0019000H_Auctioneer_REV1_WEB_HD_30_LCD20_TurboTax_30.mp4, is an online TurboTax ad for TY 2021 that, according to Intuit's data at GX434, [REDACTED] (RX1415 (GX623) (Intuit); GX434 (Intuit); GX Summary 002 (Complaint Counsel) at 'Summary-Online_Ads' row 224, row 225, row 226, row 227, row 228; Baburek (Complaint Counsel) Tr. 318–23).

Response to Finding No. 426:

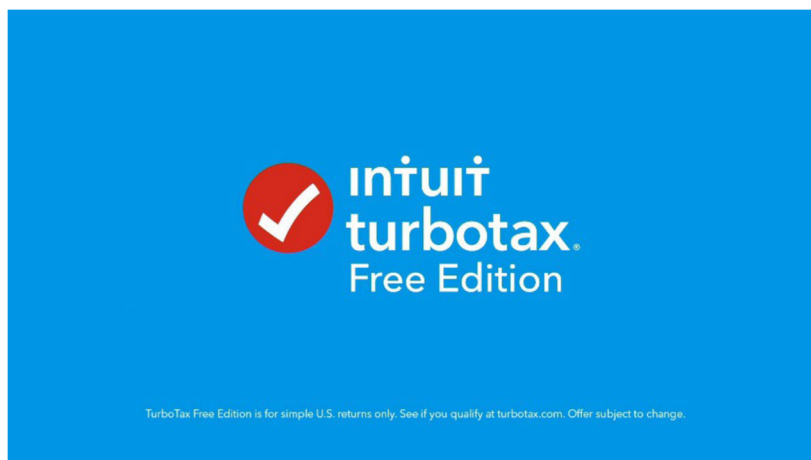
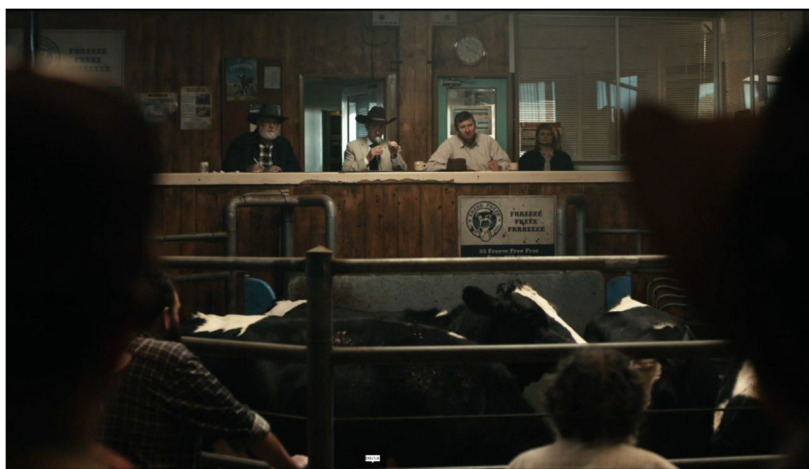
The Proposed Finding is misleading because RX1415 is not an “online TurboTax ad.” It is a brand video advertisement for a specific TurboTax SKU, TurboTax Free Edition. (RX1415 (Intuit); GX146 (Ryan (Intuit) Dep.) at 39).

Intuit otherwise has no specific response except to note that the number of impressions or clicks an ad received is not evidence that the ad conveyed any of the claims asserted by Complaint Counsel, that reasonable consumers were likely to be deceived by the ad, or that the claims were material to reasonable consumers. The dissemination data offered in the Proposed Finding illustrates that reasonable consumers were *unlikely* to be deceived. That Complaint Counsel have identified only 26 even potentially relevant consumer complaints from Tax Year

2021 (see CCFE ¶¶677) when RX1415 ran, even though RX1415 on its own [REDACTED] [REDACTED] that year, is strong evidence that reasonable consumers were not deceived by RX1415 or any of the other challenged advertisements that ran in Tax Year 2021 (see PFF ¶¶632, 637, 639, 641-647).

The challenged ad also has not aired in the last year. Moreover, the binding Consent Order with the attorneys general of all 50 states and the District of Columbia already prohibits Intuit from running this ad or substantially similar ads in the future, and Intuit has disclaimed any intention of running such ads again in the future. (See PFF ¶¶225, 810, 824).

427. Screenshots from RX1415 (GX623) are pictured below.



(RX1415 (Intuit)).

Response to Finding No. 427:

The Proposed Finding is misleading because it does not reflect how consumers would have actually seen the ad. The ad would appear much larger, and the text much clearer, to consumers viewing the ad on YouTube, either on a TV or a computer. (*See* PFF ¶¶229, 232).

The Proposed Finding is also incomplete and misleading because it is just a snippet of the full brand video ad that actually ran and Complaint Counsel have omitted critical information for evaluating the advertisement. (CCFF ¶427; RX1415 (Intuit)). Consumers did not view the challenged advertisement as static images. Not captured in the Proposed Finding is the voiceover included in RX1415 stating that “TurboTax Free Edition is free” and “See details at turbotax.com.” In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

The Proposed Finding is also incomplete because it fails to recognize that consumers clicking on the links accompanying the advertisement would be taken directly to the landing page on the TurboTax website for TurboTax Free Edition, where they would see detailed information about the SKU’s qualifications. (Johnson (Intuit) Tr. 595-596; *see also* PFF ¶253). Indeed, Complaint Counsel and their witnesses recognized that the TurboTax website repeatedly disclosed the qualifications of free TurboTax offers and provided detailed information about those qualifications. (PFF ¶¶369-370). For example, Complaint Counsel’s own 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 the free TurboTax offers. (PFF ¶790). Reasonable consumers understood that display ads such as RX1415 (GX623) link to a website when clicked (here, the TurboTax website) that includes more information about the advertised free offer, and by linking directly to the TurboTax website, the

advertisement incorporated the detailed information on the TurboTax website. (Golder (Intuit) Tr. 1116-1117; *see also* PFF ¶¶254; CCF ¶455 (“The TurboTax website is ... integrated into TurboTax’s free advertising.”)).

Moreover, the Proposed Finding does not support an inference that the challenged ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The advertisement includes a large TurboTax Free Edition logo, states that “TurboTax Free Edition is for simple U.S. returns only,” and tells consumers that they can “See if [they] qualify at turbotax.com.” (RX1415 (Intuit)). The ad also includes a voiceover stating that the free offer was for a specific TurboTax SKU, “TurboTax Free Edition,” and telling consumers to “See details at turbotax.com.” (RX1415 (Intuit)). By identifying the specific TurboTax SKU being advertised, the ad informed consumers that the offer does not apply to all TurboTax products. (*See* PFF ¶¶317, 321). Likewise, by stating that “TurboTax Free Edition is for simple U.S. returns only,” the ad informed consumers that the free offer was not available to everyone, and that eligibility was contingent on the complexity of the consumer’s tax returns. (PFF ¶322; *see also* PFF ¶¶130-145). And by stating verbally “See details at turbotax.com” and in writing “See if you qualify at turbotax.com,” the ad conveyed to consumers that not every taxpayer qualifies for the TurboTax SKU advertised and told consumers precisely where to go to find additional information about the offer’s qualifications. (PFF ¶¶323, 325). Complaint Counsel have offered no evidence that *all* components of the ad were not visible or audible to consumers (*see* PFF ¶¶230-231), nor could they given the prominence of that content and the benchmarking analysis showing that the disclosures were comparable to disclosures in other companies’ ads (*see* PFF ¶¶237-240).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel assert were conveyed. Instead, the undisputed testimony from Intuit's executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (See PFF ¶¶167-177, 190, 192-202, 405, 852, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel have not offered any evidence that this ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the qualifications included in the ad would prevent consumers from being misled by the ad. (See PFF ¶¶242-246, 302-322, 328-330, 334). Even without those disclosures, consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

428. RX1417 (GX625), which Intuit produced bearing Bates number INTUIT-FTC-PART3-000000540 and with the original file name QTTX0025000H_Dance_Workout_REV1_WEB_HD_15_LCD20_TurboTax_15.mp4, is an online TurboTax ad for TY 2021 that, according to Intuit's data at GX434, [REDACTED] (RX1417 (GX625) (Intuit); GX434 (Intuit); GX Summary 002 (Complaint Counsel) at 'Summary-Online_Ads' row 239, row 240, row 241, row 242, row 243; Baburek (Complaint Counsel) Tr. 318-23).

Response to Finding No. 428:

The Proposed Finding is misleading because RX1417 is not an "online TurboTax ad." It is a brand video advertisement for a specific TurboTax SKU, TurboTax Free Edition. (RX1417 (Intuit); GX146 (Ryan (Intuit) Dep.) at 39).

Intuit otherwise has no specific response except to note that the number of impressions or clicks an ad received is not evidence that the ad conveyed any of the claims asserted by Complaint Counsel, that reasonable consumers were likely to be deceived by the ad, or that the claims were material to reasonable consumers. The dissemination data offered in the Proposed Finding illustrates that reasonable consumers were *unlikely* to be deceived. That Complaint Counsel have identified only 26 even potentially relevant consumer complaints from Tax Year 2021 (*see* CCF ¶677) when RX1417 ran, even though RX1417 on its own [REDACTED] [REDACTED] that year, is strong evidence that reasonable consumers were not deceived by RX1417 or any of the other challenged advertisements that ran in Tax Year 2021 (*see* PFF ¶¶632, 637, 639, 641-647).

The challenged ad also has not aired in the last year. Moreover, the binding Consent Order with the attorneys general of all 50 states and the District of Columbia already prohibits Intuit from running this ad or substantially similar ads in the future, and Intuit has disclaimed any intention of running such ads again in the future. (*See* PFF ¶¶225, 810, 824).

429. Screenshots from RX1417 (GX625) are pictured below.





(RX1417 (Intuit)).

Response to Finding No. 429:

The Proposed Finding is misleading because it does not reflect how consumers would have actually seen the ad. The ad would appear much larger, and the text much clearer, to consumers viewing the ad on YouTube, either on a TV or a computer. (See PFF ¶¶229, 232).

The Proposed Finding is also incomplete and misleading because it is just a snippet of the full brand video ad that actually ran and Complaint Counsel have omitted critical information for evaluating the advertisement. (CCFF ¶429; RX1417 (Intuit)). Consumers did not view the challenged advertisement as static images. Not captured in the Proposed Finding is the voiceover included in RX1417 stating that “TurboTax Free Edition is free” and “See details at turbotax.com.” In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

The Proposed Finding is also incomplete because it fails to recognize that consumers clicking on the links accompanying the advertisement would be taken directly to the landing page on the TurboTax website for TurboTax Free Edition, where they would see detailed information about the SKU’s qualifications. (Johnson (Intuit) Tr. 595-596; see also PFF ¶253).

Indeed, Complaint Counsel and their witnesses recognized that the TurboTax website repeatedly disclosed the qualifications of free TurboTax offers and provided detailed information about those qualifications. (PFF ¶¶369-370). For example, Complaint Counsel’s own 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 the free TurboTax offers. (PFF ¶790). Reasonable consumers understood that display ads such as RX1417 (GX625) link to a website when clicked (here, the TurboTax website) that includes more information about the advertised free offer, and by linking directly to the TurboTax website, the advertisement incorporated the detailed information on the TurboTax website. (Golder (Intuit) Tr. 1116-1117; *see also* PFF ¶254; CCF ¶455 (“The TurboTax website is ... integrated into TurboTax’s free advertising.”)).

Moreover, the Proposed Finding does not support an inference that the challenged ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The advertisement includes a large TurboTax Free Edition logo, states that “TurboTax Free Edition is for simple U.S. returns only,” and tells consumers that they can “see if [they] qualify at turbotax.com.” (RX1417 (Intuit)). The ad also includes a voiceover stating that the free offer was for a specific TurboTax SKU, “TurboTax Free Edition,” and telling consumers to “See details at turbotax.com.” (RX1417 (Intuit)). By identifying the specific TurboTax SKU being advertised, the ad informed consumers that the offer does not apply to all TurboTax products. (*See* PFF ¶¶317, 321). Likewise, by stating that “TurboTax Free Edition is for simple U.S. returns only,” the ad informed consumers that the free offer was not available to everyone, and that eligibility was contingent on the complexity of the consumer’s tax returns. (PFF ¶322; *see also* PFF ¶¶130-

145). And by stating verbally “See details at turbotax.com” and in writing “See if you qualify at turbotax.com,” the ad conveyed to consumers that not every taxpayer qualifies for the TurboTax SKU advertised and told consumers precisely where to go to find additional information about the offer’s qualifications. (PFF ¶¶323, 325). Complaint Counsel have offered no evidence that *all* components of the ad were not visible or audible to consumers (*see* PFF ¶¶230-231), nor could they given the prominence of that content and the benchmarking analysis showing that the disclosures were comparable to disclosures in other companies’ ads (*see* PFF ¶¶237-240).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel assert were conveyed. Instead, the undisputed testimony from Intuit’s executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (*See* PFF ¶¶167-177, 190, 192-202, 405, 852, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel have not offered any evidence that this ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the qualifications included in the ad would prevent consumers from being misled by the ad. (*See* PFF ¶¶242-246, 302-322, 328-330, 334). Even without those disclosures, consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

E. Email Marketing

430. In numerous instances, Intuit sent email messages to consumers representing that TurboTax is free. (*See e.g.* GX171 (Complaint Counsel) at CC-00005813; GX172 (Complaint Counsel) at CC-00005814; GX181 (Complaint Counsel) at CC-00005823; GX477 (Complaint Counsel) at CC-00010142; GX480 (Complaint Counsel) at CC-00010145; GX383 (Schulte) at CC-00007177 (2020 email from TurboTax stating “FREE Guaranteed \$0 Fed. \$0 State. \$0 to File.”); GX386 (Adamson) at CC-00007182 (2020 email from TurboTax stating “FREE guaranteed \$0 Fed \$0 State \$0 To File TurboTax Free Edition, simple tax returns.*”); GX381 (Schulte) at CC-00007173 (2019 email from TurboTax stating “FREE guaranteed \$0 Fed \$0 State \$0 To File” and “File your simple tax returns for FREE Free, free free free FREE! You have everything you need to finish and file for free, free, free and yes __FREE!”); GX377 (Schulte) at CC-00007165 (2018 email from TurboTax stating “Welcome back to TurboTax Get your biggest refund for free this year FREE guaranteed \$0 Fed \$0 State \$0 To File); GX373 (Schulte) at CC-00007155 (2017 email from TurboTax stating “Your W-2 is Now Available. File Free Today!”); GX374 (Schulte) at CC-00007158 (2017 email from TurboTax stating “Get your biggest refund for free again this year[.] Absolute zero GUARANTEED \$0 Fed \$0 State \$0 To File.”); GX388 (Adamson) at CC-00007184 (2016 email from TurboTax stating “Get your biggest refund absolutely free. Join the millions who file for \$0 Absolutezero 1040EZ/A \$0 Fed \$0 State \$0 To File”).

Response to Finding No. 430:

The Proposed Finding is incorrect and unsupported. Intuit did not send consumers emails representing, expressly or impliedly, that “TurboTax is free.” The challenged email ads all included disclosure language indicating that the free TurboTax offer was only available to consumers who qualify, through language such as “TurboTax Free Edition, for simple tax returns only. See if you qualify,” or “Pay \$0 to file your simple federal taxes with TurboTax Free Edition (1040EZ/1040A returns)” —with the qualifications often written in different ways in multiple locations in a single email. (PFF ¶281; *see also* Responses to CCF ¶¶431-442). Most of the challenged email ads also expressly identified the specific TurboTax SKU being advertised. Complaint Counsel have offered no evidence that these qualifications were not visible to consumers (*see* PFF ¶286), nor could they given the prominence of those qualifications (*see* PFF ¶¶287-290).

Further, Complaint Counsel have not offered any evidence that Intuit intended to make the claim “TurboTax is free” in any of the challenged email ads. Instead, the undisputed testimony from Intuit’s executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (See PFF ¶¶167-177, 190, 192-202, 405, 852, 857, 860, 870).

The Proposed Finding also does not support an inference that the challenged email ads were likely to mislead reasonable consumers. Complaint Counsel offered no evidence that the challenged email ads were likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the qualifications included in the ads ensured that reasonable consumers understood that a specific TurboTax SKU was being advertised as free, that there were qualifications for the free TurboTax SKU being advertised, and the nature and character of those qualifications. (See PFF ¶¶287-292, 302-322, 328-330, 334, 470-514, 520-527). Even without those disclosures, reasonable consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

431. In some instances, Intuit’s marketing partners (such as Chase) sent email messages to consumers representing that TurboTax is free. (See *e.g.* GX371 (Bansal) at CC-00007150 (2018 email from Chase stating “File your taxes for \$0 with TurboTax Free Edition.”)).

Response to Finding No. 431:

The Proposed Finding is incorrect, incomplete, and misleading. Neither Intuit nor its marketing partners sent consumers emails representing that “TurboTax is free.” In making that claim, the Proposed Finding ignores or disregards that GX371 repeatedly conveys the qualifications for the free offer in multiple locations throughout the email. As the Proposed

Finding notes, the subject line of the email stated that the free offer was for “TurboTax Free Edition.” (GX371 (FTC)). The first line of text in the email then stated, “Pay \$0 to file your simple federal taxes with TurboTax.” (GX371 (FTC)). Further down the email, using the same font size as other text in the message, it stated “File Your Simple Fed Return for \$0,” followed by “TurboTax Free Edition, 1030EZ/1040A.” (GX371 (FTC)). Two lines of text below that, the email again stated in font size that matched the rest of the email, “Pay \$0 To Prepare And File Your Simple Federal Taxes,” followed by “with TurboTax Free Edition (1040EZ/1040A returns).” (GX371 (FTC)). And then near the bottom of the email, under the bolded, capitalized, and blue heading “Important Information,” the email stated, “TurboTax Free Edition: \$0 federal (forms 1040EZ/1040A) offer only available with TurboTax Free Edition,” “TurboTax online and mobile pricing is based on your tax situation and varies by product.” (GX371 (FTC)). These numerous qualifications, which are unavoidable when scrolling through the email, made it clear that the free offer was for a specific TurboTax SKU—TurboTax Free Edition—and that the free SKU was available only for consumers with simple tax returns, which the email identified as Forms 1040EZ/1040A. Complaint Counsel have offered no evidence that these qualifications were not visible to consumers (*see* PFF ¶286), nor could they given the prominence of those qualifications (*see* PFF ¶¶287-290).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel offered no evidence that the ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the qualifications included in the ad ensured that reasonable consumers understood that only a specific TurboTax SKU was being advertised as free, that there were qualifications for that free

TurboTax SKU, and the nature and character of those qualifications. (*See* PFF ¶¶287-292, 302-322, 328-329, 334, 470-527). Even without those disclosures, reasonable consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

1. Email Marketing TY 2019

432. GX171 is an email FTC Investigator Diana Shiller received from TurboTax in March 2020 at an email address she created to capture the consumer experience. (Shiller (Complaint Counsel) Tr. 197-98; GX171 (Complaint Counsel) at CC-00005813).

Response to Finding No. 432:

The Proposed Finding is incomplete and misleading. It ignores that Ms. Shiller only received the email captured in GX171 because she signed up for a TurboTax account on the TurboTax website (GX342 ¶102; Shiller (FTC) Tr. 197-198; PFF ¶283)—where she would have seen detailed information about all TurboTax SKUs, including free SKUs (*see* PFF ¶¶364-441)—and then engaged in behavior on the TurboTax website that demonstrated that she was likely to qualify for a free TurboTax SKU (and Ms. Shiller had in fact previously filed her taxes for free using TurboTax) (*See* PFF ¶¶198, 283; Shiller (FTC) Tr. 256; *see also* RX1390 (Shiller (FTC) Dep.) at 27-28; Shiller (FTC) Tr. 206). In fact, Intuit typically only sends emails for free TurboTax SKUs to consumers already familiar with those offers, either because they previously used a free TurboTax SKU or had started their return in a free TurboTax SKU. (PFF ¶283).

433. GX171 includes the following claims:

- “Get that Green for St. Patty’s Day FREE guaranteed \$0 Fed \$0 State \$0 To File.”
- “Do your taxes for FREE! The IRS is sending refunds out every day—the sooner you file, the faster you’ll get yours. Get started today!”

(GX171 (Complaint Counsel) at CC-00005813).

Response to Finding No. 433:

The Proposed Finding is incomplete and misleading because it disregards the disclosures included in the email. GX171 also states, “TurboTax Free Edition, simple tax returns only*.” The finding and exhibit are also incomplete and misleading because they do not include the full content of the email. The text “TurboTax Free Edition, simple tax returns only” was followed by an asterisk (GX171 (FTC)), which indicated to reasonable consumers that there was “additional information below” in the email (Shiller (FTC) Tr. 211, 253). That additional information is missing from this finding and the underlying exhibit. (*Compare* GX171 (FTC), with PFF ¶¶282, 353; GX371 (FTC); RX1431 (Intuit)). In other emails, for example, an asterisk directed consumers to language stating, “For simple tax returns only. Not all taxpayers qualify. A simple tax return is Form 1040 only,” along with additional details about the tax situations that were covered by the free offer. (*See* RX1431 (Intuit)). Because the exhibit offered by Complaint Counsel is incomplete, it does not support any argument that the ad conveyed the claim that Complaint Counsel assert or that it was likely to mislead reasonable consumers. (*See* PCL ¶¶9, 68; *see also* *FTC v. Cyberspace.Com LLC*, 453 F.3d 1196, 1200 (9th Cir. 2006) (“The tendency of the advertising to deceive must be judged by viewing it as a whole.”); *S.C. Johnson & Son, Inc. v. Clorox Co.*, 241 F.3d 232, 238 (2d Cir. 2001) (“[I]n reviewing FTC actions prohibiting unfair advertising practices under the Federal Trade Commission Act a court must consider the advertisement in its entirety and not ... engage in disputatious dissection.” (quotation marks omitted))).

Instead, the asterisk in Complaint Counsel’s incomplete copy of the ad supports an inference that additional qualifying language was included in the advertisement, similar to other email ads in the record. (*See* RX1431 (Intuit)). When considered as a whole, including the qualifications that Complaint Counsel excluded from the exhibit, GX171 did not make the claim

alleged nor was it likely to mislead reasonable consumers. (See PCL ¶¶9, 68; *see also FTC v. Cyberspace.Com LLC*, 453 F.3d 1196, 1200 (9th Cir. 2006) (“The tendency of the advertising to deceive must be judged by viewing it as a whole.”); *S.C. Johnson & Son, Inc. v. Clorox Co.*, 241 F.3d 232, 238 (2d Cir. 2001) (“[I]n reviewing FTC actions prohibiting unfair advertising practices under the Federal Trade Commission Act a court must consider the advertisement in its entirety and not ... engage in disputatious dissection.” (quotation marks omitted))).

Moreover, the Proposed Finding is incomplete because it does not mention that consumers who clicked on the advertisement would be taken directly to the TurboTax website, where they would see detailed information about the free offer’s qualifications. (PFF ¶284). Indeed, Complaint Counsel and their witnesses recognized that the TurboTax website repeatedly disclosed the qualifications of free TurboTax offers and provided detailed information about those qualifications. (PFF ¶¶369-370). For example, Complaint Counsel’s own 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 the free TurboTax offers. (PFF ¶790). Reasonable consumers understood that email ads such as GX171 link to a website (here, the TurboTax website) that includes more information about the advertised free offer, and by linking directly to the TurboTax website, the advertisement incorporated the detailed information on the TurboTax website. (PFF ¶285; *see also CCF ¶455* (“The TurboTax website is ... integrated into TurboTax’s free advertising.”)).

The Proposed Finding does not support an inference that the ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The advertisement stated, “TurboTax Free Edition, simple tax returns only*,” with an asterisk providing additional information about the offer’s qualifications.

(GX171 (FTC)). Complaint Counsel have offered no evidence that those qualifications were not visible to consumers (*see* PFF ¶286), nor could they given the prominence of those qualifications (*see* PFF ¶¶287-290). Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel assert were conveyed. Instead, the undisputed testimony from Intuit’s executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (*See* PFF ¶¶167-177, 190, 192-202, 405, 852, 857, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel have not offered any evidence that this ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the qualifications included in the ad would prevent consumers from being misled by the ad. (*See* PFF ¶¶287-292, 302-322, 328-329, 334). Even without those disclosures, consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

434. GX171 includes the following disclaimer in font that is significantly smaller and less prominent than the free claim: “TurboTax Free Edition, simple tax returns only*.” (GX171 (Complaint Counsel) at CC-00005813).

Response to Finding No. 434:

The Proposed Finding is incomplete and misleading. First, it wrongly refers to language in the ad as a “disclaimer.” Second, it does not include the full content of the challenged email. As reflected in the Proposed Finding, the text “TurboTax Free Edition, simple tax returns only” was followed by an asterisk (GX171 (FTC)), which indicated to reasonable consumers that there

was “additional information below” in the email (Shiller (FTC) Tr. 211, 253). That additional information is missing from this finding and exhibit. (*Compare* GX171 (FTC), with PFF ¶325; RX1431 (Intuit)). Because the exhibit offered by Complaint Counsel is incomplete, no finding can be made about whether the email, when considered as a whole, conveyed the claims that Complaint Counsel assert or that it was likely to mislead reasonable consumers. (*See* PCL ¶¶9, 68; *see also* *FTC v. Cyberspace.Com LLC*, 453 F.3d 1196, 1200 (9th Cir. 2006) (“The tendency of the advertising to deceive must be judged by viewing it as a whole.”); *S.C. Johnson & Son, Inc. v. Clorox Co.*, 241 F.3d 232, 238 (2d Cir. 2001) (“[I]n reviewing FTC actions prohibiting unfair advertising practices under the Federal Trade Commission Act a court must consider the advertisement in its entirety and not ... engage in disputatious dissection.” (quotation marks omitted))).

The Proposed Finding is also incorrect or at least misleading in representing that the text “TurboTax Free Edition, simple tax returns only” was in significantly smaller and less prominent font. While that text is smaller than “Free Guaranteed” and “\$0 Fed \$0 State \$0 To File,” it is not significantly smaller, and it is plainly visible in the advertisement. (*See* GX171 (FTC)). Complaint Counsel have not offered any evidence that consumers could not see or read that text. (*See* PFF ¶286). The evidence instead establishes that such written qualifications were noticeable and legible. (*See* PFF ¶287). Accordingly, the Proposed Finding does not support an inference that the challenged ad expressly or impliedly claimed that all TurboTax was free or that TurboTax would necessarily be free for the consumer when it was not, or that reasonable consumers were likely misled by the challenged ad.

435. GX172 is an email FTC Investigator Diana Shiller received from TurboTax in July 2020 at an email address she created to capture the consumer experience. (Shiller (Complaint Counsel) Tr. 198-99; GX172 (Complaint Counsel) at CC-00005814).

Response to Finding No. 435:

The Proposed Finding is incomplete and misleading. It ignores that Ms. Shiller only received the email captured in GX172 because she signed up for a TurboTax account on the TurboTax website (GX342 ¶102; Shiller (FTC) Tr. 197-198; PFF ¶283)—where she would have seen detailed information about all TurboTax SKUs, including free SKUs (*see* PFF ¶¶364-441)—and then engaged in behavior on the TurboTax website that demonstrated that she was likely to qualify for a free TurboTax SKU (and Ms. Shiller had in fact previously filed her taxes for free using TurboTax) (*See* PFF¶¶198, 283; Shiller (FTC) Tr. 256; *see also* RX1390 (Shiller (FTC) Dep.) at 27-28; Shiller (FTC) Tr. 206). In fact, Intuit typically only sends emails for free TurboTax SKUs to consumers already familiar with those offers, either because they previously used a free TurboTax SKU or had started their return in a free TurboTax SKU. (PFF ¶283).

436. GX172 includes the following claims:

- “FREE guaranteed \$0 Fed. \$0 State. \$0 To File.”
- “Give TurboTax another shot—it’s never been easier to file your taxes for free. Import your W-2, answer simple questions about your life and we’ll get you your max refund—guaranteed! File for \$0.”

(GX172 (Complaint Counsel) at CC-00005814).

Response to Finding No. 436:

The Proposed Finding is incomplete and misleading because it omits that GX172 also states, “TurboTax Free Edition, simple tax returns only*.” The finding and exhibit are also incomplete and misleading because they do not include the full content of the email. The text “TurboTax Free Edition, simple tax returns only” was followed by an asterisk (GX172 (FTC)), which indicated to reasonable consumers that there was “additional information below” in the email (Shiller (FTC) Tr. 211, 253). That additional information is missing from this finding and the underlying exhibit. (*Compare* GX172 (FTC), *with* PFF ¶¶282, 353; GX371 (FTC); RX1431

(Intuit)). In other emails, for example, an asterisk directed consumers to language stating, “For simple tax returns only. Not all taxpayers qualify. A simple tax return is Form 1040 only,” along with additional details about the tax situations that were covered by the free offer. (See RX1431 (Intuit)). Because the exhibit offered by Complaint Counsel is incomplete, it does not support any argument that the ad conveyed the claim that Complaint Counsel assert or that it was likely to mislead reasonable consumers. (See PCL ¶¶9, 68; see also *FTC v. Cyberspace.Com LLC*, 453 F.3d 1196, 1200 (9th Cir. 2006) (“The tendency of the advertising to deceive must be judged by viewing it as a whole.”); *S.C. Johnson & Son, Inc. v. Clorox Co.*, 241 F.3d 232, 238 (2d Cir. 2001) (“[I]n reviewing FTC actions prohibiting unfair advertising practices under the Federal Trade Commission Act a court must consider the advertisement in its entirety and not ... engage in disputatious dissection.” (quotation marks omitted))).

Instead, the asterisk in Complaint Counsel’s incomplete copy of the ad supports an inference that additional qualifying language was included in the advertisement, similar to other email ads in the record. (See RX1431 (Intuit)). When considered as a whole, including the qualifications that Complaint Counsel excluded from the exhibit, GX172 did not make the claim alleged nor was it likely to mislead reasonable consumers. (See PCL ¶¶9, 68; see also *FTC v. Cyberspace.Com LLC*, 453 F.3d 1196, 1200 (9th Cir. 2006) (“The tendency of the advertising to deceive must be judged by viewing it as a whole.”); *S.C. Johnson & Son, Inc. v. Clorox Co.*, 241 F.3d 232, 238 (2d Cir. 2001) (“[I]n reviewing FTC actions prohibiting unfair advertising practices under the Federal Trade Commission Act a court must consider the advertisement in its entirety and not ... engage in disputatious dissection.” (quotation marks omitted))).

Moreover, the Proposed Finding is incomplete because it does not mention that consumers who clicked on the advertisement would be taken directly to the TurboTax website,

where they would see detailed information about the free offer's qualifications. (PFF ¶284). Indeed, Complaint Counsel and their witnesses recognized that the TurboTax website repeatedly disclosed the qualifications of free TurboTax offers and provided detailed information about those qualifications. (PFF ¶¶369-370). For example, Complaint Counsel's own 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 the free TurboTax offers. (PFF ¶790). Reasonable consumers understood that email ads such as GX172 link to a website (here, the TurboTax website) that includes more information about the advertised free offer, and by linking directly to the TurboTax website, the advertisement incorporated the detailed information on the TurboTax website. (PFF ¶285; *see also* CCFF ¶455 ("The TurboTax website is ... integrated into TurboTax's free advertising.")).

The Proposed Finding does not support an inference that the ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The advertisement stated, "TurboTax Free Edition, simple tax returns only*," with an asterisk providing additional information about the offer's qualifications. (GX172 (FTC)). Complaint Counsel have offered no evidence that those qualifications were not visible to consumers (*see* PFF ¶286), nor could they given the prominence of those qualifications (*see* PFF ¶¶287-290). Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel assert were conveyed. Instead, the undisputed testimony from Intuit's executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (*See* PFF ¶¶167-177, 190, 192-202, 405, 852, 857, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel have not offered any evidence that this ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the qualifications included in the ad would prevent consumers from being misled by the ad. (See PFF ¶¶287-292, 302-322, 328-329, 334). Even without those disclosures, consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

437. GX172 includes the following disclaimer in font that is significantly smaller and less prominent than the free claims: “TurboTax Free Edition, simple tax returns only*.” (GX172 (Complaint Counsel) at CC-00005814).

Response to Finding No. 437:

The Proposed Finding is incomplete and misleading. First, it wrongly refers to language in the ads as a “disclaimer.” Second, it does not include the full content of the challenged email. As reflected in the Proposed Finding, the text “TurboTax Free Edition, simple tax returns only” was followed by an asterisk (GX172 (FTC)), which indicated to reasonable consumers that there was “additional information below” in the email (Shiller (FTC) Tr. 211, 253). That additional information is missing from this finding and exhibit. (Compare GX172 (FTC), with PFF ¶¶282, 353; GX371 (FTC); RX1431 (Intuit)). Because the exhibit offered by Complaint Counsel is incomplete, no finding can be made about whether the email, when considered as a whole, conveyed the claims that Complaint Counsel assert or that it was likely to mislead reasonable consumers. (See PCL ¶¶9, 68; see also *FTC v. Cyberspace.Com LLC*, 453 F.3d 1196, 1200 (9th Cir. 2006) (“The tendency of the advertising to deceive must be judged by viewing it as a

whole.”); *S.C. Johnson & Son, Inc. v. Clorox Co.*, 241 F.3d 232, 238 (2d Cir. 2001) (“[I]n reviewing FTC actions prohibiting unfair advertising practices under the Federal Trade Commission Act a court must consider the advertisement in its entirety and not ... engage in disputatious dissection.” (quotation marks omitted))).

The Proposed Finding is also incorrect or at least misleading in representing that the text “TurboTax Free Edition, simple tax returns only*” was in significantly smaller and less prominent font. While that text is smaller than “Free Guaranteed” and “\$0 Fed \$0 State \$0 To File,” it is not significantly smaller, and it is plainly visible in the advertisement. (See GX172 (FTC). Additionally, “TurboTax Free Edition, simple tax returns only*” was located directly below the orange button the consumer would click to begin to file their taxes, and directly below the offer to file for free. (GX172 (FTC)). Complaint Counsel have not offered any evidence that consumers could not see or read that text. (See PFF ¶286). The evidence instead establishes that such written qualifications were noticeable and legible. (See PFF ¶287). Accordingly, the Proposed Finding does not support an inference that the challenged ad expressly or impliedly claimed that all TurboTax was free or that TurboTax would necessarily be free for the consumer when it was not, or that reasonable consumers were likely misled by the challenged ad.

2. Email Marketing TY 2020

438. GX181 is an email FTC Investigator Diana Shiller received from TurboTax in January 2021 at an email address she created to capture the consumer experience. (Shiller (Complaint Counsel) Tr. 199; GX181 (Complaint Counsel) at CC-00005823).

Response to Finding No. 438:

The Proposed Finding is incomplete and misleading. It ignores that Ms. Shiller only received the email captured in GX181 because she signed up for a TurboTax account on the TurboTax website (GX342 ¶102; Shiller (FTC) Tr. 197-198; PFF ¶283)—where she would have seen detailed information about all TurboTax SKUs, including free SKUs (see PFF ¶¶364-441)—

and then engaged in behavior on the TurboTax website that demonstrated that she was likely to qualify for a free TurboTax SKU (and Ms. Shiller had in fact previously filed her taxes for free using TurboTax) (See PFF ¶¶198, 283; Shiller (FTC) Tr. 256; *see also* RX1390 (Shiller (FTC) Dep.) at 27-28; Shiller (FTC) Tr. 206). In fact, Intuit typically only sends emails for free TurboTax SKUs to consumers already familiar with those offers, either because they previously used a free TurboTax SKU or had started their return in a free TurboTax SKU. (PFF ¶283).

439. GX181 includes the following claim: “GET YOUR MAXIMUM REFUND FAST. FREE guaranteed \$0 Fed \$0 State \$0 To File.” GX181 (Complaint Counsel) at CC-00005823).

Response to Finding No. 439:

The Proposed Finding is incomplete and misleading because it omits that GX181 also states, “TurboTax Free Edition, for simple tax returns only*.” The finding and exhibit are also incomplete and misleading because they do not include the full content of the email. The text “TurboTax Free Edition, for simple tax returns only” was followed by an asterisk (GX181 (FTC)), which indicated to reasonable consumers that there was “additional information below” in the email (Shiller (FTC) Tr. 211, 253). That additional information is missing from this finding and the underlying exhibit. (*Compare* GX181 (FTC), *with* PFF ¶¶282, 353; GX371 (FTC); RX1431 (Intuit)). In other emails, for example, an asterisk directed consumers to language stating, “For simple tax returns only. Not all taxpayers qualify. A simple tax return is Form 1040 only,” along with additional details about the tax situations that were covered by the free offer. (*See* RX1431 (Intuit)). Because the exhibit offered by Complaint Counsel is incomplete, it does not support any argument that the ad conveyed the claim that Complaint Counsel assert or that it was likely to mislead reasonable consumers. (*See* PCL ¶¶9, 68; *see also* *FTC v. Cyberspace.Com LLC*, 453 F.3d 1196, 1200 (9th Cir. 2006) (“The tendency of the advertising to deceive must be judged by viewing it as a whole.”); *S.C. Johnson & Son, Inc. v.*

Clorox Co., 241 F.3d 232, 238 (2d Cir. 2001) (“[I]n reviewing FTC actions prohibiting unfair advertising practices under the Federal Trade Commission Act a court must consider the advertisement in its entirety and not ... engage in disputatious dissection.” (quotation marks omitted))).

Instead, the asterisk in Complaint Counsel’s incomplete copy of the ad supports an inference that additional qualifying language was included in the advertisement, similar to other email ads in the record. (*See* RX1431 (Intuit)). When considered as a whole, including the qualifications that Complaint Counsel excluded from the exhibit, GX181 did not make the claim alleged nor was it likely to mislead reasonable consumers. (*See* PCL ¶¶9, 68; *see also* *FTC v. Cyberspace.Com LLC*, 453 F.3d 1196, 1200 (9th Cir. 2006) (“The tendency of the advertising to deceive must be judged by viewing it as a whole.”); *S.C. Johnson & Son, Inc. v. Clorox Co.*, 241 F.3d 232, 238 (2d Cir. 2001) (“[I]n reviewing FTC actions prohibiting unfair advertising practices under the Federal Trade Commission Act a court must consider the advertisement in its entirety and not ... engage in disputatious dissection.” (quotation marks omitted))).

Moreover, the Proposed Finding is incomplete because it does not mention that consumers who clicked on the advertisement would be taken directly to the TurboTax website, where they would see detailed information about the free offer’s qualifications. (PFF ¶284). Indeed, Complaint Counsel and their witnesses recognized that the TurboTax website repeatedly disclosed the qualifications of free TurboTax offers and provided detailed information about those qualifications. (PFF ¶¶369-370). For example, Complaint Counsel’s own 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 the free TurboTax offers. (PFF ¶790). Reasonable consumers understood that email ads such as GX181 link to a

website (here, the TurboTax website) that includes more information about the advertised free offer, and by linking directly to the TurboTax website, the advertisement incorporated the detailed information on the TurboTax website. (PFF ¶285; *see also* CCF ¶455 (“The TurboTax website is ... integrated into TurboTax’s free advertising.”)).

The Proposed Finding does not support an inference that the ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The advertisement stated, “TurboTax Free Edition, for simple tax returns only*,” with an asterisk providing additional information about the offer’s qualifications. (GX181 (FTC)). Complaint Counsel have offered no evidence that those qualifications were not visible to consumers (*see* PFF ¶286), nor could they given the prominence of those qualifications (*see* PFF ¶¶287-290). Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel assert were conveyed. Instead, the undisputed testimony from Intuit’s executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (*See* PFF ¶¶167-177, 190, 192-202, 405, 852, 857, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel have not offered any evidence that this ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the qualifications included in the ad would prevent consumers from being misled by the ad. (*See* PFF ¶¶287-292, 302-322, 328-329, 334). Even without those disclosures, consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information

about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

440. GX181 includes the following disclaimer in font that is significantly smaller and less prominent than the free claim: “TurboTax Free Edition, for simple tax returns only*.” (GX181 (Complaint Counsel) at CC-00005823).

Response to Finding No. 440:

The Proposed Finding is incomplete and misleading. First, it wrongly refers to language in the ads as a “disclaimer.” Second, it does not include the full content of the challenged email. As reflected in the Proposed Finding, the text “TurboTax Free Edition, for simple tax returns only” was followed by an asterisk (GX181 (FTC)), which indicated to reasonable consumers that there was “additional information below” in the email (Shiller (FTC) Tr. 211, 253). That additional information is missing from this finding and exhibit. (*Compare* GX181 (FTC), *with* PFF ¶¶282, 353; GX371 (FTC); RX1431 (Intuit)). Because the exhibit offered by Complaint Counsel is incomplete, no finding can be made about whether the email, when considered as a whole, conveyed the claims that Complaint Counsel assert or that it was likely to mislead reasonable consumers. (*See* PCL ¶¶9, 68; *see also* *FTC v. Cyberspace.Com LLC*, 453 F.3d 1196, 1200 (9th Cir. 2006) (“The tendency of the advertising to deceive must be judged by viewing it as a whole.”); *S.C. Johnson & Son, Inc. v. Clorox Co.*, 241 F.3d 232, 238 (2d Cir. 2001) (“[I]n reviewing FTC actions prohibiting unfair advertising practices under the Federal Trade Commission Act a court must consider the advertisement in its entirety and not ... engage in disputatious dissection.” (quotation marks omitted))).

The Proposed Finding is also incorrect or at least misleading in representing that the text “TurboTax Free Edition, for simple tax returns only*” was in significantly smaller and less prominent font. While that text is smaller than “Free Guaranteed” and “\$0 Fed \$0 State \$0 To File,” it is not significantly smaller, and it is plainly visible in the advertisement. (*See* GX181

(FTC). Additionally, “TurboTax Free Edition, for simple tax returns only*” was located directly above the button the consumer would click to begin to file their taxes, and directly below the offer to file for free. (GX181 (FTC)). Complaint Counsel have not offered any evidence that consumers could not see or read that text. (See PFF ¶286). The evidence instead establishes that such written qualifications were noticeable and legible. (See PFF ¶287). Accordingly, the Proposed Finding does not support an inference that the challenged ad expressly or impliedly claimed that all TurboTax was free or that TurboTax would necessarily be free for the consumer when it was not, or that reasonable consumers were likely misled by the challenged ad.

3. Email Marketing TY 2021

441. On April 18, 2022, Intuit distributed the following email:

The image is a screenshot of an email advertisement for Intuit TurboTax. At the top left is the Intuit TurboTax logo, and at the top right is a "Sign in" button. A dark banner across the top contains a clock icon and the text "TAXES DUE BEFORE MIDNIGHT!". The main content features a woman on the left holding a smartphone that displays a "Great refund!" of "\$2,766". To her right, on a blue background, is the text "FINAL DAY TO FILE" in large white letters, followed by "File for free and get your maximum refund – guaranteed." and an orange "File for \$0" button. Below this is the text "TurboTax Free Edition, for simple tax returns only*". At the bottom of the main content area, there is a blue banner with "FREE" in large white letters, followed by "\$0 Fed", "\$0 State", and "\$0 To File" in white. To the right of this are five yellow stars and the text "4.9 average user rating". Below the blue banner is the text "TurboTax Free Edition, for simple tax returns only*". At the very bottom, there is a sign-in section with the text "Sign in with your User ID:", a password field with a lock icon, and a "Go" button.



🔒 **Check before you click!** TurboTax will never ask you for personal information in an email. When you click on a link, the address should always contain "intuit.com".



intuit.

Legal
Privacy
Security

*A simple tax return is Form 1040 only. Situations covered in TurboTax Free Edition, TurboTax Live Basic, and TurboTax Live Full Service Basic:

- W-2 income
- Limited interest and dividend income reported on a 1099-INT or 1099-DIV
- Claiming the standard deduction
- Earned Income Tax Credit (EIC)
- Child tax credits
- Student Loan Interest deduction

Maine and Massachusetts 2021 taxes are due by April 19, 2022.

Prices ultimately determined at time of print or e-file. Terms, conditions, features, availability, pricing, fees, service and support options subject to change without notice.

Refund amounts shown are for example only. Your refund is based on your tax situation.

[Click here](#) to see TurboTax product guarantees, disclaimers and other important information.

This email was sent to the following address:
[REDACTED]

Did you receive this email in error? [Find out why](#)
If you feel you have received this message in error or would like to unsubscribe, [please click here](#) or go to [Manage Preferences](#).

© 2022 Intuit Inc. All rights reserved. [Trademark](#).

Customer Communications, [2800 E. Commerce Center Place, Tucson, AZ 85708](#)

3008-003A

(GX342 (Complaint Counsel) ¶ 172, CC-00006989; GX477 (Complaint Counsel) at CC-00010142).

Response to Finding No. 441:

The Proposed Finding is incomplete and unsupported because it does not say anything about who received this email or why they received it. Ms. Shiller’s declaration simply states

that some unknown “FTC staff attorney” forwarded her the email. (GX342 (Shiller (FTC) Decl. ¶172). For that reason alone, the Proposed Finding does not support an inference that the challenged email was likely to mislead reasonable consumers. In fact, the record shows that Intuit typically only sends emails for free TurboTax SKUs to consumers already familiar with those offers, either because they previously used a free TurboTax SKU or had started their return in a free TurboTax SKU. (PFF ¶283).

The Proposed Finding is also incomplete because it does not mention that consumers who clicked on the advertisement would be taken directly to the TurboTax website, where they would see detailed information about the free offer’s qualifications. (PFF ¶284). Indeed, Complaint Counsel and their witnesses recognized that the TurboTax website repeatedly disclosed the qualifications of free TurboTax offers and provided detailed information about those qualifications. (PFF ¶¶369-370). For example, Complaint Counsel’s own 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 the free TurboTax offers. (PFF ¶790). Reasonable consumers understood that email ads such as GX477 link to a website (here, the TurboTax website) that includes more information about the advertised free offer, and by linking directly to the TurboTax website, the advertisement incorporated the detailed information on the TurboTax website. (PFF ¶285; *see also* CCFF ¶455 (“The TurboTax website is ... integrated into TurboTax’s free advertising.”)).

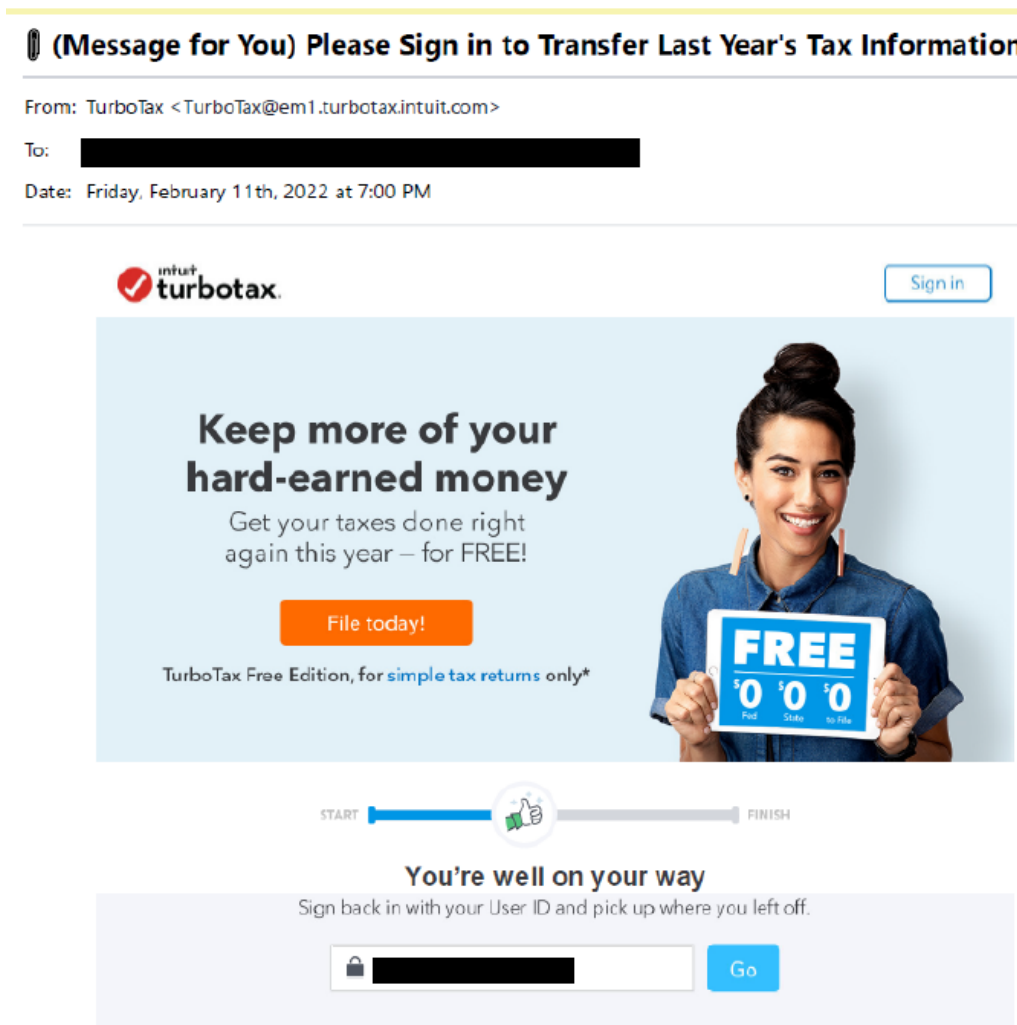
The Proposed Finding is also incorrect insofar as Complaint Counsel contend that it made the claim that all “TurboTax is free.” The email informed consumers in multiple places that the free offer was for “TurboTax Free Edition, for simple tax returns only.” (GX477 (FTC)). Indeed, that text was directly below the button the consumer would click to begin to file their

taxes, and below both references to the free offer in the email. In both instances, the text “TurboTax Free Edition, for simple tax returns only” was also followed by an asterisk (GX477 (FTC)), which indicated to reasonable consumers that there was “additional information below” in the email (Shiller (FTC) Tr. 211, 253). The text associated with that asterisk, shown in the Proposed Finding, stated “A simple tax return is Form 1040 only,” and then detailed the “Situations covered in TurboTax Free Edition, TurboTax Live Basic, and TurboTax Live Full Service Basic,” including “W-2 income; Limited interest and dividend income reported on a 1099-INT or 1099-DIV; Claiming the standard deduction; Earned Income Tax Credit (EIC); Child tax credits; Student Loan Interest deduction.” (GX477 (FTC)). Complaint Counsel have offered no evidence that those qualifications were not visible to consumers (*see* PFF ¶286), nor could they given the prominence of those qualifications (*see* PFF ¶¶287-290). Moreover, Complaint Counsel have not offered any evidence that Intuit intended to make the claims that Complaint Counsel allege. Instead, the undisputed testimony from Intuit’s executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (*See* PFF ¶¶167-177, 190, 192-202, 405, 852, 857, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel offered no evidence that the ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the qualifications included in the ad ensured that reasonable consumers understood that a specific TurboTax SKU was being advertised as free, that there were qualifications for the free TurboTax SKU being advertised, and the nature and character of those qualifications. (*See* PFF

¶¶287-292, 302-322, 328-329, 334). Even without those disclosures, reasonable consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

442. On February 11, 2022, Intuit sent the following email:



(Shiller (Complaint Counsel) Tr. 199-200; GX342 (Complaint Counsel) ¶ 173, CC-00006991; GX480 (Complaint Counsel) at CC-00010145).

Response to Finding No. 442:

The Proposed Finding is incomplete and misleading. It ignores that Ms. Shiller only received the email captured in GX480 because she signed up for a TurboTax account on the TurboTax website (GX342 ¶102; Shiller (FTC) Tr. 197-198; PFF ¶283)—where she would have seen detailed information about all TurboTax SKUs, including free SKUs (*see* PFF ¶¶364-441)—and then engaged in behavior on the TurboTax website that demonstrated that she was likely to qualify for a free TurboTax SKU (and Ms. Shiller had in fact previously filed her taxes for free using TurboTax) (*See* PFF¶¶198, 283; Shiller (FTC) Tr. 256; *see also* RX1390 (Shiller (FTC) Dep.) at 27-28; Shiller (FTC) Tr. 206). In fact, Intuit typically only sends emails for free TurboTax SKUs to consumers already familiar with those offers, either because they previously used a free TurboTax SKU or had started their return in a free TurboTax SKU. (PFF ¶283).

The Proposed Finding and exhibit are also incomplete and misleading because they do not include the full content of the email. The text “TurboTax Free Edition, for simple tax returns only” was followed by an asterisk (GX480 (FTC)), which indicated to reasonable consumers that there was “additional information below” in the email (Shiller (FTC) Tr. 211, 253). That additional information is missing from this finding and the underlying exhibit. (*Compare* GX480 (FTC), *with* PFF ¶¶282, 353; GX371 (FTC); RX1431 (Intuit)). In other emails, for example, an asterisk directed consumers to language stating, “For simple tax returns only. Not all taxpayers qualify. A simple tax return is Form 1040 only,” along with additional details about the tax situations that were covered by the free offer. (*See* RX1431 (Intuit)). Because the exhibit offered by Complaint Counsel is incomplete, it does not support any argument that the ad conveyed the claim that Complaint Counsel assert or that it was likely to mislead reasonable consumers. (*See* PCL ¶¶9, 68; *see also* *FTC v. Cyberspace.Com LLC*, 453 F.3d 1196, 1200 (9th Cir. 2006) (“The tendency of the advertising to deceive must be judged by viewing it as a

whole.”); *S.C. Johnson & Son, Inc. v. Clorox Co.*, 241 F.3d 232, 238 (2d Cir. 2001) (“[I]n reviewing FTC actions prohibiting unfair advertising practices under the Federal Trade Commission Act a court must consider the advertisement in its entirety and not ... engage in disputatious dissection.” (quotation marks omitted))).

Instead, the asterisk in Complaint Counsel’s incomplete copy of the ad supports an inference that additional qualifying language was included in the advertisement, similar to other email ads in the record. (*See* RX1431 (Intuit)). When considered as a whole, including the qualifications that Complaint Counsel excluded from the exhibit, GX480 did not make the claim alleged nor was it likely to mislead reasonable consumers. (*See* PCL ¶¶9, 68; *see also* *FTC v. Cyberspace.Com LLC*, 453 F.3d 1196, 1200 (9th Cir. 2006) (“The tendency of the advertising to deceive must be judged by viewing it as a whole.”); *S.C. Johnson & Son, Inc. v. Clorox Co.*, 241 F.3d 232, 238 (2d Cir. 2001) (“[I]n reviewing FTC actions prohibiting unfair advertising practices under the Federal Trade Commission Act a court must consider the advertisement in its entirety and not ... engage in disputatious dissection.” (quotation marks omitted))).

Additionally, the Proposed Finding is incomplete because it fails to recognize that consumers who clicked on the advertisement would be taken directly to the TurboTax website, where they would see detailed information about the free offer’s qualifications. (PFF ¶284). Indeed, Complaint Counsel and their witnesses recognized that the TurboTax website repeatedly disclosed the qualifications of free TurboTax offers and provided detailed information about those qualifications. (PFF ¶¶369-370). For example, Complaint Counsel’s own 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 the free TurboTax offers. (PFF ¶790). Reasonable consumers understood that email ads such as GX480 link to a

website (here, the TurboTax website) that includes more information about the advertised free offer, and by linking directly to the TurboTax website, the advertisement incorporated the detailed information on the TurboTax website. (PFF ¶285; *see also* CCF ¶455 (“The TurboTax website is ... integrated into TurboTax’s free advertising.”)).

The Proposed Finding does not support an inference that the ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The ad stated, “TurboTax Free Edition, for simple tax returns only*,” with an asterisk providing additional information about the offer’s qualifications. (GX480 (FTC). Complaint Counsel have offered no evidence that those qualifications were not visible to consumers (*see* PFF ¶286), nor could they given the prominence of those qualifications (*see* PFF ¶¶287-290). Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel assert were conveyed. Instead, the undisputed testimony from Intuit’s executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (*See* PFF ¶¶167-177, 190, 192-202, 405, 852, 857, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel have not offered any evidence that this ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the qualifications included in the ad would prevent consumers from being misled by the ad. (*See* PFF ¶¶287-292, 302-322, 328-329, 334). Even without those disclosures, consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information

about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

F. Search Ads

443. Intuit has creative control over the text that is included in the display URL, headline, and description. (RX1018 (Golder Expert Report) ¶ 139; *see also* Ryan (Intuit) Tr. 697).

Response to Finding No. 443:

The Proposed Finding is incomplete and misleading because it fails to recognize that Intuit does not always have control over the text that is included in a paid-search ad. On some occasions, paid search ads have been shown to consumers that have not been approved or otherwise controlled by Intuit. For example, GX177, a paid-search ad identified by Complaint Counsel (*see* CCF ¶447), was not an ad placed by TurboTax, meaning that Intuit did not have creative control over that ad. As Ms. Ryan previously stated, Intuit did not bid on the search term reflected in that paid-search ad, meaning the ad never should have been shown. (GX439 (Intuit) ¶26). That the ad was mistakenly shown to consumers is also clear on its face; it did not even take consumers to the TurboTax website. (*See* CCF ¶447; GX177 (FTC)). Actual TurboTax paid-search ads for Free Edition, by contrast, linked directly to the Free Edition landing page. (*See* PFF ¶269). It is also telling that the paid-search ad looks nothing like any of the other paid-search ads at issue in this proceeding. (*See* PFF ¶¶266-269, 272-275; CCF ¶¶445-446, 448-454).

The Proposed Finding is also incomplete because it omits that Intuit's "control" over the text in the display URL, headline, and description is subject to character limits (RX1018 (Golder Expert Report) ¶139), which greatly restrict the information that Intuit conveys in paid-search ads. It also omits that Intuit does not have complete control over when or how ads appear in search results. Instead, Intuit bids on a variety of keywords in an auction marketplace, and if

Intuit is the highest bidder, a TurboTax advertisement would appear at the top of the search results page when consumers search for those keywords. (PFF ¶184). Intuit submits components of the advertising copy that should appear when a paid-search ad is shown, but ultimately the search engine (e.g., Google or Bing) compiles and presents the advertisement based on the search performed and the information the search engine has about the particular consumer who performed the search. (PFF ¶184).

444. In TY 2021, over 20% of consumers who arrived at the TurboTax website did so after clicking on paid search advertising. (RX1018 (Golder Expert Report) Figure 24 (*citing* [REDACTED] (Intuit); [REDACTED] (Intuit) at INTUIT-FTC-PART3-000602274)).

Response to Finding No. 444:

The Proposed Finding is incomplete because it does not clarify that the paid-search data from Professor Golder’s report is not limited to paid-search ads for free TurboTax SKUs. As Professor Golder clearly explained, “these statistics are not limited to Intuit’s free-related advertising” and many TurboTax ads “do not include any references to filing for free.” (RX1018 (Golder Expert Report) ¶162).

1. Paid Search TY 2019

445. In TY 2019, Intuit placed an ad on the Google results page for the search term “free file taxes ONLINE.”

7/10/2020

free file taxes ONLINE - Google Search

The screenshot shows a Google search interface. The search bar contains the text "free file taxes ONLINE". Below the search bar, there are navigation links for "All", "Videos", "News", "Shopping", "Images", and "More". The search results show "About 229,000,000 results (0.70 seconds)". The top result is an advertisement for TurboTax, titled "TurboTax® Official Site - 100% Free Online Tax Filing". The ad text includes: "\$0 Fed. \$0 State. \$0 To File. Plus, TurboTax® Also Guarantees Maximum Refund. Over 50 Million Americans Can File With TurboTax® Free Edition. Get Your Taxes Done Today." Below the ad text, there are two columns of text: "TurboTax® Premier For Investments & Rental Property Maximize Your Tax Deductions." and "Why Choose TurboTax? Ranked #1 In Tax Software 100% Accurate Calculations."

(GX342 (Complaint Counsel) ¶ 99, at CC-00006944; GX168 (Complaint Counsel); GX168-A (Complaint Counsel)). This ad was observed by FTC Investigator Diana Shiller on July 10, 2020. (GX342 (Complaint Counsel) ¶ 99, at CC-00006944).

Response to Finding No. 445:

The Proposed Finding is misleading because it states that Intuit “placed” paid-search ads, suggesting it exercises complete control over when and how ads appear in Google search results. In fact, Intuit bids on a variety of keywords in an auction marketplace, and if Intuit is the highest bidder, a TurboTax advertisement would appear at the top of the search results page when consumers search for those keywords. (PFF ¶184). Intuit submits components of the advertising copy that should appear when a paid-search ad is shown, but ultimately the search engine (e.g., Google or Bing) compiles and presents the advertisement based on the search performed and the information the search engine has about the particular consumer who performed the search. (PFF ¶184).

The Proposed Finding is also incomplete and misleading because it ignores the search results that would have appeared along with the challenged ad. In addition to the challenged ad, consumers searching for “free file taxes ONLINE” would have seen an organic search result for TurboTax Free Edition stating, “File your taxes for free with TurboTax Free Edition. You’ll pay

nothing to file simple federal and state tax returns.” (GX168-A (FTC)). Consumers would have also seen the recommended searches under the heading “People also ask” with queries such as “Is Turbo Tax really free?” and “Who can file taxes for free?,” both indicating that there was additional information available for the consumer and demonstrating that reasonable consumers do in fact search for more information about free offers. (GX168-A (FTC); *see also* Shiller (FTC) Tr. 263-264). Consumers also would have seen the ads for free tax-preparation products from other companies and search results related to the IRS Free File Program. (*See* GX168-A (FTC)).

Moreover, the Proposed Finding is incomplete because it does not mention that consumers who clicked on the advertisement would be taken directly to the Free Edition landing page, where they would see detailed information about the free offer’s qualifications. (*See* PFF ¶269). Complaint Counsel and their witnesses recognized that the TurboTax website repeatedly disclosed the qualifications of free TurboTax offers and provided detailed information about those qualifications. (PFF ¶¶369-370). For example, Complaint Counsel’s own 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 the free TurboTax offers. (PFF ¶790). Reasonable consumers understood that paid-search ads such as GX168-A link to a website (here, the TurboTax website) with more information about the advertised free offer, and by linking directly to the TurboTax website, the advertisement integrated the detailed information on the TurboTax website. (CCFF ¶455 (“The TurboTax website is ... integrated into TurboTax’s free advertising.”); PFF ¶270).

The Proposed Finding does not support an inference that the ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the

consumer when it was not. The advertisement states that “Over 50 Million Americans Can File For Free With TurboTax Free Edition,” telling consumers both that the offer was for a *specific TurboTax SKU* and that not all consumers would qualify for that offer. Complaint Counsel have offered no evidence that those qualifications were not visible to consumers (*see* PFF ¶271), nor could they given the prominence of that content (*see* PFF ¶¶272-274). Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel allege. Instead, the undisputed testimony from Intuit’s executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (*See* PFF ¶¶167-177, 190, 192-202, 405, 852, 857, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel have not offered any evidence that this ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the qualifications included in the ad ensured that reasonable consumers understood that only a single TurboTax SKU was free and that there were qualifications for the free TurboTax SKU being advertised. (*See* PFF ¶¶38, 265-266, 275-279, 302-307, 309, 311-314, 316-321, 328-330, 334). Even without those disclosures, reasonable consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶265-266, 275-279, 302-307, 309, 311-314, 316-321, 328-330, 334, 470-514, 520-527).

446. In TY 2019, Intuit placed a TurboTax ad on the Google results page for the search term “free file.”

7/10/2020

free file - Google Search

The screenshot shows a Google search interface. At the top left is the Google logo. The search bar contains the text 'free file'. Below the search bar are navigation links: All, News, Videos, Shopping, Images, More, Settings, and Tools. The search results show 'About 7,320,000,000 results (0.47 seconds)'. The first result is an advertisement from turbotax.intuit.com/free/efile. The ad title is 'TurboTax® Free Tax Filing - E-file Your Taxes For Free'. The ad text reads: 'Fast, Easy And 100% Free Tax Filing With TurboTax®. \$0 Federal. \$0 State. \$0 To File. Over 50 Million Americans Can File With TurboTax® Free Edition. Get Your Taxes Done Today.' Below the ad are two links: 'Why Choose TurboTax?' with subtext 'Ranked #1 In Tax Software' and '100% Accurate Calculations.'; and 'Free Refund Estimate' with subtext 'Use Tax Calculator To Find Out How Much You'll Get Back This Year.'

(GX342 (Complaint Counsel) ¶ 101, at CC-00006945; GX170 (Complaint Counsel)).

Response to Finding No. 446:

The Proposed Finding is misleading because it states that Intuit “placed” paid-search ads, suggesting it exercises complete control over when and how ads appear in Google search results. In fact, Intuit bids on a variety of keywords in an auction marketplace, and if Intuit is the highest bidder, a TurboTax advertisement would appear at the top of the search results page when consumers search for those keywords. (PFF ¶184). Intuit submits components of the advertising copy that should appear when a paid-search ad is shown, but ultimately the search engine (e.g., Google or Bing) compiles and presents the advertisement based on the search performed and the information the search engine has about the particular consumer who performed the search. (PFF ¶184).

The Proposed Finding is also incomplete and misleading because it includes only a snippet from the search results for “free file” and not the full results. (*See* GX170 (FTC)). It does not show the search results that would have appeared along with the challenged ad, including both organic search results for TurboTax Free Edition, and for other free tax-

preparation products. Consumers would have seen the ads for free tax-preparation products from other companies and search results related to the IRS Free File Program. (*See, e.g.*, GX168-A (FTC)).

Moreover, the Proposed Finding is incomplete because it does not mention that consumers who clicked on the advertisement would be taken directly to the Free Edition landing page, where they would see detailed information about the free offer's qualifications. (*See* PFF ¶269). Complaint Counsel and their witnesses recognized that the TurboTax website repeatedly disclosed the qualifications of free TurboTax offers and provided detailed information about those qualifications. (PFF ¶¶369-370). For example, Complaint Counsel's own 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 the free TurboTax offers. (PFF ¶790). Reasonable consumers understood that paid-search ads such as GX170 link to a website (here, the TurboTax website) with more information about the advertised free offer, and by linking directly to the TurboTax website, the advertisement integrated the detailed information on the TurboTax website. (CCFF ¶455 ("The TurboTax website is ... integrated into TurboTax's free advertising."); PFF ¶270).

The Proposed Finding does not support an inference that the ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The advertisement states that "Over 50 Million Americans Can File For Free With TurboTax Free Edition," telling consumers both that the offer was for a *specific TurboTax SKU* and that not all consumers would qualify for that offer. Complaint Counsel have offered no evidence that those qualifications were not visible to consumers (*see* PFF ¶271), nor could they given the prominence of that content (*see* PFF ¶¶272-274). Further, Complaint

Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel allege. Instead, the undisputed testimony from Intuit’s executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (See PFF ¶¶167-177, 190, 192-202, 405, 852, 857, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel have not offered any evidence that this ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the qualifications included in the ad ensured that reasonable consumers understood that only a single TurboTax SKU was free and that there were qualifications for the free TurboTax SKU being advertised. (See PFF ¶¶38, 265-266, 275-279, 302-307, 309, 311-314, 316-321, 328-330, 334). Even without those disclosures, reasonable consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶265-266, 275-279, 302-307, 309, 311-314, 316-321, 328-330, 334, 470-514, 520-527).

2. Paid Search TY 2020

447. In TY 2020, Intuit placed a TurboTax ad on the Bing results page for the search term “Turbo tax free file program”:

 TurboTax® By Intuit® | Biggest Refund Guaranteed | Free Fed

<https://www.intuit.com/official-site> ▾ 234,700+ followers on Facebook

(Ad) Free Fed. Filing With TurboTax®. Get Your Biggest Refund Guaranteed!

For Accountants · For Individuals · For Small Businesses

4/5 ★★★★★ (209K reviews)

Links: [Intuit QuickBooks](#) · [Quickbooks Self-Employed](#) · [QuickBooks Payroll](#)

[TurboTax® Official Site](#) · [Downloads](#) · [Turbotax](#) · [QuickBooks® Online](#)

(GX342 (Complaint Counsel) ¶ 118, at CC-00006956; GX177 (Complaint Counsel)). This ad was observed by FTC Investigator Diana Shiller on January 11, 2021. (GX342 (Complaint Counsel) ¶ 118, at CC-00006956).

Response to Finding No. 447:

The Proposed Finding is incorrect. The paid-search ad identified, GX177, was not a TurboTax-placed ad at all. As Ms. Ryan previously stated, Intuit did not bid on the search term reflected in that paid-search ad, meaning the ad never should have been shown. (GX439 (Intuit) ¶26). That the ad was mistakenly shown to consumers is also clear on its face; it did not even take consumers to the TurboTax website. (See CCF ¶447; GX177 (FTC)). Actual TurboTax paid-search ads for Free Edition, by contrast, linked directly to the Free Edition landing page. (See PFF ¶269). It is also telling that the paid-search ad looks nothing like any of the other paid-search ads at issue in this proceeding. (See PFF ¶¶266-269, 272-275; CCF ¶¶445-446, 448-454).

Significantly, Complaint Counsel also chose not to present GX177 to any witness during discovery or at trial in this case. (See Complaint Counsel’s Exhibit Index at 8 (May 23, 2023)). Therefore, Complaint Counsel should not be permitted to rely on their mistaken assumptions about this ad, or to draw any inferences from it.

448. In TY 2020, Intuit placed a TurboTax ad on the Google results page search term “filing taxes”:

1/11/2021

Filing taxes - Google Search

The screenshot shows a Google search results page for the query 'Filing taxes'. At the top left is the Google logo. The search bar contains the text 'Filing taxes' with a clear (X) button, a microphone icon, and a search icon. Below the search bar are navigation links: All, News, Videos, Images, Maps, More, Settings, and Tools. The search results indicate 'About 2,160,000,000 results (0.72 seconds)'. The first result is an advertisement from turbotax.intuit.com/taxes, titled 'TurboTax® Free Edition - File Your Taxes Now'. The ad text reads: 'Free For Simple Tax Returns Only With TurboTax® Free Edition. Get Your Max Refund Today. Over 13M Americans Filed Taxes 100% Free With TurboTax® Last Year. Max Refund Guaranteed! TurboTax Live Basic. File With Confidence. Self-Employed Live.' Below the ad text are four promotional boxes: 'Free Refund Estimate' (Use Our Tax Calculator To Find Out How Much You'll Get Back This Year.), 'Up to \$3,000 in Advance' (Get Your TurboTax® Refund Advance As Fast As 1 Day After IRS Accept.), 'TurboTax® Self-Employed' (Industry-Specific Deductions. Get Every Dollar You Deserve.), and 'TurboTax® Premier' (For Investments And Rental Property Checks 400+ Tax Deductions).

(GX342 (Complaint Counsel) ¶ 119, at CC-00006957; GX178 (Complaint Counsel)).

Response to Finding No. 448:

The Proposed Finding is misleading because it states that Intuit “placed” paid-search ads, suggesting it exercises complete control over when and how ads appear in Google search results. In fact, Intuit bids on a variety of keywords in an auction marketplace, and if Intuit is the highest bidder, a TurboTax advertisement would appear at the top of the search results page when consumers search for those keywords. (PFF ¶184). Intuit submits components of the advertising copy that should appear when a paid-search ad is shown, but ultimately the search engine (e.g., Google or Bing) compiles and presents the advertisement based on the search performed and the information the search engine has about the particular consumer who performed the search. (PFF ¶184).

The Proposed Finding is also incomplete and misleading because it includes only a snippet from the search results for “Filing taxes” and not the full results. (See GX178 (FTC)). It does not show the search results that would have appeared along with the challenged ad,

including both organic search results for TurboTax Free Edition, and for other free tax-preparation products. Consumers would have seen the ads for free tax-preparation products from other companies and search results related to the IRS Free File Program. (*See, e.g.*, GX168-A (FTC)).

Moreover, the Proposed Finding is incomplete because it does not mention that consumers who clicked on the advertisement would be taken directly to the Free Edition landing page, where they would see detailed information about the free offer's qualifications. (*See* PFF ¶269). Complaint Counsel and their witnesses recognized that the TurboTax website repeatedly disclosed the qualifications of free TurboTax offers and provided detailed information about those qualifications. (PFF ¶¶369-370). For example, Complaint Counsel's own 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 the free TurboTax offers. (PFF ¶790). Reasonable consumers understood that paid-search ads such as GX178 link to a website (here, the TurboTax website) with more information about the advertised free offer, and by linking directly to the TurboTax website, the advertisement integrated the detailed information on the TurboTax website. (CCFF ¶455 ("The TurboTax website is ... integrated into TurboTax's free advertising."); PFF ¶270).

The Proposed Finding does not support an inference that the ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The advertisements stated in the headline, "TurboTax Free Edition," and below that, "Free For Simple Tax Returns Only With TurboTax Free Edition," telling consumers that the offer was for a *specific TurboTax SKU*, that not all consumers would qualify for that offer, and that the qualifications related to the complexity of the consumer's tax return.

Complaint Counsel have offered no evidence that those qualifications were not visible to consumers (*see* PFF ¶¶271), nor could they given the prominence of that content (*see* PFF ¶¶272-274). Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel allege. Instead, the undisputed testimony from Intuit’s executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (*See* PFF ¶¶167-177, 190, 192-202, 405, 852, 857, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel have not offered any evidence that this ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the qualifications included in the ad ensured that reasonable consumers understood that only a single TurboTax SKU was free, that there were qualifications for the free TurboTax SKU being advertised, and the nature and character of those qualifications. (*See* PFF ¶¶38, 265-266, 275-279, 302-321, 328-330, 334). Even without those disclosures, reasonable consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶38, 265-266, 275-279, 302-321, 328-330, 334, 470-527).

449. In TY 2020, Intuit placed a TurboTax ad on the Google results page for the search term “IRS taxes for free”:

1/11/2021

IRS taxes for free - Google Search

The screenshot shows a Google search results page. At the top left is the Google logo. The search bar contains the text 'IRS taxes for free'. Below the search bar are navigation links: All, News, Maps, Images, Shopping, More, Settings, and Tools. The search results show 'About 58,700,000 results (0.57 seconds)'. The first result is an advertisement from turbotax.intuit.com/free/taxes, titled '\$0 Fed. \$0 State. \$0 to File. - TurboTax® Official Site'. Below the title is a short description: 'Free For Simple Tax Returns Only. Find Even More For Complex Tax Situations w/ TurboTax®. File Your Federal And State Tax Forms With TurboTax® & Get Every Dollar That You Deserve. TurboTax Live Premier. File With Confidence. TurboTax Live Deluxe.' Below the ad are four promotional cards: 'Autofill Your W-2' (Easily Autofill Your W-2 In A Snap For Fast And Simple Tax Filing.), 'Your Fastest Tax Refund' (E-File Your Taxes with TurboTax®. Get Your Fastest Refund Possible.), 'Up to \$3,000 in Advance' (Get Your TurboTax® Refund Advance As Fast As 1 Day After IRS Accept.), and 'TurboTax® Live Basic' (100% Free Expert Review When You File Simple Returns By 2/15.).

(GX342 (Complaint Counsel) ¶ 121, at CC-00006959; GX180 (Complaint Counsel)).

Response to Finding No. 449:

The Proposed Finding is misleading because it states that Intuit “placed” paid-search ads, suggesting it exercises complete control over when and how ads appear in Google search results. In fact, Intuit bids on a variety of keywords in an auction marketplace, and if Intuit is the highest bidder, a TurboTax advertisement would appear at the top of the search results page when consumers search for those keywords. (PFF ¶184). Intuit submits components of the advertising copy that should appear when a paid-search ad is shown, but ultimately the search engine (e.g., Google or Bing) compiles and presents the advertisement based on the search performed and the information the search engine has about the particular consumer who performed the search. (PFF ¶184).

The Proposed Finding is also incomplete and misleading because it includes only a snippet from the search results for “IRS taxes for free” and not the full results. (*See* GX180 (FTC)). It does not show the search results that would have appeared along with the challenged

ad, including both organic search results for TurboTax Free Edition, and for other free tax-preparation products. Consumers would have seen the ads for free tax-preparation products from other companies and search results related to the IRS Free File Program. (*See, e.g.*, GX168-A (FTC)).

Moreover, the Proposed Finding is incomplete because it does not mention that consumers who clicked on the advertisement would be taken directly to the Free Edition landing page, where they would see detailed information about the free offer's qualifications. (*See* PFF ¶269). Complaint Counsel and their witnesses recognized that the TurboTax website repeatedly disclosed the qualifications of free TurboTax offers and provided detailed information about those qualifications. (PFF ¶¶369-370). For example, Complaint Counsel's own 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 the free TurboTax offers. (PFF ¶790). Reasonable consumers understood that paid-search ads such as GX180 link to a website (here, the TurboTax website) with more information about the advertised free offer, and by linking directly to the TurboTax website, the advertisement integrated the detailed information on the TurboTax website. (CCFF ¶455 ("The TurboTax website is ... integrated into TurboTax's free advertising."); PFF ¶270).

The Proposed Finding does not support an inference that the ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The advertisement states, "Free For Simple Tax Returns Only," telling consumers that not everyone would qualify for that offer, that the free offer was for a *specific TurboTax SKU*, that not all consumers would qualify for that offer, that the qualifications related to the complexity of the consumer's tax return, and that there were additional SKUs for

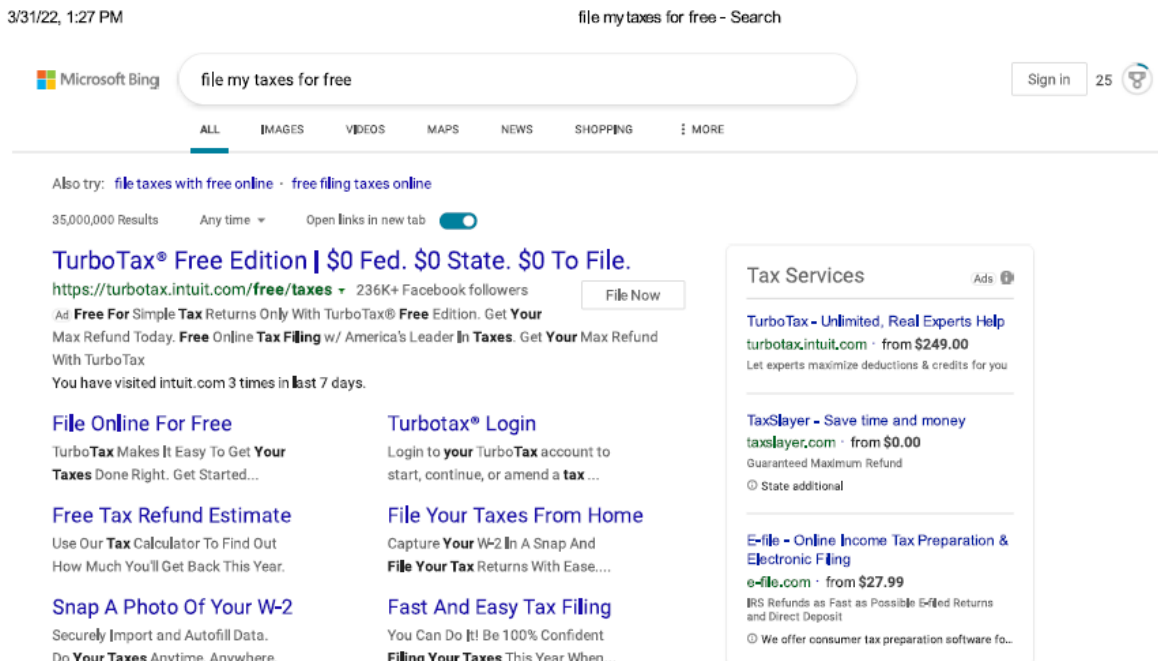
“Complex Tax Situations.” In fact, the advertisement identified two of those other TurboTax SKUs by name—TurboTax Live Premier and TurboTax Live Deluxe. Further, the ad identified “TurboTax Live Basic” as a specific SKU that was available for free, stating that it was free “when you file simple returns by 2/15.” Again, that communicated to consumers that only *certain TurboTax SKUs* were free for consumers with simple tax returns who qualified. Complaint Counsel have offered no evidence that those qualifications were not visible to consumers (*see* PFF ¶271), nor could they given the prominence of that content (*see* PFF ¶¶272-274). Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel allege. Instead, the undisputed testimony from Intuit’s executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (*See* PFF ¶¶167-177, 190, 192-202, 405, 852, 857, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel have not offered any evidence that this ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the qualifications included in the ad ensured that reasonable consumers understood that only specific TurboTax SKUs were free, that there were qualifications for the free TurboTax SKU being advertised, and the nature and character of those qualifications. (*See* PFF ¶¶38, 265-266, 275-279, 302-321, 328-330, 334). Even without those disclosures, reasonable consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional

information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶38, 265-266, 275-279, 302-321, 328-330, 334, 470-527).

3. Paid Search TY 2021

450. In TY 2021, Intuit placed TurboTax ads on the Bing search results page for the search term “file my taxes for free”:



4/7/22, 9:50 AM

file my taxes for free - Search

Microsoft Bing

file my taxes for free

Sign in

ALL IMAGES VIDEOS MAPS NEWS SHOPPING MORE

Also try: file taxes with free online · free filing taxes online

44,300,000 Results Any time Open links in new tab

TurboTax® Free Edition | \$0 Fed. \$0 State. \$0 To File.

https://turbotax.intuit.com/free/taxes -

Ad Free For Simple Tax Returns Only With TurboTax® Free Edition. Get Your Max Refund Today.

Free Online Tax Filing w/ America's Leader In Taxes. Get Your Max Refund With TurboTax

Types: CD/Download Products, Mobile App, Online Products, Small Business Taxes

Free Tax Refund Estimate

Use Our Tax Calculator To Find Out How Much You'll Get Back This Year.

Snap A Photo Of Your W-2

Securely Import and Autofill Data. Do Your Taxes Anytime, Anywhere.

TurboTax Live®

Connect With A Live Tax Expert For Tax Advice And A Final Review.

TurboTax® Premier

For Filers Who Sold Investments. Effortlessly Import Your Tax Info See results only from intuit.com

PCMag Editors' Choice

7-Time Winner Of Best Tax Software Try Us To Find Out Why

TurboTax® Self-Employed

Review Industry-Specific Deductions Get Every Dollar You Deserve.

Advance Child Tax Credit

Claim Your Child Tax Credit And Get Your Max Refund. Learn More.

Maximize Your Tax Refund

Get Every Dollar You Deserve When You File With TurboTax®. File Now!



E-file.com® Official Site

e-file.com

Free IRS E-Filing. E-File Your Tax Return Online with E-file.com® - Start Here

File Now

4/18/22, 10:18 AM file my taxes for free

Microsoft Bing

ALL IMAGES VIDEOS MAPS NEWS SHOPPING MORE

Also try: [file taxes with free online](#) · [free filing taxes online](#)

63,700,000 Results Any time ▾ Open links in new tab

TurboTax® Free Edition | \$0 Fed. \$0 State. \$0 To File.
<https://turbotax.intuit.com/free/taxes> 236K+ Facebook followers File Now

Ad **Free For Simple Tax** Returns Only With TurboTax® **Free** Edition. Get **Your** Max Refund Today. **Free Online Tax Filing** w/ America's Leader In **Taxes**. Get **Your** Max Refund With TurboTax

File With Confidence · Audit Support Guarantee · Maximum Refund Guaranteed

| | |
|--|---|
| <p>File Online For Free File Your Federal And State Tax Forms With TurboTax To Get Every...</p> | <p>Free Online Tax Filing More Americans Trust Their Taxes To TurboTax Than All Other...</p> |
| <p>File Your Taxes From Home Over 13M Americans Filed Taxes 100% Free With TurboTax Last...</p> | <p>Free Tax Refund Estimate Use Our Tax Calculator To Find Out How Much You'll Get Back This Year.</p> |

(GX342 (Complaint Counsel) ¶¶ 163-65, at CC-00006982-6984; GX190 (Complaint Counsel); GX191 (Complaint Counsel); GX192 (Complaint Counsel)).

Response to Finding No. 450:

The Proposed Finding is misleading because it states that Intuit “placed” paid-search ads, suggesting it exercises complete control over when and how ads appear in Bing search results. In fact, Intuit bids on a variety of keywords in an auction marketplace, and if Intuit is the highest bidder, a TurboTax advertisement would appear at the top of the search results page when consumers search for those keywords. (PFF ¶184). Intuit submits components of the advertising copy that should appear when a paid-search ad is shown, but ultimately the search engine (e.g., Google or Bing) compiles and presents the advertisement based on the search performed and the information the search engine has about the particular consumer who performed the search. (PFF ¶184).

The Proposed Finding is also incomplete and misleading because it includes only snippets from the search results for “file my taxes for free” and not the full results. (See GX190

(FTC); GX191 (FTC); GX192 (FTC)). It does not show the search results that would have appeared along with the challenged ads, including both organic search results for TurboTax Free Edition, and for other free tax-preparation products. Consumers would have seen the ads for free tax-preparation products from other companies and search results related to the IRS Free File Program. (*See, e.g.*, GX168-A (FTC)).

Moreover, the Proposed Finding is incomplete because it does not mention that consumers who clicked on the advertisements would be taken directly to TurboTax's website, where they would see detailed information about the free offer's qualifications. (*See* PFF ¶269). Complaint Counsel and their witnesses recognized that the TurboTax website repeatedly disclosed the qualifications of free TurboTax offers and provided detailed information about those qualifications. (PFF ¶¶369-370). For example, Complaint Counsel's own 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 the free TurboTax offers. (PFF ¶790). Reasonable consumers understood that paid-search ads such as GX190, GX191, and GX192 link to a website (here, the TurboTax website) with more information about the advertised free offer, and by linking directly to the TurboTax website, the advertisements integrated the detailed information on the TurboTax website. (CCFF ¶455 ("The TurboTax website is ... integrated into TurboTax's free advertising."); PFF ¶270).

The Proposed Finding does not support an inference that the ads expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The advertisements stated in the headline, "TurboTax Free Edition," and below that, "Free For Simple Tax Returns Only With TurboTax Free Edition." (GX190 (FTC); GX191 (FTC); GX192 (FTC)). This language told consumers that the free offer was for

a *specific TurboTax SKU*, that not all consumers would qualify for that offer, and that the qualifications related to the complexity of the consumer's tax return. Complaint Counsel have offered no evidence that those qualifications were not visible to consumers (*see* PFF ¶271), nor could they given the prominence of that content (*see* PFF ¶¶272-274). Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel allege. Instead, the undisputed testimony from Intuit's executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (*See* PFF ¶¶167-177, 190, 192-202, 405, 852, 857, 860, 870).

The Proposed Finding also does not support an inference that the ads were likely to mislead reasonable consumers. Complaint Counsel have not offered any evidence that these ads were likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the qualifications included in the ads ensured that reasonable consumers understood that only a single TurboTax SKU was free, that there were qualifications for the free TurboTax SKU being advertised, and the nature and character of those qualifications. (*See* PFF ¶¶38, 265-266, 275-279, 302-321, 328-330, 334). Even without those disclosures, reasonable consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶38, 265-266, 275-279, 302-321, 328-330, 334, 470-527).

451. In TY 2021, Intuit placed TurboTax ads on the Google results page for the search term "file my taxes for free":

3/31/22, 12:15 PM

file my taxes for free - Google Search

Google file my taxes for free

All Shopping News Videos Maps More Tools

About 7,180,000,000 results (0.37 seconds)

Ad · <https://turbotax.intuit.com/free>

TurboTax® Free Edition - \$0 Fed. \$0 State. \$0 To File.

Free For Simple **Tax Returns** Only With TurboTax® **Free** Edition. Get Your Max Refund Today. **Free** Online **Tax** Filing w/ America's Leader In **Taxes**. Get Your Max Refund With TurboTax®. Audit Support Guarantee. Import Prior Year's Data. **Free** & Easy Filing.

[Free Tax Refund Estimate](#)
Use Our Tax Calculator To Find Out How Much You'll Get Back This Year.

[Snap A Photo Of Your W-2](#)
Securely Import and Autofill Data. Do Your Taxes Anytime, Anywhere.

[TurboTax® Self-Employed](#)
Review Industry-Specific Deductions Get Every Dollar You Deserve.

4/18/22, 9:42 AM

file my taxes for free - Google Search

Google file my taxes for free

All Shopping News Videos Maps More Tools

About 3,000,000,000 results (0.45 seconds)

Ad · <https://turbotax.intuit.com/free/taxes>

TurboTax® Free Edition - \$0 Fed. \$0 State. \$0 To File.

Free For Simple **Tax Returns** Only With TurboTax® **Free** Edition. Get Your Max Refund Today. **Free** Online **Tax** Filing w/ America's Leader In **Taxes**. Get Your Max Refund With...

[Free Tax Refund Estimate](#)
Use Our Tax Calculator To Find Out How Much You'll Get Back This Year.

[Snap A Photo Of Your W-2](#)
Securely Import and Autofill Data. Do Your Taxes Anytime, Anywhere.

(GX342 (Complaint Counsel) ¶¶ 166, 168, at CC-00006985-86; GX193 (Complaint Counsel); GX195 (Complaint Counsel)).

Response to Finding No. 451:

The Proposed Finding is misleading because it states that Intuit “placed” paid-search ads, suggesting it exercises complete control over when and how ads appear in Google search results. In fact, Intuit bids on a variety of keywords in an auction marketplace, and if Intuit is the highest bidder, a TurboTax advertisement would appear at the top of the search results page when consumers search for those keywords. (PFF ¶184). Intuit submits components of the advertising copy that should appear when a paid-search ad is shown, but ultimately the search engine (e.g., Google or Bing) compiles and presents the advertisement based on the search performed and the information the search engine has about the particular consumer who performed the search. (PFF ¶184).

The Proposed Finding is also incomplete and misleading because it includes only snippets from the search results for “file my taxes for free” and not the full results. (*See* GX193 (FTC); GX195 (FTC)). It does not show the search results that would have appeared along with the challenged ads, including both organic search results for TurboTax Free Edition, and for other free tax-preparation products. Consumers would have seen the ads for free tax-preparation products from other companies and search results related to the IRS Free File Program. (*See, e.g.*, GX168-A (FTC)).

Moreover, the Proposed Finding is incomplete because it does not mention that consumers who clicked on the advertisements would be taken directly to TurboTax’s website, where they would see detailed information about the free offer’s qualifications. (*See* PFF ¶269). Complaint Counsel and their witnesses recognized that the TurboTax website repeatedly disclosed the qualifications of free TurboTax offers and provided detailed information about those qualifications. (PFF ¶¶369-370). For example, Complaint Counsel’s own expert conceded that it took only “a few seconds” to access the TurboTax website, and that once on the website it

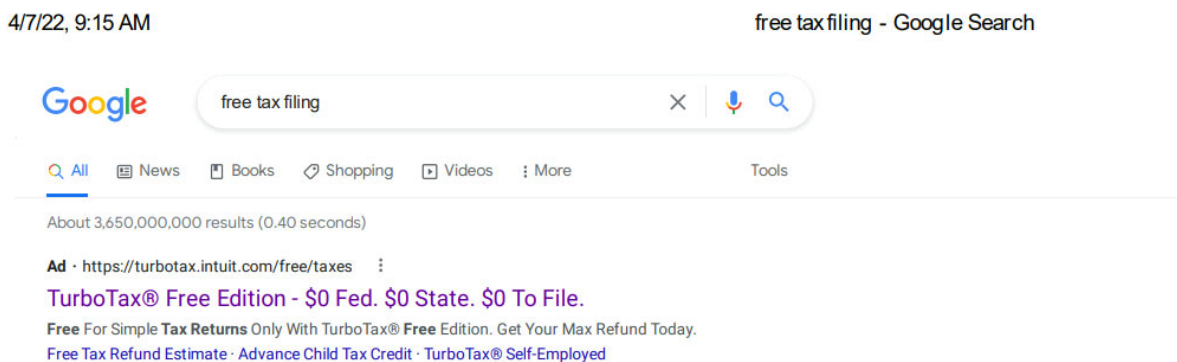
took only “five to ten seconds” to encounter full eligibility information for the free TurboTax offers. (PFF ¶790). Reasonable consumers understood that paid-search ads such as GX193 or GX195 link to a website (here, the TurboTax website) with more information about the advertised free offer, and by linking directly to the TurboTax website, the advertisement integrated the detailed information on the TurboTax website. (CCFF ¶455 (“The TurboTax website is ... integrated into TurboTax’s free advertising.”); PFF ¶270).

The Proposed Finding does not support an inference that the ads expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The advertisements stated in the headline, “TurboTax Free Edition,” and below that, “Free For Simple Tax Returns Only With TurboTax Free Edition.” This language told consumers that the free offer was for a *specific TurboTax SKU*, that not all consumers would qualify for that offer, and that the qualifications related to the complexity of the consumer’s tax return. Complaint Counsel have offered no evidence that those qualifications were not visible to consumers (*see* PFF ¶271), nor could they given the prominence of that content (*see* PFF ¶¶272-274). Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel allege. Instead, the undisputed testimony from Intuit’s executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (*See* PFF ¶¶167-177, 190, 192-202, 405, 852, 857, 860, 870).

The Proposed Finding also does not support an inference that the ads were likely to mislead reasonable consumers. Complaint Counsel have not offered any evidence that these ads were likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the

evidence establishes that the qualifications included in the ads ensured that reasonable consumers understood that only a single TurboTax SKU was free, that there were qualifications for the free TurboTax SKU being advertised, and the nature and character of those qualifications. (See PFF ¶¶38, 265-266, 275-279, 302-321, 328-330, 334). Even without those disclosures, reasonable consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶38, 265-266, 275-279, 302-321, 328-330, 334, 470-527).

452. In TY 2021, Intuit placed TurboTax ads on the Google results page for the search term “free tax filing”:



(GX342 (Complaint Counsel) ¶ 167, at CC-00006986; GX194 (Complaint Counsel)).

Response to Finding No. 452:

The Proposed Finding is misleading because it states that Intuit “placed” paid-search ads, suggesting it exercises complete control over when and how ads appear in Google search results. In fact, Intuit bids on a variety of keywords in an auction marketplace, and if Intuit is the highest bidder, a TurboTax advertisement would appear at the top of the search results page when consumers search for those keywords. (PFF ¶184). Intuit submits components of the advertising copy that should appear when a paid-search ad is shown, but ultimately the search engine (e.g., Google or Bing) compiles and presents the advertisement based on the search performed and the

information the search engine has about the particular consumer who performed the search. (PFF ¶184).

The Proposed Finding is also incomplete and misleading because includes only a snippet from the search results for “free tax filing” and not the full results. (*See* GX194 (FTC)). It does not show the search results that would have appeared along with the challenged ad, including both organic search results for TurboTax Free Edition, and for other free tax-preparation products. Consumers would have seen the ads for free tax-preparation products from other companies and search results related to the IRS Free File Program. (*See, e.g.*, GX168-A (FTC)).

Moreover, the Proposed Finding is incomplete because it does not mention that consumers who clicked on the advertisement would be taken directly to TurboTax’s website, where they would see detailed information about the free offer’s qualifications. (*See* PFF ¶269). Complaint Counsel and their witnesses recognized that the TurboTax website repeatedly disclosed the qualifications of free TurboTax offers and provided detailed information about those qualifications. (PFF ¶¶369-370). For example, Complaint Counsel’s own 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 the free TurboTax offers. (PFF ¶790). Reasonable consumers understood that paid-search ads such as GX194 link to a website (here, the TurboTax website) with more information about the advertised free offer, and by linking directly to the TurboTax website, the advertisement integrated the detailed information on the TurboTax website. (CCFF ¶455 (“The TurboTax website is ... integrated into TurboTax’s free advertising.”); PFF ¶270).

The Proposed Finding does not support an inference that the ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the

consumer when it was not. The advertisements stated in the headline, “TurboTax Free Edition,” and below that, “Free For Simple Tax Returns Only With TurboTax Free Edition.” This language told consumers that the free offer was for a *specific TurboTax SKU*, that not all consumers would qualify for that offer, and that the qualifications related to the complexity of the consumer’s tax return. Complaint Counsel have offered no evidence that those qualifications were not visible to consumers (*see* PFF ¶271), nor could they given the prominence of that content (*see* PFF ¶¶272-274). Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel allege. Instead, the undisputed testimony from Intuit’s executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (*See* PFF ¶¶167-177, 190, 192-202, 405, 852, 857, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel have not offered any evidence that this ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the qualifications included in the ad ensured that reasonable consumers understood that only a single TurboTax SKU was free, that there were qualifications for the free TurboTax SKU being advertised, and the nature and character of those qualifications. (*See* PFF ¶¶38, 265-266, 275-279, 302-321, 328-330, 334). Even without those disclosures, reasonable consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶38, 265-266, 275-279, 302-321, 328-330, 334, 470-527).

453. After April 18, 2022 (Tax Day), Intuit continued placing TurboTax paid search ads on search result pages for the search term “file tax extension”:

4/19/22, 5:51 PM

File tax extension - Google Search

The screenshot shows a Google search interface. The search bar contains the text "File tax extension". Below the search bar, there are navigation links for "All", "News", "Books", "Videos", "Shopping", and "More", along with a "Tools" link. The search results indicate "About 886,000,000 results (0.58 seconds)". The first result is an advertisement for TurboTax, titled "File An Extension For Free - TurboTax® Free Tax Filing". The ad text reads: "Free For Simple Tax Returns Only With TurboTax® Free Edition. Get Your Max Refund Today. Simple Step-By-Step Instructions Make It Easy To File Taxes Early...". Below the main text are links for "TurboTax® Self-Employed", "Tax Document Checklist", and "Import Last Year's Data". To the right of the ad is a small image of a woman smiling on a video call.

(GX342 (Complaint Counsel) ¶ 204, at CC-00007005; GX496 (Complaint Counsel)).

Response to Finding No. 453:

The Proposed Finding is misleading it states that Intuit “placed” paid-search ads, suggesting it exercises complete control over when and how ads appear in Google search results. In fact, Intuit bids on a variety of keywords in an auction marketplace, and if Intuit is the highest bidder, a TurboTax advertisement would appear at the top of the search results page when consumers search for those keywords. (PFF ¶184). Intuit submits components of the advertising copy that should appear when a paid-search ad is shown, but ultimately the search engine (e.g., Google or Bing) compiles and presents the advertisement based on the search performed and the information the search engine has about the particular consumer who performed the search. (PFF ¶184).

The Proposed Finding is also incomplete and misleading because it includes only a snippet from the search results for “File tax extension” and not the full results. (See GX496 (FTC)). It does not show the search results that would have appeared along with the challenged

ad, including both organic search results for TurboTax Free Edition, and for other free tax-preparation products. Consumers would have seen the ads for free tax-preparation products from other companies and search results related to the IRS Free File Program. (*See, e.g.*, GX168-A (FTC)).

Moreover, the Proposed Finding is incomplete because it does not mention that consumers who clicked on the advertisement would be taken directly to TurboTax's website, where they would see detailed information about the free offer's qualifications. (*See* PFF ¶269). Complaint Counsel and their witnesses recognized that the TurboTax website repeatedly disclosed the qualifications of free TurboTax offers and provided detailed information about those qualifications. (PFF ¶¶369-370). For example, Complaint Counsel's own 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 the free TurboTax offers. (PFF ¶790). Reasonable consumers understood that paid-search ads such as GX496 link to a website (here, the TurboTax website) with more information about the advertised free offer, and by linking directly to the TurboTax website, the advertisement integrated the detailed information on the TurboTax website. (CCFF ¶455 ("The TurboTax website is ... integrated into TurboTax's free advertising."); PFF ¶270).

The Proposed Finding does not support an inference that the ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The advertisement states "Free For Simple Tax Returns Only With TurboTax Free Edition," telling consumers that the offer was for a *specific TurboTax SKU*, that not all consumers would qualify for that offer, and that the qualifications were related to the complexity of the consumer's tax return. Complaint Counsel have offered no evidence that those

qualifications were not visible to consumers (*see* PFF ¶271), nor could they given the prominence of that content (*see* PFF ¶¶272-274). Further, Complaint Counsel have not offered any evidence that Intuit intended to make any of the claims that Complaint Counsel allege. Instead, the undisputed testimony from Intuit’s executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (*See* PFF ¶¶167-177, 190, 192-202, 405, 852, 857, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel have not offered any evidence that this ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the qualifications included in the ad ensured that reasonable consumers understood that only a single TurboTax SKU was free, that there were qualifications for the free TurboTax SKU being advertised, and the nature and character of those qualifications. (*See* PFF ¶¶38, 265-266, 275-279, 302-321, 328-330, 334). Even without those disclosures, reasonable consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶38, 265-266, 275-279, 302-321, 328-330, 334, 470-527).

454. After April 18, 2022 (Tax Day), Intuit continued placing TurboTax paid search ads on the Google search results page for the search term “File a Tax Extension For Free”:

4/27/22, 2:28 PM

File a Tax Extension For Free - Google Search

The screenshot shows a Google search interface. The search bar contains the text "File a Tax Extension For Free". Below the search bar, there are navigation links for "All", "Videos", "News", "Shopping", "Images", and "More". The search results show "About 159,000,000 results (0.50 seconds)". An advertisement is displayed for "File An Extension For Free - TurboTax® Free Tax Filing". The ad text reads: "Free For Simple Tax Returns Only With TurboTax® Free Edition. Get Your Max Refund Today. Simple Step-By-Step Instructions Make It Easy To File Taxes Early Or File An Extension. Finish and File Today. File With Confidence. Maximum Refund Guaranteed."

(GX342 (Complaint Counsel) ¶ 205, at CC-00007006; GX497 (Complaint Counsel)).

Response to Finding No. 454:

The Proposed Finding is misleading because it states that Intuit “placed” paid-search ads, suggesting it exercises complete control over when and how ads appear in Google search results. In fact, Intuit bids on a variety of keywords in an auction marketplace, and if Intuit is the highest bidder, a TurboTax advertisement would appear at the top of the search results page when consumers search for those keywords. (PFF ¶184). Intuit submits components of the advertising copy that should appear when a paid-search ad is shown, but ultimately the search engine (e.g., Google or Bing) compiles and presents the advertisement based on the search performed and the information the search engine has about the particular consumer who performed the search. (PFF ¶184).

The Proposed Finding is also incomplete and misleading because it includes only a snippet from the search results for “File a Tax Extension For Free” and not the full results. (*See* GX497 (FTC)). It does not show the search results that would have appeared along with the challenged ad, including both organic search results for TurboTax Free Edition, and for other free tax-preparation products. Consumers would have seen the ads for free tax-preparation products

from other companies and search results related to the IRS Free File Program. (*See, e.g.*, GX168-A (FTC)).

Moreover, the Proposed Finding is incomplete because it does not mention that consumers who clicked on the advertisement would be taken directly to TurboTax's website, where they would see detailed information about the free offer's qualifications. (*See* PFF ¶269). Complaint Counsel and their witnesses recognized that the TurboTax website repeatedly disclosed the qualifications of free TurboTax offers and provided detailed information about those qualifications. (PFF ¶¶369-370). For example, Complaint Counsel's own 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 the free TurboTax offers. (PFF ¶790). Reasonable consumers understood that paid-search ads such as GX497 link to a website (here, the TurboTax website) with more information about the advertised free offer, and by linking directly to the TurboTax website, the advertisement integrated the detailed information on the TurboTax website. (CCFF ¶455 ("The TurboTax website is ... integrated into TurboTax's free advertising."); PFF ¶270).

The Proposed Finding does not support an inference that the ad expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. The advertisement states "Free For Simple Tax Returns Only With Free Edition," telling consumers that the offer was for a *specific TurboTax SKU*, that not all consumers would qualify for that offer, and that the qualifications were related to the complexity of the consumer's tax return. Complaint Counsel have offered no evidence that those qualifications were not visible to consumers (*see* PFF ¶271), nor could they given the prominence of that content (*see* PFF ¶¶272-274). Further, Complaint Counsel have not offered

any evidence that Intuit intended to make any of the claims that Complaint Counsel allege.

Instead, the undisputed testimony from Intuit's executives establishes that Intuit did not intend for any of the ads to claim that all TurboTax products are free or that TurboTax would be free for a consumer when that was not the case. (*See* PFF ¶¶167-177, 190, 192-202, 405, 852, 857, 860, 870).

The Proposed Finding also does not support an inference that the ad was likely to mislead reasonable consumers. Complaint Counsel have not offered any evidence that this ad was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the qualifications included in the ad ensured that reasonable consumers understood that only a single TurboTax SKU was free, that there were qualifications for the free TurboTax SKU being advertised, and the nature and character of those qualifications. (*See* PFF ¶¶38, 265-266, 275-279, 302-321, 328-330, 334). Even without those disclosures, reasonable consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶38, 265-266, 275-279, 302-321, 328-330, 334, 470-527).

G. TurboTax Website

455. The TurboTax website is a very important part of TurboTax marketing and is integrated into TurboTax's free advertising. (Golder (Intuit) Tr. 1124-1126).

Response to Finding No. 455:

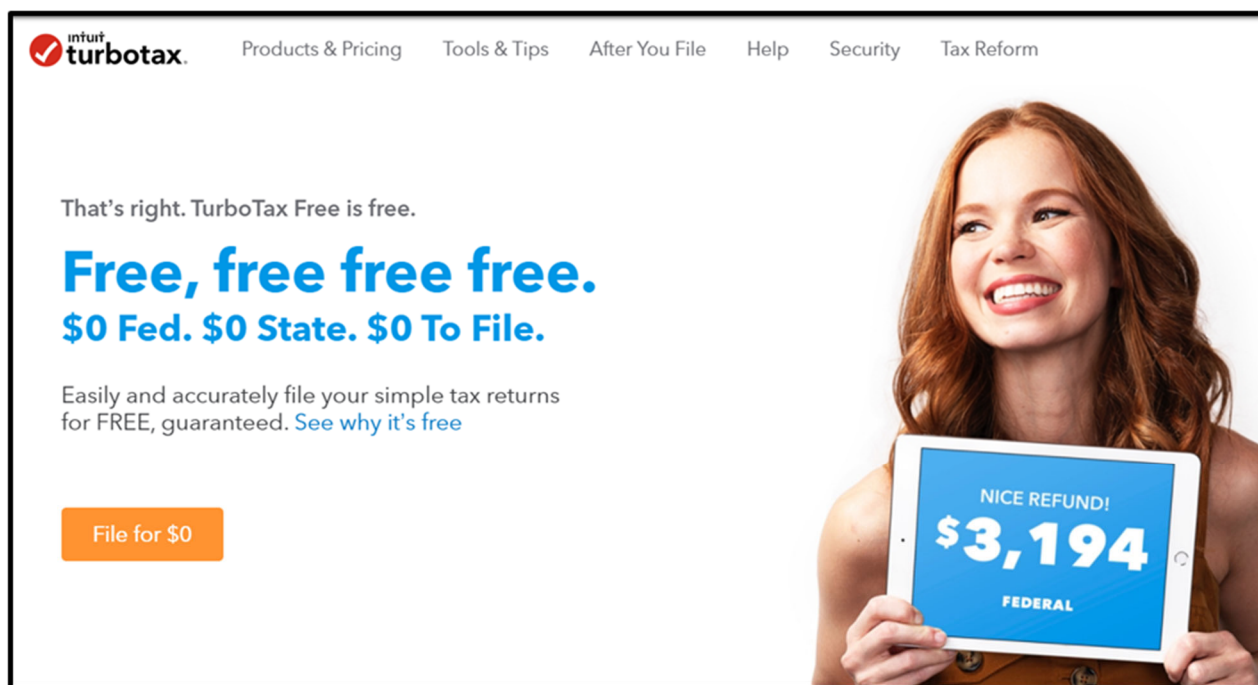
Intuit agrees that the TurboTax website, including its detailed information on qualifications for free TurboTax SKUs, is a very important part of TurboTax marketing and is integrated into the challenged advertisements. (*See* PFF ¶¶328-329). Because the parties agree

that the TurboTax website is integrated into the challenged ads, reasonable consumers could not possibly have been deceived by the challenged ads, as the website provides extensive and detailed information about every tax situation covered by free TurboTax SKUs and those not covered. (PFF ¶¶330; *see also* PFF ¶¶364-441).

The Proposed Finding is incorrect, however, to the extent it suggests that the challenged ads would be deceptive had they not integrated the TurboTax website. The challenged ads by themselves—i.e., without integrating content from the TurboTax website—do not convey to reasonable consumers that TurboTax is free for them or that all TurboTax is free, but rather all leave the impression that a specific TurboTax SKU is free, there are qualifications for the free SKU based on complexity of tax return, and additional details about the free SKU and its qualifications are available on the TurboTax website. (PFF ¶¶210-211, 242-244, 260-262, 273-275, 288-290, 297-299).

1. TurboTax Website TY 2018

456. During TY 2018, the TurboTax home page included the following visual:



(GX342 (Complaint Counsel) ¶ 79, at CC-00006933; GX163 (Complaint Counsel)).

Response to Finding No. 456:

The Proposed Finding is inaccurate, incomplete, and misleading because it ignores disclosures and omits important context, including that the “visual” referenced in this Proposed Finding is just a small portion of the TurboTax homepage. In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

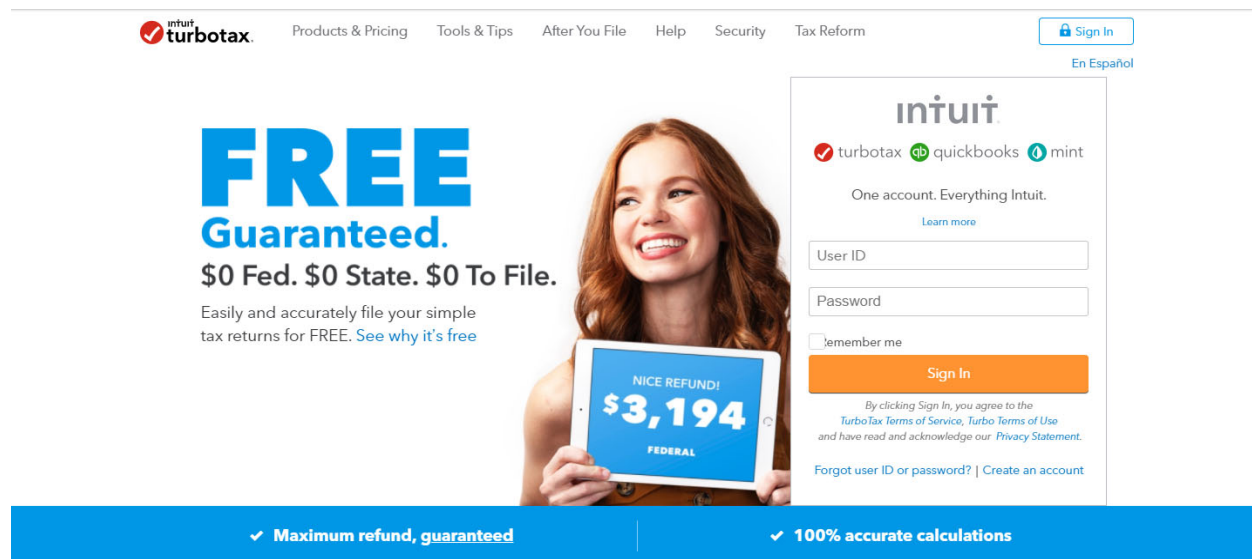
The Proposed Finding fails to mention that the referenced visual informed consumers that the free offer was for a specific SKU, “TurboTax Free,” and that the Tax Year 2018 homepage also referenced other TurboTax SKUs—including TurboTax Live and Self-Employed—which made clear that free offer was for TurboTax Free Edition only. (RX22 (Intuit)). The Proposed Finding also fails to mention that the visual included a written disclosure stating “file your simple tax returns for FREE.” (GX163 (Complaint Counsel)). Further, the Proposed Finding fails to mention that a consumer who clicked on the “See why it’s free” hyperlink would see a pop-up stating that TurboTax Free Edition was for “simple” tax returns only and listing the tax situations covered and not covered by Free Edition. (PFF ¶¶376, 379-380; *see also* RX1287 (Intuit); RX1288 (Intuit)). The Proposed Finding also fails to mention that the full TurboTax Tax Year 2018 homepage also included an “Important Offer Details and Disclosures” section that stated “TurboTax Free Guarantee: \$0 Federal + \$0 State + \$0 To File offer is available for simple tax returns with TurboTax Free Edition. A simple tax return is Form 1040 only, with no attached schedules.” (RX1213 (Intuit)). In addition, the Proposed Finding fails to mention that the TurboTax homepage changed after Tax Year 2018, such that the written disclosure on the homepage now states “Simple tax returns only,” and the “See why it’s free” pop-up hyperlink now invites consumers to “See if you qualify.” (*See* PFF ¶¶374-377).

Moreover, the Proposed Finding does not support an inference that the Tax Year 2018 TurboTax homepage expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. As discussed, the homepage informed consumers that a specific TurboTax SKU was being offered for free by referring to “TurboTax Free.” (GX163 (Complaint Counsel); RX1213 (Intuit); *see* PFF ¶¶317-321). As Mr. Rubin explained, “TurboTax Free” was how Intuit referred to TurboTax Free Edition during that year, consistent with how it referred to the other TurboTax SKUs. (PFF ¶227). The homepage also informed consumers that the free offer had qualifications based on the complexity of a tax return by stating “simple tax returns.” (PFF ¶322; *see also* PFF ¶¶130-145). Further, the homepage contained a hyperlink entitled “see why it’s free,” which informed consumers that the free offer had qualifications, and which linked to detailed information about the qualifications for Free Edition. (GX163 (Complaint Counsel); PFF ¶¶376, 379-380). Complaint Counsel offered no evidence that these disclosures were not seen by consumers—in fact, Complaint Counsel and their witnesses recognized that the TurboTax website repeatedly disclosed TurboTax Free Edition’s qualifications. (PFF ¶¶367-370).

The Proposed Finding also does not support an inference that the Tax Year 2018 TurboTax homepage was likely to mislead reasonable consumers. Complaint Counsel offered no evidence that the homepage was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the disclosures on the homepage ensured that reasonable consumers understood that there were qualifications for the free TurboTax SKU being advertised, the nature and character of those qualifications, and that additional information could be found by clicking on the hyperlink. (PFF ¶¶317, 319-322, 376-384, 520-521). Even without

those disclosures, reasonable consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

457. During TY 2018, the TurboTax home page included the following visual:



(GX342 (Complaint Counsel) ¶ 79, at CC-00006933-34; GX164 (Complaint Counsel)).

Response to Finding No. 457:

The Proposed Finding is inaccurate, incomplete, and misleading because it ignores disclosures and omits important context, including that the “visual” referenced in this Proposed Finding is just a small portion of the TurboTax homepage. In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

The Proposed Finding fails to mention that the Tax Year 2018 homepage referenced other TurboTax SKUs—including TurboTax Live and Self-Employed—which made clear that free offer was for TurboTax Free Edition only. (RX22 (Intuit)). The Proposed Finding also fails to mention that the referenced visual included a written disclosure stating “file your simple tax

returns for FREE.” (GX164 (Complaint Counsel)). Further, the Proposed Finding fails to mention that a consumer who clicked on the “See why it’s free” hyperlink would see a pop-up stating that TurboTax Free Edition was for “simple” tax returns only and listing the tax situations covered and not covered by Free Edition. (PFF ¶¶376, 379-380; *see also* RX1287 (Intuit); RX1288 (Intuit)). The Proposed Finding also fails to mention that the full TurboTax Tax Year 2018 homepage also included an “Important Offer Details and Disclosures” section that stated “TurboTax Free Guarantee: \$0 Federal + \$0 State + \$0 To File offer is available for simple tax returns with TurboTax Free Edition. A simple tax return is Form 1040 only, with no attached schedules.” (RX1213 (Intuit)). In addition, the Proposed Finding fails to mention that the TurboTax homepage changed after Tax Year 2018, such that the written disclosure on the homepage now states “Simple tax returns only,” and the “See why it’s free” pop-up hyperlink now invites consumers to “See if you qualify.” (*See* PFF ¶¶374-377).

Moreover, the Proposed Finding does not support an inference that the Tax Year 2018 TurboTax homepage expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. As discussed, the homepage informed consumers that a specific TurboTax SKU was being offered for free. (GX164 (Complaint Counsel); RX1213 (Intuit); *see* PFF ¶¶317-321). The homepage also informed consumers that the free offer had qualifications based on the complexity of a tax return by stating “simple tax returns.” (PFF ¶322; *see also* PFF ¶¶130-145). Further, the homepage contained a hyperlink entitled “see why it’s free,” which informed consumers that the free offer had qualifications, and which linked to detailed information about the qualifications for Free Edition. (GX164 (Complaint Counsel); PFF ¶¶376, 379-380). Complaint Counsel offered no evidence that these disclosures were not seen by consumers—in fact, Complaint Counsel and

their witnesses recognized that the TurboTax website repeatedly disclosed TurboTax Free Edition's qualifications. (PFF ¶¶367-370).

The Proposed Finding also does not support an inference that the Tax Year 2018 TurboTax homepage was likely to mislead reasonable consumers. Complaint Counsel offered no evidence that the homepage was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the disclosures on the homepage ensured that reasonable consumers understood that there were qualifications for the free TurboTax SKU being advertised, the nature and character of those qualifications, and that additional information could be found by clicking on the hyperlink. (PFF ¶¶317, 319-322, 376-384, 520-521). Even without those disclosures, reasonable consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

458. In TY 2018, clicking on the hyperlinked text "See why it's free" in the images at paragraphs 45 and 46 above caused the following pop-up to appear (GX342 (Complaint Counsel) ¶ 80):

Is TurboTax Free Edition really free?

Yes, we guarantee you'll pay nothing to file your simple federal and state taxes.

Join the millions who file for \$0

50 million hard-working taxpayers can file their simple federal and state taxes for free. You can file with TurboTax Free Edition if you only have the following situations:

- W-2 income
- Limited interest and dividend income reported on a 1099-INT or 1099-DIV
- Claim the standard deduction
- Earned Income Tax Credit (EIC)
- Child tax credits

Situations not covered in TurboTax Free Edition include:

- Itemized deductions (Schedule A)
- Business or 1099-MISC income (Schedule C)
- Stock sales (Schedule D)
- Rental property income (Schedule E)
- Credits, deductions and income reported on schedules 1-6, such as the Student Loan Interest Deduction

How does TurboTax make any money?

Customers with more complex tax situations will file with our other TurboTax products that provide all the right forms and guidance they need. We also offer additional benefits that go beyond filing your taxes, but they are completely optional and are not required to file your taxes for free. Many of our customers value additional features like:

- One-on-one help for answers, on demand with a TurboTax specialist
- 24/7 Tax Return Access to view and print copies of all your completed TurboTax returns

With TurboTax Free, the power to file for free is all yours!

[File for \\$0](#)

[Sign In](#)

[En Español](#)

(GX342 (Complaint Counsel) ¶ 80, at CC-00006935; GX165 (Complaint Counsel)).

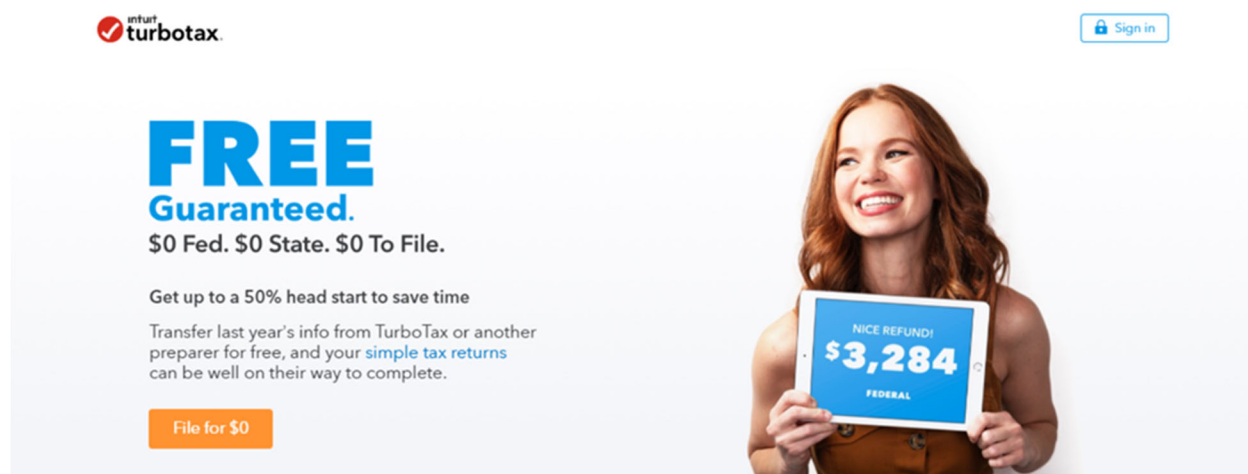
Response to Finding No. 458:

Intuit has no specific response other than to note that it uses links to a pop-up screen with additional qualification details to draw consumers attention to that information and because putting all the qualification details next to the offer for a free TurboTax SKU would likely overload consumers with “too much information to really read and comprehend.” (PFF ¶¶378-379; Johnson (Intuit) Tr. 595). The pop-up is “a way of disrupting the consumer’s viewing pattern to draw their attention to something that’s really important.” (PFF ¶383; Johnson (Intuit) Tr. 609).

Moreover, reasonable consumers are familiar with disclosures that are available by clicking a hyperlink and know in particular that hyperlinks are typically displayed in blue text and that clicking that text will lead to a webpage with additional information. (PFF ¶520). Accordingly, reasonable consumers visiting the TurboTax website understood that additional information about the qualifications for free TurboTax offers was available by clicking on the hyperlinked disclosure text on the TurboTax website. (PFF ¶521).

2. TurboTax Website TY 2019

459. During TY 2019, the TurboTax home page included the following visual:



(GX342 (Complaint Counsel) ¶ 95, at CC-00006943; GX166 (Complaint Counsel); *see also* Shiller (Complaint Counsel) Tr. 200; GX166-A (Complaint Counsel)).

Response to Finding No. 459:

The Proposed Finding is inaccurate, incomplete, and misleading because it ignores disclosures and omits important context, including that the “visual” referenced in this Proposed Finding is just a small portion of the TurboTax homepage. In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

The Proposed Finding fails to mention that the full Tax Year 2019 homepage referenced other TurboTax SKUs—including TurboTax Self-Employed—which made clear that free offer

was for TurboTax Free Edition only. (RX1214 (Intuit)). The Proposed Finding also fails to mention that the referenced visual included a hyperlinked written disclosure stating “simple tax returns.” (GX166 (Complaint Counsel)). Further, the Proposed Finding fails to mention that a consumer who clicked on the “simple tax returns” hyperlink would see a pop-up stating that TurboTax Free Edition was for “simple tax returns” only and listing the tax situations covered and not covered by Free Edition. (PFF ¶¶376, 379-380; *see also* RX1290 (Intuit); RX1291 (Intuit); RX1292 (Intuit)). In addition, the Proposed Finding fails to mention that the TurboTax homepage changed after Tax Year 2019, such that the hyperlink now invites consumers to “See if you qualify.” (*See* PFF ¶¶374-377).

Moreover, the Proposed Finding does not support an inference that the Tax Year 2019 TurboTax homepage expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. As discussed, the homepage informed consumers that a specific TurboTax SKU—TurboTax Free Edition—was being offered for free. (GX166 (Complaint Counsel); RX1213 (Intuit); *see* PFF ¶¶317-321). The homepage also informed consumers that the free offer had qualifications based on the complexity of a tax return by stating “simple tax returns.” (PFF ¶322; *see also* PFF ¶¶130-145). Further, that “simple tax returns” disclosure was a hyperlink that linked to detailed information about the qualifications for Free Edition. (GX166 (Complaint Counsel); PFF ¶¶376, 379-380). Complaint Counsel offered no evidence that these disclosures were not seen by consumers—in fact, Complaint Counsel and their witnesses recognized that the TurboTax website repeatedly disclosed TurboTax Free Edition’s qualifications. (PFF ¶¶367-370).

The Proposed Finding also does not support an inference that the Tax Year 2019 TurboTax homepage was likely to mislead reasonable consumers. Complaint Counsel offered no

evidence that the homepage was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the disclosures on the homepage ensured that reasonable consumers understood that there were qualifications for the free TurboTax SKU being advertised, the nature and character of those qualifications, and that additional information could be found by clicking on the hyperlink. (PFF ¶¶317, 319-322, 376-384, 520-521). Even without those disclosures, reasonable consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

460. Clicking on the orange “File for \$0” button on the TY 2019 TurboTax home page, (*see* GX166 (Complaint Counsel)), brought consumers to a screen to create an account and linked the Terms and Privacy Policy. (GX342 (Complaint Counsel) ¶ 97, at CC-00006943; *see also* Shiller (Complaint Counsel) Tr. 200; GX166-A (Complaint Counsel)).

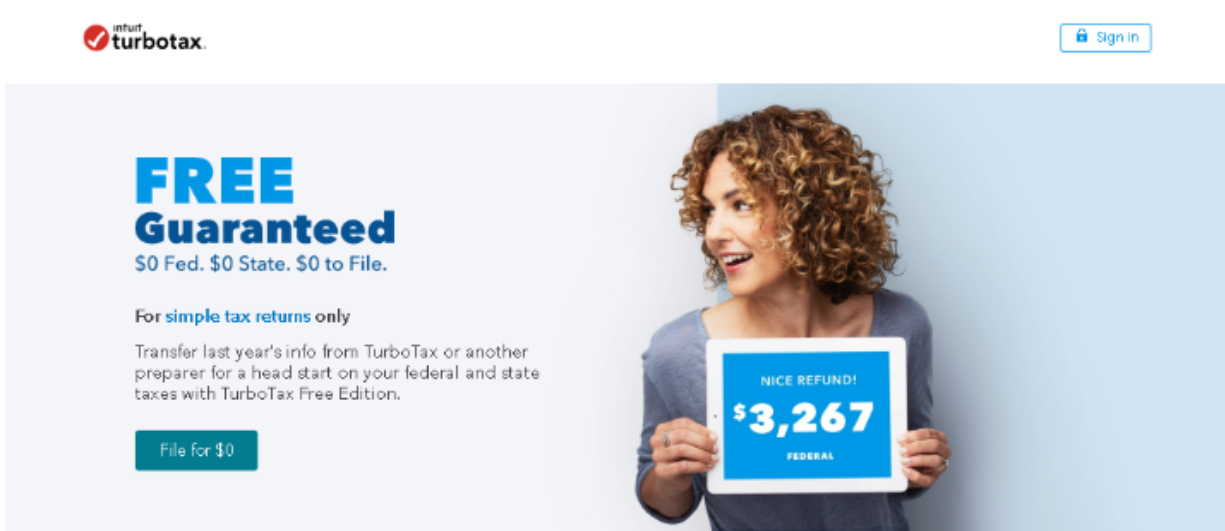
Response to Finding No. 460:

This Proposed Finding is wrong and not supported by the cited evidence. Consumers who clicked on the “File for \$0” button on the Tax Year 2019 TurboTax home page were shown the Products & Pricing page, not a screen “to create an account and linked the Terms and Privacy Policy.”³ (*See* PFF ¶¶408-409). Ms. Shiller’s cited declaration states only that the screen where consumers create an account contains links to TurboTax’s Terms and Global Privacy Policy and therefore does not support the claimed proposition in the Proposed Finding. (GX342 (FTC) ¶97).

³ It is unclear what “linked the Terms and Privacy Policy” means.

3. TurboTax Website TY 2020

461. During TY 2020, the TurboTax home page included the following advertisement:



(GX342 (Complaint Counsel) ¶ 125, at CC-00006962; GX183 (Complaint Counsel); GX183-A (Complaint Counsel)).

Response to Finding No. 461:

The Proposed Finding is inaccurate, incomplete, and misleading because it ignores disclosures and omits important context, including that the “visual” referenced in this Proposed Finding is just a small portion of the TurboTax homepage. In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

The Proposed Finding fails to mention that the referenced visual informed consumers that the free offer was for a specific SKU, “TurboTax Free Edition,” and that the full Tax Year 2020 homepage referenced other TurboTax SKUs—including TurboTax Deluxe, Premier, and Self-Employed—which made clear that free offer was for TurboTax Free Edition only. (GX183-A (Complaint Counsel)). The Proposed Finding also fails to mention that the referenced visual included a prominent, bolded hyperlinked written disclosure stating “For simple tax returns only.” (GX183 (Complaint Counsel)). Further, the Proposed Finding fails to mention that a

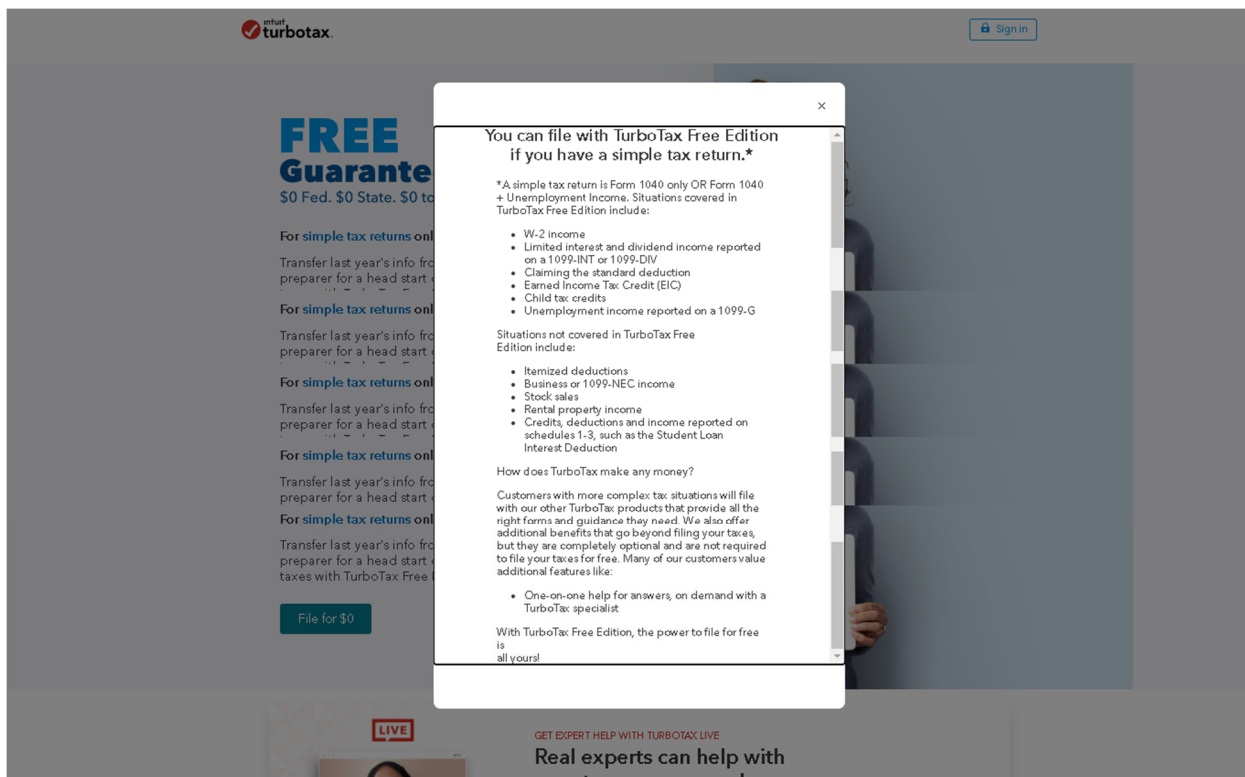
consumer who clicked on the “simple tax returns” hyperlink would see a pop-up stating that TurboTax Free Edition was for “simple tax returns” only and listing the tax situations covered and not covered by Free Edition. (PFF ¶¶376, 379-380; *see also* RX21 (Intuit); RX1293 (Intuit); RX1294 (Intuit)). In addition, the Proposed Finding fails to mention that the TurboTax homepage changed after Tax Year 2020, such that the hyperlink now invites consumers to “See if you qualify.” (*See* PFF ¶¶374-377).

Moreover, the Proposed Finding does not support an inference that the Tax Year 2020 TurboTax homepage expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. As discussed, the homepage informed consumers that a specific TurboTax SKU—TurboTax Free Edition—was being offered for free. (GX183 (Complaint Counsel); *see* PFF ¶¶317-321). The homepage also informed consumers that the free offer had qualifications based on the complexity of a tax return by stating “simple tax returns.” (PFF ¶322; *see also* PFF ¶¶130-145). Further, that “simple tax returns” disclosure was a hyperlink that linked to detailed information about the qualifications for Free Edition. (GX183 (Complaint Counsel); PFF ¶¶376, 379-380). Complaint Counsel offered no evidence that these disclosures were not seen by consumers—in fact, Complaint Counsel and their witnesses recognized that the TurboTax website repeatedly disclosed TurboTax Free Edition’s qualifications. (PFF ¶¶367-370).

The Proposed Finding also does not support an inference that the Tax Year 2019 TurboTax homepage was likely to mislead reasonable consumers. Complaint Counsel offered no evidence that the homepage was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the disclosures on the homepage ensured that

reasonable consumers understood that there were qualifications for the free TurboTax SKU being advertised, the nature and character of those qualifications, and that additional information could be found by clicking on the hyperlink. (PFF ¶¶317, 319-322, 376-384, 520-521). Even without those disclosures, reasonable consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

462. In TY 2020, clicking on the hyperlinked text “simple tax returns” button on the TurboTax home page caused the following pop-up to appear:



(GX342 (Complaint Counsel) ¶ 127, at CC-00006963; GX184 (Complaint Counsel)).

Response to Finding No. 462:

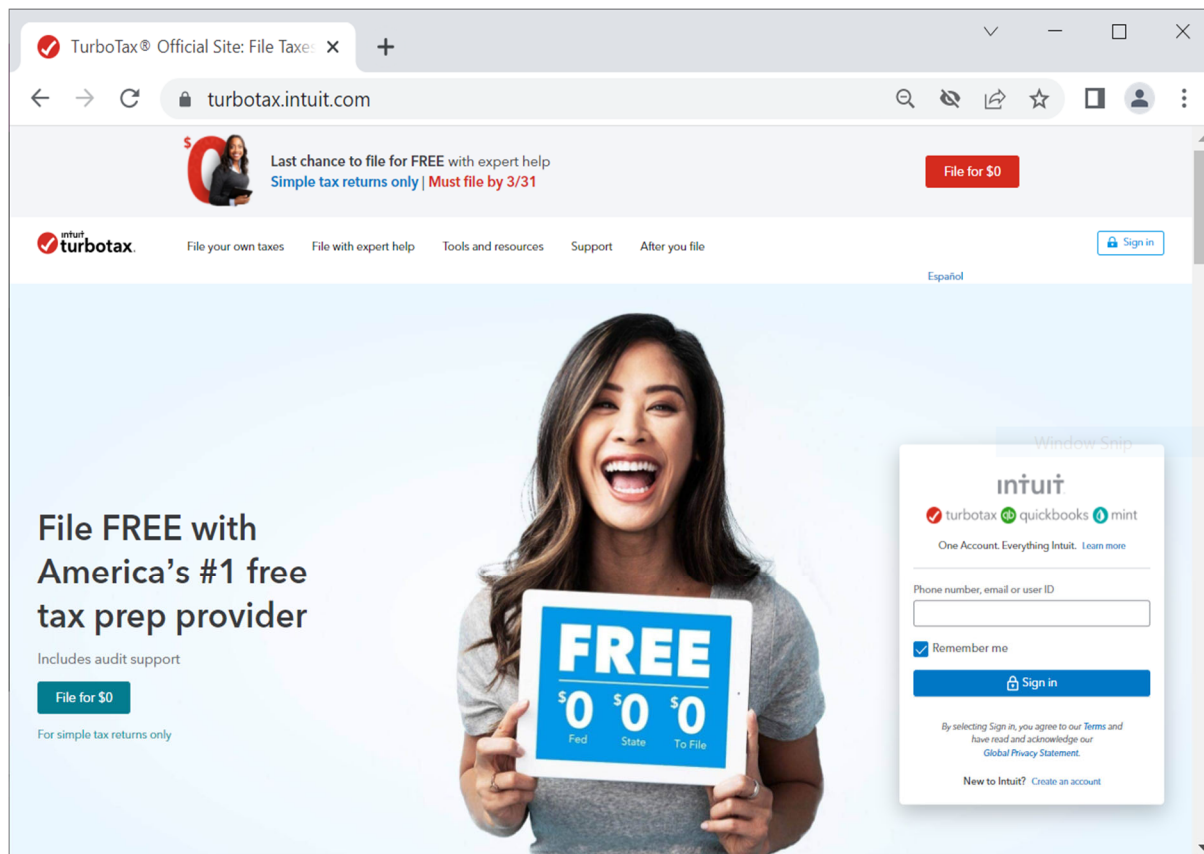
Intuit has no specific response other than to note that it uses links to a pop-up screen with additional qualification details to draw consumers attention to that information and because putting all the qualification details next to the offer for a free TurboTax SKU would likely

overload consumers with “too much information to really read and comprehend.” (PFF ¶¶378-379; Johnson (Intuit) Tr. 595). The pop-up is “a way of disrupting the consumer’s viewing pattern to draw their attention to something that’s really important.” (PFF ¶383; Johnson (Intuit) Tr. 609).

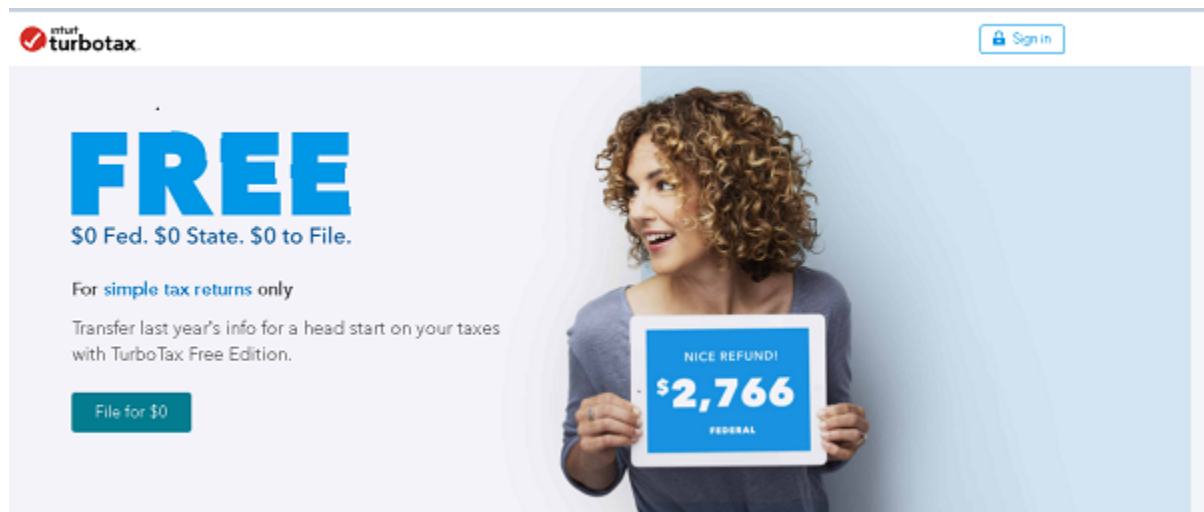
Moreover, reasonable consumers are familiar with disclosures that are available by clicking a hyperlink and know in particular that hyperlinks are typically displayed in blue text and that clicking that text will lead to a webpage with additional information. (PFF ¶520). Accordingly, reasonable consumers visiting the TurboTax website understood that additional information about the qualifications for free TurboTax offers was available by clicking on the hyperlinked disclosure text on the TurboTax website. (PFF ¶521).

4. TurboTax Website TY 2021

463. During TY 2021, the TurboTax Official Site included the following visuals on March 26, 2022:



(GX 342 (Complaint Counsel) ¶ 190, CC-00006998; GX486 (Complaint Counsel)). The TurboTax Official Site included the following visuals on March 31, 2022:



(GX342 (Complaint Counsel) ¶ 187, CC-00006996; GX483 (Complaint Counsel); GX483-A (Complaint Counsel); see also Shiller (Complaint Counsel) Tr. 201; GX483-A (Complaint Counsel)).

Response to Finding No. 463:

The Proposed Finding is inaccurate, incomplete, and misleading because it ignores disclosures and omits important context, including that the “visuals” referenced in this Proposed Finding are just a small portion of the TurboTax homepage. In determining the claims conveyed by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

The Proposed Finding fails to mention that the referenced visuals informed consumers that the free offer was for a specific SKU—e.g., by stating “TurboTax Free Edition” or by indicating the offer was for a limited time with “expert help”—and also that the full Tax Year 2021 homepage referenced other TurboTax SKUs—including TurboTax Live and Live Full Service—which made clear that free offer was for specific free SKUs only. (GX486 (Complaint Counsel); GX483 (Complaint Counsel); RX1263-A (Intuit)). The Proposed Finding also fails to mention that the referenced visuals included a prominent, bolded hyperlinked written disclosure stating “For simple tax returns only.” (GX486 (Complaint Counsel); GX483 (Complaint Counsel)). Further, the Proposed Finding fails to mention that a consumer who clicked on the “simple tax returns” hyperlink would see a pop-up stating that TurboTax Free Edition was for “simple tax returns” only and listing the tax situations covered and not covered by Free Edition. (PFF ¶¶376, 379-380; *see also* RX3 (Intuit); RX4 (Intuit)). The Proposed Finding also fails to mention that the full TurboTax Tax Year 2021 homepage also included an “Important offer details and disclosures” section that stated “TurboTax Free Edition: \$0 Federal + \$0 State + \$0 To File offer is available for simple tax returns only with TurboTax Free Edition. A simple tax return is Form 1040 only (without any additional attached schedules).” (RX1263-A (Intuit)). In addition, the Proposed Finding fails to mention that the TurboTax homepage changed after Tax

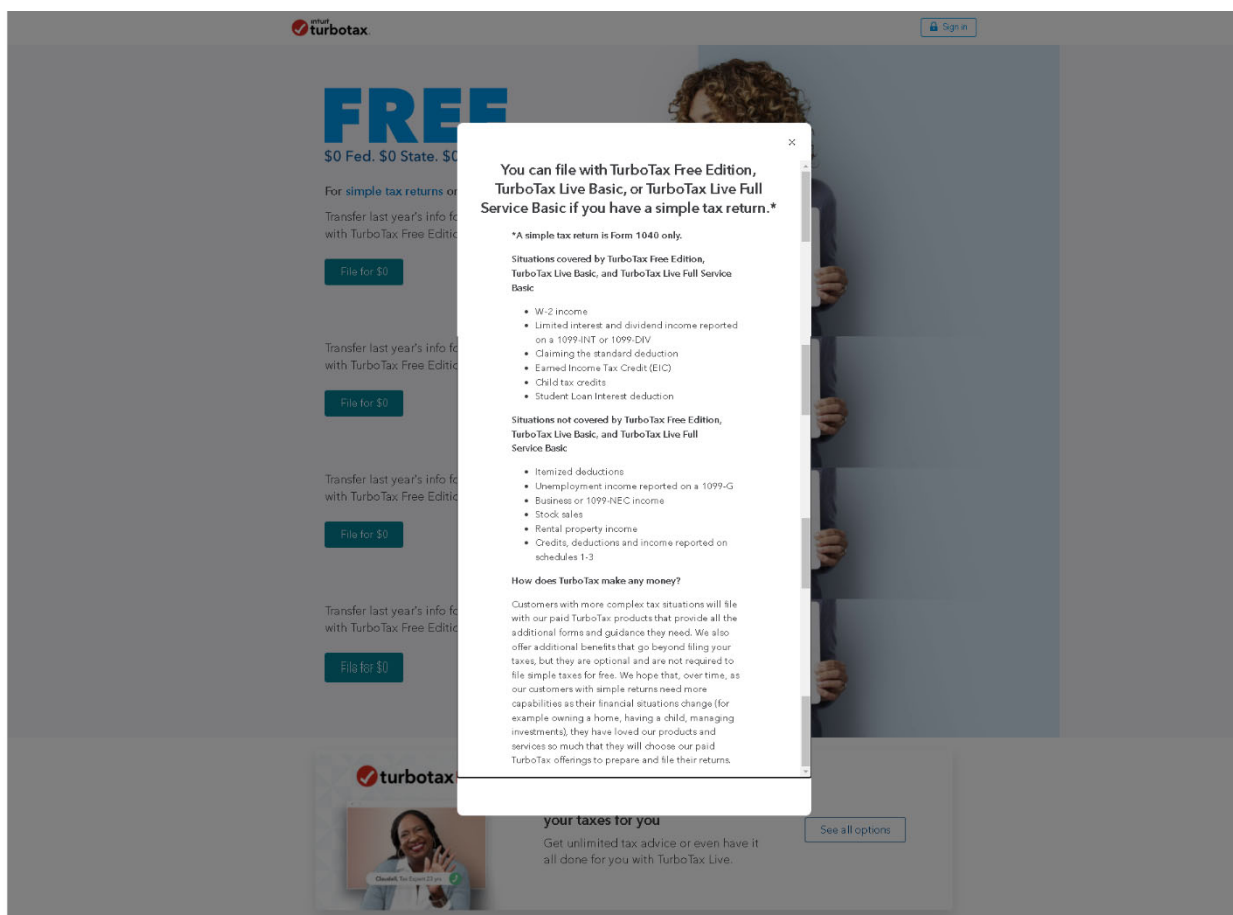
Year 2021, such that the hyperlink now invites consumers to “See if you qualify.” (See PFF ¶¶374-377).

Moreover, the Proposed Finding does not support an inference that the Tax Year 2021 TurboTax homepage expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. As discussed, the homepage informed consumers that a specific TurboTax SKU—e.g., TurboTax Free Edition—was being offered for free. (GX486 (Complaint Counsel); GX483 (Complaint Counsel); see PFF ¶¶317-321). The homepage also informed consumers that the free offer had qualifications based on the complexity of a tax return by stating “For simple tax returns only.” (GX486 (Complaint Counsel); GX483 (Complaint Counsel); PFF ¶322; see also PFF ¶¶130-145). Further, that “simple tax returns” disclosure was a hyperlink that linked to detailed information about the qualifications for Free Edition. (GX486 (Complaint Counsel); GX483 (Complaint Counsel); PFF ¶¶376, 379-380). Complaint Counsel offered no evidence that these disclosures were not seen by consumers—in fact, Complaint Counsel and their witnesses recognized that the TurboTax website repeatedly disclosed TurboTax Free Edition’s qualifications. (PFF ¶¶367-370).

The Proposed Finding also does not support an inference that the Tax Year 2021 TurboTax homepage was likely to mislead reasonable consumers. Complaint Counsel offered no evidence that the homepage was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the disclosures on the homepage ensured that reasonable consumers understood that there were qualifications for the free TurboTax SKU being advertised, the nature and character of those qualifications, and that additional information could

be found by clicking on the hyperlink. (PFF ¶¶317, 319-322, 376-384, 520-521). Even without those disclosures, reasonable consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

464. In TY 2021, clicking on the hyperlinked text “simple tax returns” button on the TurboTax home page caused the following pop-up to appear:



(GX342 (Complaint Counsel) ¶ 188, CC-00006997; GX484 (Complaint Counsel); *see also* Shiller (Complaint Counsel) Tr. 201-02; GX483-A (Complaint Counsel)).

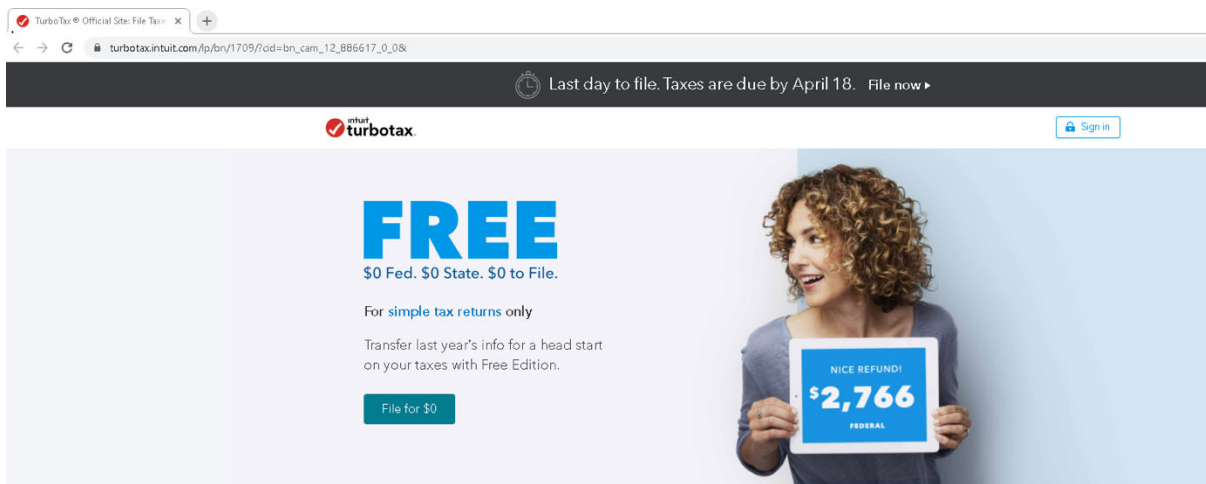
Response to Finding No. 464:

Intuit has no specific response other than to note that it uses links to a pop-up screen with additional qualification details to draw consumers attention to that information and because

putting all the qualification details next to the offer for a free TurboTax SKU would likely overload consumers with “too much information to really read and comprehend.” (PFF ¶¶378-379; Johnson (Intuit) Tr. 595). The pop-up is “a way of disrupting the consumer’s viewing pattern to draw their attention to something that’s really important.” (PFF ¶383; Johnson (Intuit) Tr. 609).

Moreover, reasonable consumers are familiar with disclosures that are available by clicking a hyperlink and know in particular that hyperlinks are typically displayed in blue text and that clicking that text will lead to a webpage with additional information. (PFF ¶520). Accordingly, reasonable consumers visiting the TurboTax website understood that additional information about the qualifications for free TurboTax offers was available by clicking on the hyperlinked disclosure text on the TurboTax website. (PFF ¶521).

465. On April 18, 2022, the TurboTax home page displayed the following visual:



(GX342 (Complaint Counsel) ¶ 189, at CC-00006997; GX485 (Complaint Counsel)).

Response to Finding No. 465:

The Proposed Finding is inaccurate, incomplete, and misleading because it ignores disclosures and omits important context, including that the “visual” referenced in this Proposed Finding are just a small portion of the TurboTax homepage. In determining the claims conveyed

by an advertisement and whether it was likely to mislead reasonable consumers, the full ad and any integrated content must be considered. (PCL ¶¶9, 16, 68; PFF ¶¶241, 313, 320, 334).

The Proposed Finding fails to mention that the referenced visual informed consumers that the free offer was for a specific SKU by stating “Free Edition,” and also that the full Tax Year 2021 homepage referenced other TurboTax SKUs—including TurboTax Live and Live Full Service—which made clear that free offer was for specific free SKUs only. (GX485 (Complaint Counsel); RX1263-A (Intuit)). The Proposed Finding also fails to mention that the referenced visual included a prominent, bolded hyperlinked written disclosure stating “For simple tax returns only.” (GX485 (Complaint Counsel)). Further, the Proposed Finding fails to mention that a consumer who clicked on the “simple tax returns” hyperlink would see a pop-up stating that TurboTax Free Edition was for “simple tax returns” only and listing the tax situations covered and not covered by Free Edition. (PFF ¶¶376, 379-380; *see also* RX3 (Intuit); RX4 (Intuit)). The Proposed Finding also fails to mention that the full TurboTax Tax Year 2021 homepage also included an “Important offer details and disclosures” section that stated “TurboTax Free Edition: \$0 Federal + \$0 State + \$0 To File offer is available for simple tax returns only with TurboTax Free Edition. A simple tax return is Form 1040 only (without any additional attached schedules).” (RX1263-A (Intuit)). In addition, the Proposed Finding fails to mention that the TurboTax homepage changed after Tax Year 2021, such that the hyperlink now invites consumers to “See if you qualify.” (*See* PFF ¶¶374-377).

Moreover, the Proposed Finding does not support an inference that the Tax Year 2021 TurboTax homepage expressly or impliedly claimed that all TurboTax products were free or that TurboTax would necessarily be free for the consumer when it was not. As discussed, the homepage informed consumers that a specific TurboTax SKU—e.g., TurboTax Free Edition—

was being offered for free. (GX485 (Complaint Counsel); *see* PFF ¶¶317-321). The homepage also informed consumers that the free offer had qualifications based on the complexity of a tax return by stating “For simple tax returns only.” (GX485 (Complaint Counsel); PFF ¶322; *see also* PFF ¶¶130-145). Further, that “simple tax returns” disclosure was a hyperlink that linked to detailed information about the qualifications for Free Edition. (GX485 (Complaint Counsel); PFF ¶¶376, 379-380). Complaint Counsel offered no evidence that these disclosures were not seen by consumers—in fact, Complaint Counsel and their witnesses recognized that the TurboTax website repeatedly disclosed TurboTax Free Edition’s qualifications. (PFF ¶¶367-370).

The Proposed Finding also does not support an inference that the Tax Year 2021 TurboTax homepage was likely to mislead reasonable consumers. Complaint Counsel offered no evidence that the homepage was likely to mislead reasonable consumers into believing that all TurboTax products were free or that TurboTax would necessarily be free for them when it was not. To the contrary, the evidence establishes that the disclosures on the homepage ensured that reasonable consumers understood that there were qualifications for the free TurboTax SKU being advertised, the nature and character of those qualifications, and that additional information could be found by clicking on the hyperlink. (PFF ¶¶317, 319-322, 376-384, 520-521). Even without those disclosures, reasonable consumers understand that free tax-preparation offers are qualified, that their ability to qualify for that offering depends on the complexity of their tax returns, and that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (PFF ¶¶470-527).

466. In TY 2021, the TurboTax “Products & Pricing” screen on the TurboTax website appeared as follows:

The screenshot shows the TurboTax website interface. At the top, there is a navigation bar with a search icon and a help icon. Below this is a promotional banner for 'New! File FREE' with a small image of a woman. The main heading reads 'Tell us about you – we'll recommend the right tax solution'. Underneath, there is a section titled 'Select all that apply:' with a grid of 12 icons representing different tax situations, such as 'I want to maximize deductions and credits', 'I have a job (received W-2)', 'I own a home', etc. Below the icons are two tabs: 'You can do it' and 'Real experts help or do it for you'. The main content area is titled 'America's #1 brand of tax software' and features a comparison of four editions: Free Edition, Deluxe, Premier, and Self-Employed. Each edition lists its price, features, and user ratings. The Free Edition is highlighted with a 'FREE' badge and a list of benefits. At the bottom, there is a dropdown menu for 'Your tax returns & documents' and a footer with legal disclaimers.

(GX342 (Complaint Counsel) ¶ 181, at CC-00006994; GX482 (Complaint Counsel)).

Response to Finding No. 466:

The Proposed Finding accurately depicts the Tax Year 2021 Products & Pricing page, which is shown to all consumers before they start their taxes with a TurboTax SKU. (PFF ¶409). The page is inconsistent with deception because a reasonable consumer who sees it would not be

likely to believe that TurboTax would necessarily be free for them or that all TurboTax SKUs are free. (PFF ¶417). As Mr. Johnson testified, Intuit designed the Products & Pricing page “to make sure that [consumers] are aware of the qualifications [for free TurboTax SKUs] and to make sure we get people in the right products.” (GX482 (Complaint Counsel); PFF ¶413). The Products & Pricing page lists each TurboTax SKU, its price, and the relevant tax situations each SKU covers, so that before consumers begin their taxes, they are informed that not all TurboTax SKUs are free, and that there is a Free Edition for simple tax returns. (GX482 (Complaint Counsel); PFF ¶413). The Products & Pricing page also includes qualifying language for TurboTax Free Edition in several places, including hyperlinked statements that it is “For simple tax returns only,” “You’ll pay absolutely nothing to file your federal and state taxes if you have a simple tax return only,” and “Free filing of your simple federal and state tax returns only”; in addition, the page provides a concise list of the tax situations covered. (GX482 (Complaint Counsel); PFF ¶414). Further, the Products & Pricing page includes multiple hyperlinked disclosures that, when clicked, bring up a pop-up screen with details about Free Edition’s qualifications. (GX482 (Complaint Counsel); PFF ¶¶415-416).

Moreover, as shown at the top of GX482, the Products & Pricing page includes a SKU selector that provides consumers with a recommendation about the TurboTax products most likely to meet their needs in an effort to “get[] more users to the right [TurboTax] SKU for the start,” so that consumers avoid required upgrades. (GX482 (Complaint Counsel); PFF ¶¶419, 423). The SKU selector is also inconsistent with deception because it provides an easy way for consumers to assess the likelihood they would qualify for a free TurboTax SKU. (PFF ¶435). As shown in GX482, the SKU selector allows consumers to click on one (or more) of twelve easily understandable tiles representing different life situations, and their selections will result in a

recommendation for a specific TurboTax SKU likely to meet those situations. (GX482 (Complaint Counsel); PFF ¶¶424-426). For instance, if consumers indicate that they received a W-2, rent their home, and have children, the SKU selector recommends TurboTax Free Edition and discloses that it is “For simple tax returns only” (PFF ¶¶426-427), but if they indicate that they own a home or sold stock, the selector recommends TurboTax Deluxe or TurboTax Premier respectively (PFF ¶428). Around 40-50% of consumers who use the SKU selector receive a recommendation to start in TurboTax Free Edition, which is roughly the same percentage of consumers who complete their taxes in Free Edition, which again is inconsistent with deception. (PFF ¶430).

III. Effects of TurboTax’s Marketing Communications on Consumers

A. Novemsky Survey and Expert Opinions

467. Complaint Counsel engaged Professor Nathan Novemsky, Ph.D., a professor of consumer psychology and marketing at Yale University to evaluate Intuit’s “free” TurboTax advertising and marketing. (GX303 (Novemsky Expert Report) ¶ 1; Novemsky (Complaint Counsel) Tr. 348-349).

Response to Finding No. 467:

Intuit has no specific response.

468. In connection with this engagement, Professor Novemsky designed and supervised a consumer perception survey. (GX303 (Novemsky Expert Report) ¶ 1; Novemsky (Complaint Counsel) Tr. 354-355).

Response to Finding No. 468:

The Proposed Finding s incorrect and misleading in suggesting that Professor Novemsky’s survey was scientifically valid and reliable; for numerous reasons, it is neither valid nor reliable. (See PFF ¶¶529-622; Responses to CCF ¶¶480-595). The Proposed Finding is also incorrect and misleading in suggesting that Professor Novemsky’s survey is properly considered a “consumer perception survey.” As Dr. Hauser explained, perception surveys

require researchers to employ some kind of mechanisms to compare outcomes between brands, or with a control group. They enable researchers to “make relative statements, not absolute statements.” (Hauser (Intuit) Tr. 899). Here, however, Professor Novemsky has no mechanism for comparing outcomes, and he presents the results of his survey in absolute terms. (Hauser (Intuit) Tr. 900). That is not the proper use of a perception survey. Finally, the Proposed Finding is incorrect and misleading insofar as it suggests that Professor Novemsky’s survey validly assessed consumers’ “perception” of the challenged ads. It did not. Professor Novemsky did not show his survey participants *any* TurboTax ads or marketing communications, so respondents would have been answering entirely from memory—even though Professor Novemsky conceded that survey participants “could have forgotten anything” they had seen about TurboTax in the past (PFF ¶¶533-534, 536).

469. As part of his engagement, Professor Novemsky drafted two declarations, an expert report, and a rebuttal expert report. (See GX302 (Complaint Counsel); GX313 (Complaint Counsel); GX303 (Novemsky Expert Report); GX749 (Novemsky Rebuttal Expert Report)).

Response to Finding No. 469:

Intuit has no specific response.

470. Complaint Counsel first provided counsel for Intuit with the perception survey results on March 28, 2022. (GX302 (Complaint Counsel)).

Response to Finding No. 470:

The Proposed Finding is incorrect. Complaint Counsel “provided” a *summary* of a subset of the survey results to Intuit by submitting a declaration from Professor Novemsky with the FTC’s motion for a temporary restraining order and preliminary injunction. Based on that information, Intuit’s survey expert, Dr. John Hauser, then identified numerous flaws with Professor Novemsky’s survey just one week later, on April 4, 2022, in a declaration submitted in support of Intuit’s opposition to the FTC’s motion. (RX403 (Intuit) ¶¶6, 24-68). After

considering Professor Novemsky's survey and the FTC's other evidence, U.S. District Judge Charles R. Breyer denied the FTC's motion. (PFF ¶¶15-16). Professor Novemsky never conducted another survey or experiment addressing the concerns that Dr. Hauser raised in April 2022.

471. In Professor Novemsky's opinion, there was deception caused by TurboTax advertising and marketing, giving consumers a false impression that they can file for free when that is not the case. (GX303 (Novemsky Expert Report) ¶ 11; GX749 (Novemsky Rebuttal Expert Report) ¶¶ 3, 15; Novemsky (Complaint Counsel) Tr. 348).

Response to Finding No. 471:

The Proposed Finding is incorrect because it does not accurately reflect, and indeed overstates, the opinion that was offered in Professor Novemsky's report. In the cited paragraph of his report, Professor Novemsky states there is "strong evidence that Intuit's marketing is the most likely source of these consumer misperceptions." (GX303 (Novemsky Expert Report ¶11)). That is not the same thing as opining, as the Proposed Finding claims, that there definitively "was deception caused by TurboTax advertising." In any event, expert opinions like Professor's Novemsky's must be formed through "reliable principles and methods." (Fed. R. Evid. 702). Here, Professor Novemsky's opinion is based on his scientifically invalid and unreliable perception survey (PFF ¶¶529-622), and other analyses that do not conform with reliable principles and methods (Hauser (Intuit) Tr. 910-911; Responses to CCF ¶¶480-595).

1. Qualifications

472. Professor Novemsky holds a Ph.D. and M.A. in Social Psychology from Princeton University. (GX303 (Novemsky Expert Report) ¶ 12; Novemsky (Complaint Counsel) Tr. 348-349).

Response to Finding No. 472:

Intuit has no specific response.

473. He is a tenured Professor at Yale, where he has been teaching for over 20 years. (GX303 (Novemsky Expert Report) Appendix A; Novemsky (Complaint Counsel) Tr. 349).

Response to Finding No. 473:

Intuit has no specific response.

474. Professor Novemsky teaches doctoral and MBA students, as well as executives at major corporations. (GX303 (Novemsky Expert Report) ¶ 14; Novemsky (Complaint Counsel) Tr. 349-350).

Response to Finding No. 474:

Intuit has no specific response.

475. Professor Novemsky is an expert in the psychology of judgment and decision-making, an area that overlaps with behavioral economics and consumer behavior. (GX303 (Novemsky Expert Report) ¶ 12; *see also* Novemsky (Complaint Counsel) Tr. 348).

Response to Finding No. 475:

Intuit has no specific response except to note that there is no requirement that an expert have a degree or specialization in psychology to opine on advertising, marketing practices, or consumer behavior. Rather, experts must have “scientific, technical, or other specialized knowledge that will help the trier of fact,” and form their opinions through “reliable principles and methods.” (Fed. R. Evid. 702). Professor Novemsky’s opinion in this case is based on his scientifically invalid and unreliable perception survey (PFF ¶¶529-622), and other analyses that do not conform with reliable principles and methods (Hauser (Intuit) Tr. 910-911; Responses to CCF ¶¶480-595).

476. Professor Novemsky’s research has focused on individual decision-making—the manner in which individuals acquire and process information when forming perceptions and preferences, the effect of product attributes (such as price and product features) and information presentation on consumers’ purchase and consumption decisions, and the effect of different marketing mix activities (such as advertising) on consumers’ buying decisions and consumer experiences. (GX303 (Novemsky Expert Report) ¶ 12; *see also* Novemsky (Complaint Counsel) Tr. 349-350).

Response to Finding No. 476:

Intuit has no specific response except to note that experts must form their opinions through “reliable principles and methods.” (Fed. R. Evid. 702). Professor Novemsky’s opinion

in this case is based on his scientifically invalid and unreliable perception survey (PFF ¶¶529-622), and other analyses that do not conform with reliable principles and methods (Hauser (Intuit) Tr. 910-911; Responses to CCFF ¶¶480-595).

477. Professor Novemsky's research has been published in leading marketing and psychology journals. (GX303 (Novemsky Expert Report) ¶ 12; Novemsky (Complaint Counsel) Tr. 351).

Response to Finding No. 477:

Intuit has no specific response except to note that experts must form their opinions through "reliable principles and methods." (Fed. R. Evid. 702). Professor Novemsky's opinion in this case is based on his scientifically invalid and unreliable perception survey (PFF ¶¶529-622), and other analyses that do not conform with reliable principles and methods (Hauser (Intuit) Tr. 910-911; Responses to CCFF ¶¶480-595).

478. Professor Novemsky has conducted, supervised, or evaluated hundreds of surveys, including many related to consumer behavior and information processing. (GX303 (Novemsky Expert Report) ¶ 16; *see also* Novemsky (Complaint Counsel) Tr. 352).

Response to Finding No. 478:

Intuit has no specific response except to note that in previously evaluating a survey, Professor Novemsky has testified that it is "impossible" to "draw any causal inference" without "an experimental design that includes a control group and a test group" (PFF ¶532) and has utilized a test-control design in several other contexts (RX1017 (Hauser Expert Report) ¶27 n.42), yet did not use a test-control design in this case, even though his opinion involves a causal conclusion (PFF ¶¶530, 532).

479. Professor Novemsky's expertise in consumer psychology, consumer decision-making, consumer experiences, and consumer information processing are relevant in evaluating Intuit's advertising and marketing of its TurboTax online tax preparation services as "free." (GX303 (Novemsky Expert Report) ¶ 18; *see also* Novemsky (Complaint Counsel) Tr. 353 ("Consumer psychology is central to my work on this matter. As I understand the question I was asked to investigate, it's about something in consumers'

heads, what do they take away from TurboTax marketing and is that thing they're taking away true or false. So it's very central.")).

Response to Finding No. 479:

The Proposed Finding is incorrect, misleading, and incomplete because expert opinions must be “not only relevant, but reliable.” (*FTC v. LendingClub Corp.*, 2020 WL 2838827, at *13 (N.D. Cal. June 1, 2020) (quoting *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 589 (1993))). Here, Professor Novemsky’s opinion about Intuit’s advertising and marketing of its TurboTax online tax preparation services is based on Professor Novemsky’s scientifically invalid and unreliable perception survey (PFF ¶¶529-622), and other analyses that do not conform with reliable principles and methods (Hauser (Intuit) Tr. 910-911; Responses to CCFF ¶¶480-595). Any general “expertise” in “consumer psychology, consumer decision-making, consumer experiences, and consumer information processing” is not relevant and should not be considered.

The Proposed Finding is also misleading insofar as it suggests that an expert must have a degree or specialization in psychology to opine on advertising, marketing practices, or consumer behavior. Rather, experts must have “scientific, technical, or other specialized knowledge that will help the trier of fact.” (Fed. R. Evid. 702). Intuit’s experts have such knowledge through their experiences in marketing science, marketing and advertising strategy, complex economic analyses, the consumer buying process, and consumer response to product development and marketing—subjects that often implicate principles of psychology. (*See Golder (Intuit) Tr. 1216* (explaining that “psychology ... underlying consumer behavior is an important part of the marketing literature”)).

2. Survey Results Regarding “Free” Misimpressions & Source of Misimpressions

480. Consumers not eligible for the TurboTax Free Edition have the misimpression that they can file their taxes for free with TurboTax. (GX303 (Novemsky Expert Report) ¶¶ 8, 69 & Figure 1; Novemsky (Complaint Counsel) Tr. 354, 358-359).

Response to Finding No. 480:

The Proposed Finding is misleading, incorrect, and unsupported. It is misleading because it is not enough for Complaint Counsel to suggest that some unspecified number of consumers have a misimpression. Complaint Counsel's burden is instead to prove that the challenged ads were likely to mislead a "*significant minority* of reasonable consumers" about their ability to file their taxes for free using TurboTax." (PCL ¶41).

The Proposed Finding is also incorrect and unsupported because the only cited authority is Professor Novemsky's scientifically invalid survey, which "did not reliably assess whether consumers are under a misimpression about their ability to file for free using TurboTax." (PFF ¶578; *see also* PFF ¶¶566-589). Among other things, Professor Novemsky focused on consumers who had not used TurboTax in at least three years and are therefore likely unfamiliar with TurboTax's products and advertising. (PFF ¶¶550-552). Professor Novemsky also did not show those survey participants *any* TurboTax ads or marketing communications, so respondents would have been answering entirely from memory—even though Professor Novemsky conceded that survey participants "could have forgotten anything" they had seen about TurboTax in the past (PFF ¶¶533-534, 536). Professor Novemsky then used questions that primed those respondents to guess that they could file for free (PFF ¶¶567-577). Indeed, respondents in Professor Novemsky's survey confirmed that they believed they could file for free because "[b]ecause this survey is suggesting that I can." (PFF ¶576). That is not evidence of a genuine misimpression.

Contrary to Complaint Counsel's unproven Proposed Finding, reliable evidence refutes the suggestion that any meaningful number of consumers have the misimpression that they can file their taxes for free with TurboTax. For one thing, if such a misimpression existed, one would expect to see widespread consumer complaints about their inability to file for free—yet the

complaint rate in this case is miniscule and nowhere near other FTC deception cases. (PFF ¶¶624-647). Moreover, the results of Intuit’s copy tests indicate that, if anything, consumers *underestimate* their ability to file their taxes for free using TurboTax. (PFF ¶¶695-713). And the TY20 NPS Survey shows that customers who visit the TurboTax website expecting to file for free ultimately *are* filing for free, while consumers expecting to pay to file are finding TurboTax’s paid SKUs. (PFF ¶¶714-721).

481. Ineligible consumers who had not used TurboTax in the previous three years believed, at a rate of 52.7%, that they could use TurboTax for free. (GX303 (Novemsky Expert Report) ¶¶ 8, 69 & Figure 1; Novemsky (Complaint Counsel) Tr. 360-361).

Response to Finding No. 481:

The Proposed Finding is incorrect and unsupported because it is based entirely on Professor Novemsky’s scientifically invalid and unreliable survey. Of particular relevance here, survey participants who have not used TurboTax in the previous three years are likely unfamiliar with TurboTax’s products and advertising. (PFF ¶¶550-552). Professor Novemsky also did not show those survey participants *any* TurboTax ads or marketing communications, so respondents would have been answering entirely from memory—even though Professor Novemsky conceded that survey participants “could have forgotten anything” they had seen about TurboTax in the past. (PFF ¶¶533-534, 536). And Professor Novemsky’s questions primed participants to guess that they could file for free—which respondents confirmed by saying that they believed they could file for free because “[b]ecause this survey is suggesting that I can.” (PFF ¶576; *see also* PFF ¶¶567-577).

Had Professor Novemsky used a control group(s) with a fictional tax brand (or other real tax brands), he could have estimated the magnitude of this “survey noise” effect and subtracted it out of his results. (PFF ¶¶539, 595). For example, Professor Novemsky could have asked a control group the same survey questions he asked his main survey group about TurboTax, but

with a fictional brand name substituted for TurboTax. (PFF ¶539). If 40% of respondents thought they could file for free with the fictional brand, Professor Novemsky could have estimated that the survey itself was causing 40% of respondents to believe they could file for free, and he could have subtracted that 40% out of his results concerning TurboTax. (See PFF ¶539). Professor Novemsky also could have asked the same survey questions about other real tax-preparation brands (like H&R Block and TaxSlayer), and then compared the results for each brand to see if consumers' perceptions with respect to one brand differed significantly from the others. (See Hauser (Intuit) Tr. 897-898).

Ultimately, as Dr. Hauser explained, perception surveys like Professor Novemsky's enable researchers to "make relative statements, not absolute statements"; they require researchers to employ some kind of mechanism to compare outcomes between brands or with a control group. (Hauser (Intuit) Tr. 899). Here, however, Professor Novemsky has no mechanism for comparing outcomes. (Hauser (Intuit) Tr. 900). He instead simply presents his 52.7% number in absolute terms. That number, on its own, would be meaningless, even if all of the other flaws in Professor Novemsky's survey were not present (PFF ¶¶566-589).

482. Intuit's marketing is the most likely source of consumer misimpressions about their ability to file for free. (GX303 (Novemsky Expert Report) ¶11; Novemsky (Complaint Counsel) Tr. 358-359 ("[M]any consumers take away the message that they can file for free when, in fact, they cannot. They take this away in large part because of TurboTax marketing.")).

Response to Finding No. 482:

The Proposed Finding is incorrect and unsupported because it is based entirely on Professor Novemsky's scientifically invalid and unreliable survey. As an initial matter, for reasons already provided (Responses to CCF ¶¶480-481; PFF ¶¶550-552, 566-588), Professor Novemsky's survey cannot reliably assess the threshold question of whether any consumer misimpression exists, so the survey necessarily cannot reliably assess the source of any supposed

misimpression. (PFF ¶589). For one thing, survey participants who have not used TurboTax in the previous three years are likely unfamiliar with TurboTax’s products and advertising; thus, to the extent any of those participants are under a misimpression about their ability to file their taxes for free, it is unlikely that misimpression was caused by TurboTax advertising. (PFF ¶¶550-552). Professor Novemsky also did not show those survey participants *any* TurboTax ads or marketing communications, so respondents would have been answering entirely from memory—even though Professor Novemsky conceded that survey participants “could have forgotten anything” they had seen about TurboTax in the past. (PFF ¶¶533-534, 536). And Professor Novemsky’s questions primed participants to guess that they could file for free—which respondents confirmed by saying that they believed they could file for free because “[b]ecause this survey is suggesting that I can.” (PFF ¶576; *see also* PFF ¶¶567-577). That is not evidence of a genuine misimpression.

In addition, the Proposed Finding draws a causal conclusion, yet Professor Novemsky’s survey was not designed to assess causality. (PFF ¶530). Testing causality requires a test-control experimental design in which participants in a “test” group are exposed to whatever subject matter is being studied, and participants in a “control” group are exposed to some kind of placebo stimulus (or no stimulus at all). (PFF ¶531). By examining the differences in responses between the two groups, researchers can isolate and measure any effect that the tested subject matter caused. (PFF ¶531). As Professor Novemsky himself testified when evaluating a survey as an expert in another case, it is “impossible” to “draw any causal inference” without “an experimental design that includes a control group and a test group.” (PFF ¶532). Absent a control group, Professor Novemsky stated under oath, one cannot test what “an ad caused consumers to understand or not understand.” (PFF ¶532). Here, however, Professor Novemsky

admits that he did not use a test-control design. (PFF ¶533). Indeed, although Professor Novemsky purports to draw a causal conclusion about TurboTax's marketing, he did not show participants any TurboTax advertisements or the TurboTax website. (PFF ¶534).

On top of that fundamental design problem, Professor Novemsky's survey led survey participants to indicate that TurboTax marketing was driving their impression. To identify the source(s) of consumers' supposed misimpression, Professor Novemsky relied on one multiple-choice question (TAT255), for which two of the five substantive answer choices conformed to Complaint Counsel's allegations, increasing the likelihood that participants would respond in a manner consistent with those allegations. (PFF ¶593). Making matters worse, by the time participants reached TAT255, they had already been primed (consciously or subconsciously) to select the two TurboTax-related answer choices, because the survey had already mentioned "TurboTax" twelve times. (PFF ¶594). If Professor Novemsky had used a control a control group, he could have measured the magnitude of this effect and removed it from his results. (PFF ¶595). But he did not do so.

The leading nature of Professor Novemsky's survey was then exacerbated by the fact that TAT255 was not the kind of question that people can reliably answer from memory. (PFF ¶603). It is well-established that individuals have "source amnesia," meaning difficulty accurately recalling the source from which they obtain information. (PFF ¶604). Instead of asking respondents what they did or saw, TAT255 asked how they learned something—which is precisely the type of question that people cannot be expected to answer accurately. (PFF ¶606). Because of source amnesia, Professor Novemsky's survey participants were especially vulnerable to leading questions and answers like those Professor Novemsky used. (PFF ¶¶606-607).

Any one of these flaws is sufficient on its own to render Professor Novemsky's "source" conclusion unreliable. (PFF ¶¶607). But the flaws likely compound one another. (PFF ¶¶607). When presented with an unreliable memory test and a list of answer choices that emphasized TurboTax, it is highly unlikely that the participants in Professor Novemsky's survey would provide accurate responses about the sources of their impressions. Thus, Professor Novemsky's conclusion about the source of any consumer misimpression is meaningless.

483. Survey respondents who were under the misimpression that they can file income taxes for free using TurboTax online software identified Intuit's TurboTax advertisements and the TurboTax website as the two most common sources playing a role in forming their misimpression, and a vast majority of the mistaken taxpayers identified at least one of these two sources as playing a role in forming their misimpression. (GX303 (Novemsky Expert Report) ¶ 77).

Response to Finding No. 483:

For the numerous reasons just provided (Response to CCF ¶482), the Proposed Finding is incorrect and unsupported because it is based entirely on Professor Novemsky's scientifically invalid and unreliable survey. As an initial matter, for reasons already provided (Responses to CCF ¶¶480-481; PFF ¶¶550-552, 566-588), Professor Novemsky's survey cannot reliably assess the threshold question of whether any consumer misimpression exists, so the survey necessarily cannot reliably assess the source of any supposed misimpression. (PFF ¶589). Among other things, Professor Novemsky focused on consumers who had not used TurboTax in at least three years and are therefore likely unfamiliar with TurboTax's products and advertising; thus, to the extent any of those participants are under a misimpression about their ability to file their taxes for free, it is unlikely that misimpression was caused by TurboTax advertising. (PFF ¶¶550-552). Professor Novemsky also did not show those survey participants *any* TurboTax ads or marketing communications, so respondents would have been answering entirely from memory—even though Professor Novemsky conceded that survey participants "could have

forgotten anything” they had seen about TurboTax in the past (PFF ¶¶533-534, 536). Professor Novemsky then used questions that primed those respondents to guess that they could file for free (PFF ¶¶567-577). Indeed, respondents in Professor Novemsky’s survey confirmed that they believed they could file for free because “[b]ecause this survey is suggesting that I can.” (PFF ¶576). That is not evidence of a genuine misimpression.

In addition, the Proposed Finding draws a causal conclusion, yet Professor Novemsky’s survey was not designed to assess causality. (PFF ¶530). Testing causality requires a test-control experimental design in which participants in a “test” group are exposed to whatever subject matter is being studied, and participants in a “control” group are exposed to some kind of placebo stimulus (or no stimulus at all). (PFF ¶531). By examining the differences in responses between the two groups, researchers can isolate and measure any effect that the tested subject matter caused. (PFF ¶531). As Professor Novemsky himself testified when evaluating a survey as an expert in another case, it is “impossible” to “draw any causal inference” without “an experimental design that includes a control group and a test group.” (PFF ¶532). Absent a control group, Professor Novemsky stated under oath, one cannot test what “an ad caused consumers to understand or not understand.” (PFF ¶532). Here, however, Professor Novemsky admits that he did not use a test-control design. (PFF ¶533). Indeed, although Professor Novemsky purports to draw a causal conclusion about TurboTax’s marketing, he did not show participants any TurboTax advertisements or the TurboTax website. (PFF ¶534).

On top of that fundamental design problem, Professor Novemsky’s survey led survey participants to indicate that TurboTax marketing was driving their impression. To identify the source(s) of consumers’ supposed misimpression, Professor Novemsky relied on one multiple-choice question (TAT255), for which two of the five substantive answer choices conformed to

Complaint Counsel's allegations, increasing the likelihood that participants would respond in a manner consistent with those allegations. (PFF ¶593). Making matters worse, by the time participants reached TAT255, they had already been primed (consciously or subconsciously) to select the two TurboTax-related answer choices, because the survey had already mentioned "TurboTax" twelve times. (PFF ¶594). If Professor Novemsky had used a control a control group, he could have measured the magnitude of this effect and removed it from his results. (PFF ¶595). But he did not do so.

The leading nature of Professor Novemsky's survey was then exacerbated by the fact that TAT255 was not the kind of question that people can reliably answer from memory. (PFF ¶603). It is well-established that individuals have "source amnesia," meaning difficulty accurately recalling the source from which they obtain information. (PFF ¶604). Instead of asking respondents what they did or saw, TAT255 asked how they learned something—which is precisely the type of question that people cannot be expected to answer accurately. (PFF ¶606). Because of source amnesia, Professor Novemsky's survey participants were especially vulnerable to leading questions and answers like those Professor Novemsky used. (PFF ¶¶606-607).

Any one of these flaws is sufficient on its own to render Professor Novemsky's "source" conclusion unreliable. (PFF ¶607). But the flaws likely compound one another. (PFF ¶607). When presented with an unreliable memory test and a list of answer choices that emphasized TurboTax, it is highly unlikely that the participants in Professor Novemsky's survey would provide accurate responses about the sources of their impressions. Thus, Professor Novemsky's conclusion about the source of any consumer misimpression is meaningless.

484. 72.3% of survey respondents who did not use TurboTax in the last three years identified Intuit's TurboTax advertisements, its website, or both, as playing a role in forming their

misimpression that they could file for free. (GX303 (Novemsky Expert Report) ¶¶ 9, 79 & Figure 2; Novemsky (Complaint Counsel) Tr. 361-362).

Response to Finding No. 484:

For the numerous reasons just provided (Responses to CCFF ¶¶482-483), the Proposed Finding is incorrect and unsupported because it is based entirely on Professor Novemsky's scientifically invalid and unreliable survey. Again, as an initial matter, Professor Novemsky's survey cannot reliably assess the threshold question of whether any consumer misimpression exists, so the survey necessarily cannot reliably assess the source of any supposed misimpression. (PFF ¶589; *see also* PFF¶¶550-552, 566-588). For one thing, survey participants who have not used TurboTax in the previous three years are likely unfamiliar with TurboTax's products and advertising; thus, to the extent any of those participants are under a misimpression about their ability to file their taxes for free, it is unlikely that misimpression was caused by TurboTax advertising. (PFF ¶¶550-552). Professor Novemsky also did not show those survey participants *any* TurboTax ads or marketing communications, so respondents would have been answering entirely from memory—even though Professor Novemsky conceded that survey participants “could have forgotten anything” they had seen about TurboTax in the past. (PFF¶¶533-534, 536). And Professor Novemsky's questions primed participants to guess that they could file for free—which respondents confirmed by saying that they believed they could file for free because “[b]ecause this survey is suggesting that I can.” (PFF ¶576; *see also* PFF ¶¶567-577). That is not evidence of a genuine misimpression.

In addition, the Proposed Finding draws a causal conclusion, yet Professor Novemsky's survey was not designed to assess causality. (PFF ¶530). Testing causality requires a test-control experimental design in which participants in a “test” group are exposed to whatever subject matter is being studied, and participants in a “control” group are exposed to some kind of

placebo stimulus (or no stimulus at all). (PFF ¶531). By examining the differences in responses between the two groups, researchers can isolate and measure any effect that the tested subject matter caused. (PFF ¶531). As Professor Novemsky himself testified when evaluating a survey as an expert in another case, it is “impossible” to “draw any causal inference” without “an experimental design that includes a control group and a test group.” (PFF ¶532). Absent a control group, Professor Novemsky stated under oath, one cannot test what “an ad caused consumers to understand or not understand.” (PFF ¶532). Here, however, Professor Novemsky admits that he did not use a test-control design. (PFF ¶533). Indeed, although Professor Novemsky purports to draw a causal conclusion about TurboTax’s marketing, he did not show participants any TurboTax advertisements or the TurboTax website. (PFF ¶534).

On top of that fundamental design problem, Professor Novemsky’s survey led survey participants to indicate that TurboTax marketing was driving their impression. To identify the source(s) of consumers’ supposed misimpression, Professor Novemsky relied on one multiple-choice question (TAT255), for which two of the five substantive answer choices conformed to Complaint Counsel’s allegations, increasing the likelihood that participants would respond in a manner consistent with those allegations. (PFF ¶593). Making matters worse, by the time participants reached TAT255, they had already been primed (consciously or subconsciously) to select the two TurboTax-related answer choices, because the survey had already mentioned “TurboTax” twelve times. (PFF ¶594). If Professor Novemsky had used a control a control group, he could have measured the magnitude of this effect and removed it from his results. (PFF ¶595). But he did not do so.

The leading nature of Professor Novemsky’s survey was then exacerbated by the fact that TAT255 was not the kind of question that people can reliably answer from memory. (PFF ¶603).

It is well-established that individuals have “source amnesia,” meaning difficulty accurately recalling the source from which they obtain information. (PFF ¶604). Instead of asking respondents what they did or saw, TAT255 asked how they learned something—which is precisely the type of question that people cannot be expected to answer accurately. (PFF ¶606). Because of source amnesia, Professor Novemsky’s survey participants were especially vulnerable to leading questions and answers like those Professor Novemsky used. (PFF ¶¶606-607).

Any one of these flaws is sufficient on its own to render Professor Novemsky’s “source” conclusion unreliable. (PFF ¶607). But the flaws likely compound one another. (PFF ¶607). When presented with an unreliable memory test and a list of answer choices that emphasized TurboTax, it is highly unlikely that the participants in Professor Novemsky’s survey would provide accurate responses about the sources of their impressions. Thus, Professor Novemsky’s conclusion about the source of any consumer misimpression is meaningless.

485. Respondents who do not select TurboTax ads or the TurboTax website as a source for their misimpression about being able to file for free, and who select other options like word of mouth, may have formed their misimpressions indirectly through TurboTax’s ads or website to the extent that the information contained in other sources is based on TurboTax advertising and the TurboTax website, and 72% is therefore a conservative measure of the number of consumers with a misimpression who formed that misimpression based on Intuit marketing. (GX749 (Novemsky Rebuttal Expert Report) ¶ 63; *see also* Novemsky (Complaint Counsel) Tr. 458).

Response to Finding No. 485:

The Proposed Finding is unsupported by any evidence and inherently speculative. The cited sources are simply *ipse dixit* statements from Professor Novemsky, who did not conduct any experiments or analyses to determine whether advertising would influence other sources of consumer impression. (*See* GX749 (Novemsky Rebuttal Expert Report) ¶63; *see also* Novemsky (FTC) Tr. 458). Indeed, Complaint Counsel’s phrasing of this Proposed Finding concedes its

speculative nature—they state only that respondents “*may have* formed their impression indirectly.” As one of Complaint Counsel’s experts admitted, this kind of statement is “not a very strong claim.” (PFF ¶930). In any event, for all of the reasons just provided (Responses to CCF ¶¶482-284), Professor Novemsky’s 72% number is the product of numerous methodological flaws and is by no means a “conservative measure.”

486. Of survey respondents who had paid to use TurboTax in the last three years, 24.1% thought that they could use TurboTax for free even though they could not. (GX303 (Novemsky Expert Report) ¶¶ 8, 70 & Figure 1; Novemsky (Complaint Counsel) Tr. 381).

Response to Finding No. 486:

The Proposed Finding is incorrect and unsupported because it is based entirely on Professor Novemsky’s scientifically invalid and unreliable survey. As noted, Professor Novemsky’s survey primed participants in numerous ways to guess that they could file for free—which respondents confirmed by saying that they believed they could file for free because “[b]ecause this survey is suggesting that I can.” (PFF ¶576; *see also* PFF ¶¶567-577). Moreover, because Professor Novemsky did not provide survey participants any TurboTax marketing communications, like TurboTax ads or webpages, these survey participants would have had to answer based entirely on their memories of filing with TurboTax, and Professor Novemsky concedes that those memories may be inaccurate. (PFF ¶¶534, 536).

Given that Professor Novemsky did not show his participants any TurboTax marketing, he has no basis whatsoever for saying that these results concerning prior TurboTax paid customer are “a testament to the power of the marketing.” (Novemsky (FTC) Tr. 380); CCF ¶488). Instead, when confronted with results in which a meaningful portion of respondents with experience paying for TurboTax provided answers that contradicted their prior experiences,

Professor Novemsky should have considered whether those results were evidence of a leading effect or other flaws within his survey. (RX1017 (Hauser Expert Report) ¶52).

487. Of those respondents who recently paid to use TurboTax and were under the misimpression that they could file for free, 73.5% identified either TurboTax advertisements or the TurboTax website, or both, as a source of their misimpression. (GX303 (Novemsky Expert Report) ¶ 79 & Figure 2).

Response to Finding No. 487:

For the numerous reasons already provided (Responses to CCFF ¶¶482-484), the Proposed Finding is incorrect and unsupported because it is based entirely on Professor Novemsky's scientifically invalid and unreliable survey. Again, as an initial matter, Professor Novemsky's survey cannot reliably assess the threshold question of whether any consumer misimpression exists, so the survey necessarily cannot reliably assess the source of any supposed misimpression. (PFF ¶589; *see also* PFF¶¶550-552, 566-588). Professor Novemsky's survey primed participants in numerous ways to guess that they could file for free. (PFF ¶¶567-577). Moreover, because Professor Novemsky did not provide survey participants any TurboTax marketing communications, like TurboTax ads or webpages, these survey participants would have had to answer based entirely on their memories of filing with TurboTax, and Professor Novemsky concedes that those memories may be inaccurate. (PFF ¶¶534, 536).

In addition, the Proposed Finding draws a causal conclusion, yet Professor Novemsky's survey was not designed to assess causality. (PFF ¶530). Testing causality requires a test-control experimental design in which participants in a "test" group are exposed to whatever subject matter is being studied, and participants in a "control" group are exposed to some kind of placebo stimulus (or no stimulus at all). (PFF ¶531). By examining the differences in responses between the two groups, researchers can isolate and measure any effect that the tested subject matter caused. (PFF ¶531). As Professor Novemsky himself testified when evaluating a survey

as an expert in another case, it is “impossible” to “draw any causal inference” without “an experimental design that includes a control group and a test group.” (PFF ¶532). Absent a control group, Professor Novemsky stated under oath, one cannot test what “an ad caused consumers to understand or not understand.” (PFF ¶532). Here, however, Professor Novemsky admits that he did not use a test-control design. (PFF ¶533). Indeed, although Professor Novemsky purports to draw a causal conclusion about TurboTax’s marketing, he did not show participants any TurboTax advertisements or the TurboTax website. (PFF ¶534).

On top of that fundamental design problem, Professor Novemsky’s survey led survey participants to indicate that TurboTax marketing was driving their impression. To identify the source(s) of consumers’ supposed misimpression, Professor Novemsky relied on one multiple-choice question (TAT255), for which two of the five substantive answer choices conformed to Complaint Counsel’s allegations, increasing the likelihood that participants would respond in a manner consistent with those allegations. (PFF ¶593). Making matters worse, by the time participants reached TAT255, they had already been primed (consciously or subconsciously) to select the two TurboTax-related answer choices, because the survey had already mentioned “TurboTax” twelve times. (PFF ¶594). If Professor Novemsky had used a control a control group, he could have measured the magnitude of this effect and removed it from his results. (PFF ¶595). But he did not do so.

The leading nature of Professor Novemsky’s survey was then exacerbated by the fact that TAT255 was not the kind of question that people can reliably answer from memory. (PFF ¶603). It is well-established that individuals have “source amnesia,” meaning difficulty accurately recalling the source from which they obtain information. (PFF ¶604). Instead of asking respondents what they did or saw, TAT255 asked how they learned something—which is

precisely the type of question that people cannot be expected to answer accurately. (PFF ¶606). Because of source amnesia, Professor Novemsky's survey participants were especially vulnerable to leading questions and answers like those Professor Novemsky used. (PFF ¶¶606-607).

Any one of these flaws is sufficient on its own to render Professor Novemsky's "source" conclusion unreliable. (PFF ¶607). But the flaws likely compound one another. (PFF ¶607). When presented with an unreliable memory test and a list of answer choices that emphasized TurboTax, it is highly unlikely that the participants in Professor Novemsky's survey would provide accurate responses about the sources of their impressions. Thus, Professor Novemsky's conclusion about the source of any consumer misimpression is meaningless.

488. To the extent consumers who recently paid for TurboTax had the misimpression that they could file for free, this provides some indication of the power of "free" messaging, and its potential to overcome even the past experiences of those who have previously paid to use TurboTax. (GX303 (Novemsky Expert Report) ¶ 70; *see also* Novemsky (Complaint Counsel) Tr. 380 ("So to me, it's testament to the power of the marketing.")).

Response to Finding No. 488:

The Proposed Finding is incorrect and unsupported because it is based entirely on Professor Novemsky's scientifically invalid and unreliable survey. Because Professor Novemsky did not show his survey participants any TurboTax marketing, he has no basis whatsoever for saying that the results concerning prior TurboTax paid customers are "a testament to the power of the marketing and its potential to overcome even the past experiences of those who have previously paid to use TurboTax." (Novemsky (FTC) Tr. 380)). Instead, Professor Novemsky should have asked whether aspects of his survey were causing respondents to provide answers that contradicted their prior experiences. As noted, Professor Novemsky's survey primed participants in numerous ways to guess that they could file for free—which respondents confirmed by saying that they believed they could file for free because "[b]ecause this survey is

suggesting that I can.” (PFF ¶576; *see also* PFF ¶¶567-577). Moreover, Professor Novemsky’s survey required survey participants to answer based entirely on their memories of filing with TurboTax, and Professor Novemsky concedes that those memories may be inaccurate. (PFF ¶¶534, 536).

489. Disclaiming a free claim may be particularly difficult because such claims are powerful and consumers are drawn to them. (GX749 (Novemsky Rebuttal Expert Report) ¶¶ 143-144 (regarding the power of free claims); Novemsky (Complaint Counsel) Tr. 1769 (“disclaiming a free claim as is the case here may be a particularly difficult claim to undermine because it’s so powerful and consumers are so drawn to it”).

Response to Finding No. 489:

The Proposed Finding is incorrect and unsupported by the cited sources. Indeed, the primary evidence cited is Professor Novemsky’s reaction to Dr. Hauser’s Disclosure Efficacy Survey results. But as Intuit explained (PFF ¶¶722-745), the Disclosure Efficacy Survey undermines Complaint Counsel’s allegations. Of particular relevance here, the Disclosure Efficacy Survey included taxpayers who qualified for TurboTax’s free SKUs. (PFF ¶724). And from the results of the Disclosure Efficacy Survey, Dr. Hauser estimated that roughly a third of participants would start in Free Edition—which is in line with the percentage of all U.S. taxpayers who to qualify to file for free with TurboTax. (PFF ¶¶743-744). If “[d]isclaiming a free claim” was “particularly difficult,” one would expect the percentage of Disclosure Efficacy Survey respondents starting in Free Edition to be much higher. (PFF ¶745).

The only additional evidence cites for this Proposed Finding is Professor Novemsky’s baseless assertion at trial, which should not be given any weight because it was not based on any reliable methods or principles. (*See* Novemsky (FTC) Tr. 1769). Indeed, because Professor Novemsky did not show his survey participants any “free claim[s],” he has no basis for testifying about the effect of such claims. (PFF ¶534).

Contrary to Professor Novemsky's bald assertions, reliable evidence demonstrates that consumers are in fact inherently skeptical of free offers. As Mr. Rubin and Mr. Johnson both explained at trial, 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 ¶488; Rubin (Intuit) Tr. 1524; Johnson (Intuit) Tr. 605). Intuit's internal market research has long confirmed this. (PFF ¶489; RX33 (Intuit) at -9032; RX34 (Intuit) at -9950; RX56 (Intuit) at -5638). Such research has found, for example, that consumers expect the scope of free tax-preparation offers to be limited and have "a natural expectation that ... costs are involved" with tax-preparation products. (PFF ¶490; RX33 (Intuit) at -9032; *see also* RX34 (Intuit) at -9950). Additional Intuit research has shown that [REDACTED] of consumers incorrectly thought TurboTax Free Edition did not include free federal filing, and even fewer thought it included free state filing and expert help, even though it did. (GX655 (Intuit)). And still more Intuit research (from 2018) revealed that only 22% of consumer respondents were "confident" that TurboTax Free Edition was actually free (RX56 (Intuit) at -5638), and that 29% of respondents were outright "doubtful" that TurboTax Free Edition was "truly free." (RX597 (Intuit) at -1665). This evidence confirms that reasonable consumers do not rush to believe (i.e., are not easily deceived into believing), that free offers are necessarily free for them, and that such claims are not as "powerful" as Professor Novemsky baselessly states. (PFF ¶¶485-492).

The "difficult[y]," then, is not "disclaiming a free claim," as Professor Novemsky says; the difficulty is overcoming reasonable consumers' skepticism. Indeed, to overcome the skepticism of consumers who *do* qualify to use TurboTax's free SKUs, Intuit must repeatedly inform those consumers that TurboTax has truly free SKUs, including TurboTax Free Edition, for consumers with simple tax returns. (PFF ¶¶191-196, 492; Rubin (Intuit) Tr. 1524-1525; GX147

(Roark (Intuit) Dep.) at 103-104). Based on their familiarity with and skepticism toward free offers, including tax-preparation offers, reasonable consumers viewing TurboTax advertisements are not misled into believing either that all TurboTax SKUs are free or that TurboTax is free for them when it is not. (PFF ¶493; Golder (Intuit) Tr. 1091-1095).

490. Consumers are familiar with free online products and services that are free for all consumers, but those offers differ from TurboTax. For example, there are free music streaming platforms free for all consumers but that include ads, with consumers able to upgrade to a paid version to avoid those ads. TurboTax does not have a version that is free for all taxpayers. (See GX749 (Novemsky Rebuttal Expert Report) ¶¶ 246-248).

Response to Finding No. 490:

The Proposed Finding is irrelevant. Complaint Counsel failed to prove that other “free online products and services” outside of the tax-preparation industry have any bearing on reasonable consumers understanding of free-tax preparation offers. In fact, those products are nothing like a tax-preparation product and say nothing about what is commonplace in the relevant market in this case. (See *Ebner v. Fresh, Inc.*, 838 F.3d 958, 965 (9th Cir. 2016)).

The Proposed Finding also disregards the un rebutted evidence that consumers are familiar with free offers in the tax-preparation market similar to TurboTax’s. In the tax-preparation industry, consumers are frequently exposed to product lineups that mirror TurboTax’s, with free offerings that are available only to taxpayers with simple returns, and paid products that cover additional tax situations or offer additional features. (PFF ¶481; Golder (Intuit) Tr. 1091, 1095-1096; RX1018 (Golder Expert Report) ¶¶108, 113). In fact, every major player in the industry employs a business model similar to TurboTax’s model—offering a basic version of their tax-preparation software for free to taxpayers with simple returns, alongside paid products capable of handling more complex returns. (PFF ¶482; Ryan (Intuit) Tr. 729-730 (TaxAct), 744-745 (TaxSlayer), 759-760 (H&R Block); Golder (Intuit) Tr. 1088-1092, 1121-

1122; RX1018 (Golder Expert Report) ¶¶108-113; RX82 (Intuit); RX83 (Intuit); RX97 (Intuit); RX98 (Intuit); RX359 (Intuit); RX422 (Intuit); RX428 (Intuit); RX874 (Intuit) at 33).

More generally, consumers are familiar with free offers or discount pricing is available only to certain consumers. (PFF ¶477; Golder (Intuit) Tr. 1092-1093; RX1018 (Golder Expert Report) ¶165). Many companies offer discount pricing for senior citizens, children, veterans, first responders, students, or first-time customers. (RX1018 (Golder Expert Report) ¶165; RX1233 (Intuit); RX1234 (Intuit); RX1235 (Intuit); RX1049 (Intuit)). The Holiday Inn, for example, advertises that “Kids Stay and Eat Free.” (Golder (Intuit) Tr. 1092; RX1049 (Intuit) at -8241 to -8244). Reasonable consumers understand based on their experiences, and even without the presence of written disclosures, that there are limitations on that free offer (such as the fact that the kids have to be staying at the Holiday Inn in order to eat for free, have to be staying with a paying adult, and have to eat at the Holiday Inn’s own restaurant). (PFF ¶477; Golder (Intuit) Tr. 1092-1094).

Moreover, the Proposed Finding demonstrates that Complaint Counsel *agree* that reasonable consumers do not view ads for free TurboTax SKUs in a vacuum, and instead understand these ads based on prior experiences, including their past experiences with free offerings generally and their exposure to free tax-preparation products in particular. (PFF ¶472; Golder (Intuit) Tr. 1063-1065; RX1018 (Golder Expert Report) ¶163). The music streaming platform examples that Complaint Counsel cite simply confirm that consumers are familiar with (and thus would expect) free offers to have certain restrictions while being accompanied by paid options. (PFF ¶500).

3. Survey Results Regarding Simple Returns

491. A substantial portion of respondents have the misimpression that their returns meet TurboTax’s definition of a “simple U.S. return.” (GX303 (Novemsky Expert Report) ¶¶ 10 & 83; Novemsky (Complaint Counsel) Tr. 353, 373).

Response to Finding No. 491:

The Proposed Finding is incorrect and unsupported because it is based entirely on Professor Novemsky's scientifically invalid and unreliable survey. For one thing, This aspect of Professor Novemsky's survey results is based entirely on one question (TAT290), which stated in relevant part: "In some of its advertisements, TurboTax mentions 'simple U.S. returns.' Do you think that your 2021 income tax return meets TurboTax's definition of 'simple U.S. return'?" (GX303 (Novemsky Expert Report) App'x E at 10). Thus, Professor Novemsky provided his survey respondents no context about the significance of "simple U.S. return," and he provided them none of the additional information that would be presented to consumers viewing a TurboTax ad in the actual marketplace. (RX1017 (Hauser Expert Report) ¶66). As explained at length in Intuit's proposed findings (PFF ¶¶244, 262, 275, 290, 299), the use of "simple tax returns" in TurboTax's marketing was almost always accompanied by (1) an express reference to a specific TurboTax SKU that was actually free, and (2) language stating that there was additional information about the SKU and its qualifications on the TurboTax website (or a hyperlink taking consumers directly to the TurboTax website). Indeed, Complaint Counsel concede that the TurboTax website—and all of the additional information it provides about "simple tax returns"—is integrated into the challenged ads themselves. (See CCFF ¶455; PFF ¶¶364-441). Having concealed all of that additional information from his survey participants, Professor Novemsky's survey results are meaningless for assessing the use of "simple returns only" in TurboTax's ads.

Professor Novemsky's decision to conceal this information from his survey participants is particularly egregious because in the marketplace, any reasonable consumers who are unsure about whether their tax situation qualifies as a simple tax return would know to conduct research and seek out additional information. (PFF ¶131; Golder (Intuit) Tr. 1084-1085, 1120-1121). By

inviting consumers to the TurboTax website, TurboTax's ads simply reinforce that natural consumer behavior. (PFF ¶326). Consumer research about "simple tax returns," moreover, would likely take mere seconds, as the answer is easily accessible through Internet search engines and the TurboTax website. (PFF ¶¶131-133). And consumers would know what kind of information to be looking for: As Professor Novemsky himself acknowledged, consumers understand that "simple returns only" conveys that the ability to use free TurboTax SKUs or offers depends on the "complexity or simplicity" of the taxpayer's return. (PFF ¶136).

In his survey, though, Professor Novemsky prevented participants from engaging in this natural information-search process—instead asking them to make a low-stakes judgment (indeed, the participants in his survey were not making an actual purchase decision), based on only a fraction of the information they would have at their fingertips when actually choosing a tax-preparation provider. (RX1017 (Hauser Expert Report) ¶66 ("respondents in the Novemsky Survey ... are not given any means or incentives to obtain information")). Under those circumstances, it is hardly surprising that many consumers would guess that they do have a simple tax return. Indeed, as Professor Novemsky acknowledges, respondents were "more likely to answer 'yes' to this question [TAT290] because [of] motivated reasoning, wishful thinking, and optimistic bias." (GX303 (Novemsky Expert Report) ¶87; RX1017 (Hauser Expert Report) ¶¶66-67).

492. The use of "simple returns" language fails to convey to consumers that they may not qualify in a manner that is consistent with TurboTax's qualification criteria. (RX749 (Novemsky Rebuttal Expert Report) ¶ 250; Novemsky (Complaint Counsel) Tr. 374-375; 373 (discussing GX855 (Complaint Counsel – iSpot.tv) and GX486 (Complaint Counsel)) ("Q. And in your opinion, how effective is the disclaimer for "simple returns only?" A. In my opinion, it's not very effective, because as my survey data show, many people who do not have simple returns, as TurboTax is using the phrase, think they have simple returns. So telling them it's only for simple returns doesn't cure the false impression that they think they can file for free with TurboTax. Q. Why else are the disclaimers we just looked at not effective? A. Well, the other part of it is having to find

them. So as you saw, they were in small print in the TV ads, shown only for a few seconds right at the end, not the exciting part of the ad that's going to get people to turn their heads to the screen. And on the website, again, in small print under much bigger claims about free.”)).

Response to Finding No. 492:

The Proposed Finding is both misleading and incorrect. It is misleading because the challenged ads convey the qualifications for TurboTax's free SKUs through language beyond merely “simple tax returns only.” As just explained (Response to CCFF ¶491), the use of “simple tax returns” in TurboTax's marketing was almost always accompanied by (1) an express reference to a specific TurboTax SKU that was being advertised as free (and in fact was free), and (2) language stating that there was additional information about the SKU and its qualifications on the TurboTax website (or a hyperlink taking consumers directly to the TurboTax website). Indeed, Complaint Counsel concede that the TurboTax website—and all of the additional information it provides about “simple tax returns”—is integrated into the challenged ads themselves. (*See* CCFF ¶455; PFF ¶¶364-441).

The Proposed Finding is also incorrect because it is based on Professor Novemsky's scientifically invalid and unreliable survey and other baseless assertions from Professor Novemsky. As noted (Response to CCFF ¶491), this aspect of Professor Novemsky's survey results is based entirely on one question (TAT290), which stated in relevant part: “In some of its advertisements, TurboTax mentions ‘simple U.S. returns.’ Do you think that your 2021 income tax return meets TurboTax's definition of ‘simple U.S. return’?” (GX303 (Novemsky Expert Report) App'x E at 10). Thus, Professor Novemsky provided his survey respondents no context about the significance of “simple U.S. return,” and he provided them none of the additional information that would be presented to consumers viewing a TurboTax ad in the actual marketplace. (RX1017 (Hauser Expert Report) ¶66). Having concealed all of that additional

information from his survey participants, Professor Novemsky's survey results are meaningless for assessing the use of "simple returns only" in TurboTax's ads.

Professor Novemsky's baseless assertions about the size and duration of the disclosures in TurboTax's brand video ads are also wrong. Professor Golder's disclosure benchmarking analysis compared disclosures in video ads for free TurboTax SKUs with those from 18 benchmark companies across four industries and found that the qualifications in the challenged brand video ads were both visible and consistent with disclosures in comparable ads. (PFF ¶¶234-237; Golder (Intuit) Tr. 1133-1136, 1138-1144, 1147-1155; RX1018 (Golder Expert Report) ¶¶127-137). In particular, TurboTax's disclosures were superior to other companies' disclosures in terms of height and duration, and the difference was statistically significant. (PFF ¶237; RX1018 (Golder Expert Report) ¶¶132, 135; Golder (Intuit) Tr. 1149-1152). Moreover, Professor Golder's benchmarking analysis found that all benchmark companies, including Intuit, placed disclosures at the bottom of the screen. (RX1018 (Golder Expert Report) ¶131). This location for disclosures is thus standard in TV ads, and therefore consumers know to look for disclosures there. (PFF ¶238; Golder (Intuit) Tr. 1153-1155; RX1018 (Golder Expert Report) ¶131).

In addition, a wide range of evidence shows that "simple tax returns" is the correct level of detail to provide consumers in a space-constrained video or display ad, where consumers must process information in a short period of time and cannot control the flow of information. (Golder (Intuit) 1107-1108). Indeed, Professor Novemsky himself conceded that a "30-second television commercial isn't the right place to share complicated information with consumers" because it provide consumers "too much information in a context where they can't process it" and are "overloaded with information." (Novemsky (FTC) Tr. 1819-1820; PFF ¶138).

Consistent with that testimony, consumers testified that “simple tax returns” is more comprehensible than describing specific IRS forms in understanding qualifications; such detailed descriptions, Complaint Counsel themselves explained, are “inscrutable.” (PFF ¶139).

Likewise, when Intuit tested consumer comprehension of “simple tax returns” through a qualitative study, the results showed that consumers found the phrase very “easy to understand.” (PFF ¶134). And a qualitative analysis of consumer feedback related to the SKU Selector also confirmed that consumers appreciate TurboTax disclosures that do not contain “complicated tax terminology” and are worded in “laymen’s terms.” (PFF ¶140). In light of all this evidence, Intuit executives credibly explained that detailing the tax forms covered by free TurboTax SKUs in ads with limited space and duration would be “[REDACTED]”. (PFF ¶333; Ryan (Intuit) Tr. 777; Rubin (Intuit) Tr. 1543-1544 (testifying that it would be “confusing for consumers” to list tax forms in ads)).

493. The “simple returns” language appeared in small font at the bottom of the screen in video and television advertising for TurboTax. (Ryan (Intuit) Tr. 736-737, 821, 822-823 (in discussing the Spelling Bee, Young Love, Dance Class, and Auctioneer video ads “Q. ...the line ‘simple tax returns only’ appeared in a small line of white print at the bottom center of the screen, while the much larger Intuit TurboTax logo appeared centered. Is that correct? A. Yes, that’s where the disclosure appeared.”)).

Response to Finding No. 493:

The Proposed Finding is both misleading and incorrect. It is misleading because the challenged ads’ use of “simple tax returns” was almost always accompanied by (1) a reference to a specific TurboTax SKU that was actually free and (2) language stating that there was additional information about the SKU and its qualifications on the TurboTax website—and that additional language was often repeated in a spoken voiceover. (PFF ¶¶218, 244, 252, 262, 275, 290, 299).

The Proposed Finding is also misleading because the “simple tax returns” language and additional information also appeared—in numerous prominent places—on the TurboTax website,

which Complaint Counsel concede is integrated into the into the challenged ads themselves. (See CCF ¶455; PFF ¶¶364-441).

The Proposed Finding is incorrect that the disclosures in the ads were “small,” thereby implying that consumers would not have seen those disclosures. Complaint Counsel did not offer any evidence that the qualifications in the challenged could not be seen (or heard) by reasonable consumers. (See PFF ¶¶230-231, 255-256, 271, 286, 295). Complaint Counsel’s own witnesses confirmed that the qualifications were legible (or audible) by repeatedly acknowledging that they saw (or heard) them. (PFF ¶¶223, 233, 306-307, 317). In fact, when Complaint Counsel failed to acknowledge the qualifications in several of the challenged ads shown during their opening statement, the Court interjected to point them out. (PFF ¶208). That the Court and Complaint Counsel’s witnesses noticed the qualifications in the challenged ads demonstrates that those qualifications were sufficiently prominent to be seen and read (or heard). Intuit also presented evidence that the challenged ads compare favorably to other ads consumers see on television, based both on the metrics Complaint Counsel single out as bases for criticism and on other metrics drawn from the FTC’s “.com Disclosures” guidelines. (PFF ¶235). Professor Golder’s benchmarking analysis revealed that the qualifications in the challenged ads were at least comparable to the qualifications in benchmark companies’ ads. (PFF ¶¶234-236, 258). And for two metrics—height and duration, both of which Complaint Counsel highlight in their post-trial brief (at 59-60) as bases for criticizing Intuit’s ads—Intuit’s qualifications were statistically *superior*. (PFF ¶237).

Finally, contrary to the Proposed Finding, Ms. Ryan did not testify that the disclosures were small; she said that some disclosures appeared at the bottom of the screen. (Ryan (Intuit) Tr. 736-737, 821, 822-823). Intuit places certain disclosures at the bottom of the screen in video

advertisements where reasonable consumers expect to find such information. (PFF ¶¶515-518).

In fact, placing disclosures at the bottom of the screen communicates to consumers that there are qualifications, even if they do not read the qualifications. (PFF ¶¶515-518). Intuit's competitors similarly place disclosures at the bottom of the screen. (PFF ¶456). This location for disclosures is standard in TV ads, and therefore consumers are conditioned to look for disclosures there.

(PFF ¶238; Golder (Intuit) Tr. 1153-1155; RX1018 (Golder Expert Report) ¶131).

494. Additionally, the phrase "simple returns" suggests a standard for consumers to determine the meaning of the phrase for themselves, and because the word "simple" has a pre-existing meaning, consumers can ask themselves, "Is my tax return simple" and answer "yes" using their own pre-existing definition of "simple." (GX303 (Novemsky Expert Report) ¶ 87).

Response to Finding No. 494:

The Proposed Finding is unsupported by any evidence other than Professor Novemsky's baseless assertion. Although Intuit agrees that the word "simple" has a pre-existing meaning, the definition of "simple tax returns" aligns with that meaning. (PFF ¶¶123, 143). Indeed, Intuit presented extensive evidence showing that consumers understand the meaning of "simple tax returns." For one thing, use of the phrase "simple tax returns" is considered "industry convention" (Johnson (Intuit) Tr. 582), as each of Intuit's major competitors also offers a free tax-preparation product that is limited to and advertised as being for taxpayers with simple tax returns. (PFF ¶141; Johnson (Intuit) Tr. 581-582; Ryan (Intuit) Tr. 708, 777; Golder (Intuit) Tr. 1121-1122; RX1018 (Golder Expert Report) ¶¶108-112; RX79 (Intuit) at 1; RX97 (Intuit) at 1; RX98 (Intuit) at 1; GX789 (Intuit) at 1). As Professor Golder explained, competitors' widespread use of "simple tax returns" is "critically important" for showing consumers understood the term. (PFF ¶144; Golder (Intuit) Tr. 1063-1064, 1090-1091, 1121-1122). The ubiquity in the industry and common usage of the phrase is therefore strong evidence that consumers understand the meaning of "simple tax returns," as it is unlikely that government and

industry actors alike would, over many years, rely on a term that taxpayers do not understand. (PFF ¶145; GX156 (Ryan (Intuit) IHT) at 40, 55).

Further, Intuit testing of comprehension of “simple tax returns” confirms that consumers understand the phrase; an Intuit qualitative study from Tax Year 2018, for example, showed that consumers found the phrase very “easy to understand.” (PFF ¶134; RX304 (Intuit); Rubin (Intuit) Tr. 1544-1546). None of the participants in that study indicated that they were confused by the phrase or did not understand it. (RX304 (Intuit)). Thus, to the extent that some reasonable consumers rely on “their own pre-existing definition of ‘simple,’” there is no basis for believing that those consumers would misunderstand whether their tax situation meets the definition of “simple tax return.” Complaint Counsel have not provided any evidence to the contrary. (See GX303 (Novemsky Expert Report) ¶87 (citing no authority)).

Moreover, many reasonable consumers do not rely solely on their pre-existing views. Any reasonable consumers who did not understand “simple tax return” would not leap to the conclusion that they had such a return, but rather, consistent with the testimony of Professor Golder, would research whether their tax situation met Intuit’s (and the IRS’s) definition of “simple.” (PFF ¶131; Golder (Intuit) Tr. 1084-1085, 1120-1121). Such research could take mere seconds, as the answer to what constitutes a simple return was the very first search result for “what is a simple tax return turbotax.” (PFF ¶¶131-132; Rubin (Intuit) Tr. 1547-1548; RX1524 (Intuit)). And consumers would know what kind of information to be looking for: As Professor Novemsky himself acknowledged, consumers understand that “simple returns only” conveys that the ability to use free TurboTax SKUs or offers depends on the “complexity or simplicity” of the taxpayer’s return. (PFF ¶136).

495. Consumers are more likely to answer “yes” to this question because motivated reasoning, wishful thinking and optimistic bias will drive many consumers to give themselves the

answer that they perceive is advantageous for them. (GX303 (Novemsky Expert Report) ¶ 87).

Response to Finding No. 495:

Intuit agrees that motivated reasoning, wishful thinking, and optimistic bias likely drove Professor Novemsky's survey participants to answer "yes" in a survey environment in response to TAT290 when they had no context about the significance of "simple tax returns" and were not making a purchase decision; this had the effect of biasing TAT290 in Complaint Counsel's favor. (See Response to CCF ¶491). But Complaint Counsel provide no evidence that motivated reasoning, wishful thinking, or optimistic bias would drive consumer behavior or decision-making in the actual marketplace when they are choosing a tax-preparation product. Indeed, the two academic articles that Professor Novemsky cites in his report have nothing to do with tax-preparation or even the consumer buying process generally. (GX303 (Novemsky Expert Report) ¶87).

Intuit, moreover, presented extensive evidence establishing that consumers in the actual marketplace would *not* simply assume they can file for free because of motivated reasoning, wishful thinking, or optimistic bias. As Mr. Rubin and Mr. Johnson both explained, 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. (Rubin (Intuit) Tr. 1524; Johnson (Intuit) Tr. 605). Intuit's internal market research has similarly confirmed that consumers are skeptical of free claims concerning tax-preparation products. (PFF ¶489; RX33 (Intuit) at -9032; RX34 (Intuit) at -9950; RX56 (Intuit) at -5638). Such research has found, for example, that consumers expect the scope of free tax-preparation offers to be limited and have "a natural expectation that ... costs are involved" with tax-preparation products. (PFF ¶490; RX33 (Intuit) at -9032; see also RX34 (Intuit) at -9950). Other Intuit research has shown that [REDACTED] of consumers incorrectly

thought TurboTax Free Edition did not include free federal filing, and even fewer thought it included free state filing and expert help, even though it did. (GX655 (Intuit)). Additional Intuit research from 2018 revealed that only 22% of consumer respondents were “confident” that TurboTax Free Edition was actually free (RX56 (Intuit) at -5638), and that 29% of respondents were outright “doubtful” that TurboTax Free Edition was “truly free.” (RX597 (Intuit) at -1665). This evidence confirms reasonable consumers do not believe that all tax-preparation products offered by a company are free, that a free tax-preparation product or offer is available for free to everyone, or that the free offer will be free for them. (PFF ¶¶485-492).

That skepticism also leads reasonable consumers to conduct research to determine if they qualify to use the free offer. (PFF ¶131; Golder (Intuit) Tr. 1084-1085, 1120-1121). Such research could take mere seconds, as the answer to what constitutes a simple return was the very first search result for “what is a simple tax return turbotax.” (PFF ¶¶131-132; Rubin (Intuit) Tr. 1547-1548; RX1524 (Intuit)). And consumers would know what kind of information to be looking for: As Professor Novemsky himself acknowledged, consumers understand that “simple returns only” conveys that the ability to use free TurboTax SKUs or offers depends on the “complexity or simplicity” of the taxpayer’s return. (PFF ¶136).

496. The consumer perception survey showed that 55% of consumers ineligible for Free Edition who had not used TurboTax in the previous three years had the misimpression that they had a “simple U.S. return.” (GX303 (Novemsky Expert Report) ¶¶ 10, 85 & Figure 3; Novemsky (Complaint Counsel) Tr. 373-374).

Response to Finding No. 496:

The Proposed Finding is incorrect and unsupported because it is based entirely on Professor Novemsky’s scientifically invalid and unreliable survey. As noted (Response to CCF ¶491), this aspect of Professor Novemsky’s survey results is based entirely on one question (TAT290), which stated in relevant part: “In some of its advertisements, TurboTax mentions

‘simple U.S. returns.’ Do you think that your 2021 income tax return meets TurboTax’s definition of ‘simple U.S. return’?” (GX303 (Novemsky Expert Report) App’x E at 10). Thus, Professor Novemsky provided his survey respondents no context about the significance of “simple U.S. return,” and he provided them none of the additional information that would be presented to consumers viewing a TurboTax ad in the actual marketplace. (RX1017 (Hauser Expert Report) ¶66). As explained at length in Intuit’s proposed findings (PFF ¶¶244, 262, 275, 290, 299), the use of “simple tax returns” in TurboTax’s marketing was almost always accompanied by (1) an express reference to a specific TurboTax SKU that was actually free, and (2) language stating that there was additional information about the SKU and its qualifications on the TurboTax website (or a hyperlink taking consumers directly to the TurboTax website). Indeed, Complaint Counsel concede that the TurboTax website—and all of the additional information it provides about “simple tax returns”—is integrated into the challenged ads themselves. (See CCFF ¶455; PFF ¶¶364-441). Having concealed all of that additional information from his survey participants, Professor Novemsky’s survey results are meaningless for assessing the use of “simple returns only” in TurboTax’s ads.

Professor Novemsky’s decision to conceal this information from his survey participants is particularly egregious because in the marketplace, any reasonable consumers who are unsure about whether their tax situation qualifies as a simple tax return would know to conduct research and seek out additional information. (PFF ¶131; Golder (Intuit) Tr. 1084-1085, 1120-1121). By inviting consumers to the TurboTax website, TurboTax’s ads simply reinforce that natural consumer behavior. (PFF ¶326). Consumer research about “simple tax returns,” moreover, would likely take mere seconds, as the answer is easily accessible through Internet search engines and the TurboTax website. (PFF ¶¶131-133). And consumers would know what kind of

information to be looking for: As Professor Novemsky himself acknowledged, consumers understand that “simple returns only” conveys that the ability to use free TurboTax SKUs or offers depends on the “complexity or simplicity” of the taxpayer’s return. (PFF ¶136).

In his survey, though, Professor Novemsky prevented participants from engaging in this natural information-search process—instead asking them to make a low-stakes judgment (indeed, the participants in his survey were not making an actual purchase decision), based on only a fraction of the information they would have at their fingertips when actually choosing a tax-preparation provider. (RX1017 (Hauser Expert Report) ¶66 (“respondents in the Novemsky Survey ... are not given any means or incentives to obtain information”). Under those circumstances, it is hardly surprising that many consumers would guess that they do have a simple tax return. Indeed, as Professor Novemsky acknowledges, respondents were “more likely to answer ‘yes’ to this question [TAT290] because [of] motivated reasoning, wishful thinking, and optimistic bias.” (GX303 (Novemsky Expert Report) ¶87; RX1017 (Hauser Expert Report) ¶¶66-67).

497. Of consumers who paid to use TurboTax in the last three years, 28.6% of consumers were under the misimpression that they had a “simple U.S. return.” (GX303 (Novemsky Expert Report) ¶ 85 & Figure 3).

Response to Finding No. 497:

The Proposed Finding is incorrect and unsupported because it is based entirely on Professor Novemsky’s scientifically invalid and unreliable survey. As noted (Responses to CCF ¶¶491, 496), this aspect of Professor Novemsky’s survey results is based entirely on one question (TAT290), which stated in relevant part: “In some of its advertisements, TurboTax mentions ‘simple U.S. returns.’ Do you think that your 2021 income tax return meets TurboTax’s definition of ‘simple U.S. return’?” (GX303 (Novemsky Expert Report) App’x E at 10). Thus, Professor Novemsky provided his survey respondents no context about the

significance of “simple U.S. return,” and he provided them none of the additional information that would be presented to consumers viewing a TurboTax ad in the actual marketplace. (RX1017 (Hauser Expert Report) ¶66). As explained at length in Intuit’s proposed findings (PFF ¶¶244, 262, 275, 290, 299), the use of “simple tax returns” in TurboTax’s marketing was almost always accompanied by (1) an express reference to a specific TurboTax SKU that was actually free, and (2) language stating that there was additional information about the SKU and its qualifications on the TurboTax website (or a hyperlink taking consumers directly to the TurboTax website). Indeed, Complaint Counsel concede that the TurboTax website—and all of the additional information it provides about “simple tax returns”—is integrated into the challenged ads themselves. (*See* CCFF ¶455; PFF ¶¶364-441). Having concealed all of that additional information from his survey participants, Professor Novemsky’s survey results are meaningless for assessing the use of “simple returns only” in TurboTax’s ads.

Professor Novemsky’s decision to conceal this information from his survey participants is particularly egregious because in the marketplace, any reasonable consumers who are unsure about whether their tax situation qualifies as a simple tax return would know to conduct research and seek out additional information. (PFF ¶131; Golder (Intuit) Tr. 1084-1085, 1120-1121). By inviting consumers to the TurboTax website, TurboTax’s ads simply reinforce that natural consumer behavior. (PFF ¶326). Consumer research about “simple tax returns,” moreover, would likely take mere seconds, as the answer is easily accessible through Internet search engines and the TurboTax website. (PFF ¶¶131-133). And consumers would know what kind of information to be looking for: As Professor Novemsky himself acknowledged, consumers understand that “simple returns only” conveys that the ability to use free TurboTax SKUs or offers depends on the “complexity or simplicity” of the taxpayer’s return. (PFF ¶136).

In his survey, though, Professor Novemsky prevented participants from engaging in this natural information-search process—instead asking them to make a low-stakes judgment (indeed, the participants in his survey were not making an actual purchase decision), based on only a fraction of the information they would have at their fingertips when actually choosing a tax-preparation provider. (RX1017 (Hauser Expert Report) ¶¶66 (“respondents in the Novemsky Survey ... are not given any means or incentives to obtain information”)). Under those circumstances, it is hardly surprising that many consumers would guess that they do have a simple tax return. Indeed, as Professor Novemsky acknowledges, respondents were “more likely to answer ‘yes’ to this question [TAT290] because [of] motivated reasoning, wishful thinking, and optimistic bias.” (GX303 (Novemsky Expert Report) ¶87; RX1017 (Hauser Expert Report) ¶¶66-67).

498. Consumers are likely to have a preconceived notion as to what “simple” means, particularly in the context of their taxes. (GX749 (Novemsky Rebuttal Expert Report) ¶ 223).

Response to Finding No. 498:

The Proposed Finding is unsupported by any evidence other than Professor Novemsky’s baseless assertion. Although Intuit agrees that the word “simple” has an ordinary meaning, particularly in the context of taxes, the definition of “simple tax returns” aligns with that ordinary meaning. (PFF ¶¶123, 135-136, 143). Professor Novemsky cites no evidence whatsoever suggesting that reasonable consumers are likely to misunderstand the definition of “simple tax returns” based on some “preconceived notion as to what ‘simple’ means.” (See GX749 (Novemsky Expert Report) ¶87 (citing no authority)). And as noted (Response to CCFF ¶494), Intuit presented extensive evidence showing that reasonable consumers are highly unlikely to rely solely on a “preconceived notion as to what simple means” when selecting an online tax-preparation product. (See GX749 (Novemsky Expert Report) ¶87). Instead, reasonable

consumers would conduct research to determine whether their tax situation met the definition of “simple tax return.” (PFF ¶¶131-132). Such research could take mere seconds, as the answer to what constitutes a simple return was the very first search result for “what is a simple tax return turbotax.” (PFF ¶¶131-132; Rubin (Intuit) Tr. 1547-1548; RX1524 (Intuit)). And consumers would know what kind of information to be looking for: As Professor Novemsky himself acknowledged, consumers understand that “simple returns only” conveys that the ability to use free TurboTax SKUs or offers depends on the “complexity or simplicity” of the taxpayer’s return. (PFF ¶136).

499. Additionally, people tend to be cognitive misers, meaning they constantly try to conserve mental energy, expending it only when motivated to. (GX749 (Novemsky Rebuttal Expert Report) ¶ 223).

Response to Finding No. 499:

The Proposed Finding is unsupported by any evidence other than Professor Novemsky’s baseless assertion. Indeed, Professor Novemsky’s survey did not assess the likelihood whether reasonable consumers “tend to be cognitive misers,” and the only authorities he cited in his (rebuttal) expert report were academic articles about decisions related to health and retirement savings. (GX749 (Novemsky Rebuttal Report) ¶227 nn.402-403). Those contexts—in which consumers may believe they can defer decision-making without any immediate consequences—are substantially different than tax preparation, because consumers are generally required to prepare and file accurate tax returns each year and face legal consequences if they do not do so.

Unsurprisingly, the evidence at trial thoroughly disproved Professor Novemsky’s *ipse dixit* theory. Professor Golder explained at length—based on extensive academic literature and marketing publications about consumer behavior and decision-making, as well as survey evidence—that reasonable consumers perform substantial research about tax-preparation products before deciding which to use, by considering a variety of sources to assess different tax-

filing options, compare their features, and evaluate alternatives before finally making a decision about which product is best for their needs. (PFF ¶¶503-509; Golder (Intuit) Tr. 1064-1067, 1078-1079, 1081; RX1555 (Kirk Fair (Intuit) Trial Dep.) at 56-57; Rubin (Intuit) Tr. 1585-1586; RX1018 (Golder Expert Report) ¶¶143-145; RX1017 (Hauser Expert Report) ¶102; RX1016-A (Kirk Fair Expert Report) ¶20). Such research may entail visiting tax-preparation websites and the IRS website, speaking with friends and family, reading reviews and testimonials, conducting internet searches, and consulting articles, rankings, and third-party reviews. (PFF ¶¶505, 507-509; Johnson (Intuit) Tr. 600-601; Golder (Intuit) Tr. 1070-1071, 1078-1079, 1081-1087, 1105-1107; Yoeli (FTC) Tr. 1758-1759 (agreeing with Dr. Hauser’s Purchase Driver Survey results); RX1555 (Kirk Fair (Intuit) Trial Dep.) at 51-52, 56; RX1018 (Golder Expert Report) ¶¶143, 151, 157-161, fig. 24; RX1017 (Hauser Expert Report) ¶109; RX1016-A (Kirk Fair Expert Report) ¶¶23, 33-37; RX57-A (Intuit) at 22; RX825 (Intuit); see also RX72 (Hartford (Consumer) Dep.) at 57-59).

Dr. Hauser’s Purchase Driver Survey confirmed that on average, consumers use no fewer than three different sources when researching tax-preparation products. (RX1017 (Hauser Expert Report) ¶109). And internal Intuit research found that it is common for consumers to “cross-shop” potential tax-filing options and simultaneously consider alternative DIY tax-preparation software and providers, along with TurboTax, with [REDACTED] [REDACTED] [REDACTED] (PFF ¶509; RX57-A (Intuit) at 25; Rubin (Intuit) Tr. 1585-1586, 1610-1611; RX1018 (Golder Expert Report) ¶143). All of this evidence confirms that consumers are *not* cognitive misers when it comes to preparing their taxes.

500. For cognitive misers, the tendency to minimize cognition may reveal itself in a tendency to assume that TurboTax's use of "simple" matches the consumer's own understanding. (GX749 (Novemsky Rebuttal Expert Report) ¶ 223).

Response to Finding No. 500:

The Proposed Finding is speculative and unsupported by any evidence other than Professor Novemsky's baseless assertion. Professor Novemsky's survey did not assess whether reasonable consumers are "cognitive misers" or tend to "minimize cognition," and he cited no authority for the assertion that such a tendency would lead reasonable consumers to misunderstand the meaning of "simple tax returns." GX749 (Novemsky Rebuttal Expert Report) ¶223 (citing no authority)). Indeed, Complaint Counsel's phrasing of this Proposed Finding concedes its speculative nature—they state only that "the tendency to minimize cognition *may* reveal itself" in the asserted way. As one of Complaint Counsel's experts admitted, this kind of statement is "not a very strong claim." (PFF ¶930).

In any event, as discussed (Responses to CCF ¶¶494, 499), Complaint Counsel have not presented any evidence suggesting that a "consumer's own understanding" of "simple" would lead them to misunderstand the definition of "simple tax returns." Rather, the evidence overwhelmingly shows that consumers understand the meaning of "simple tax returns," which aligns with the ordinary meaning of the word "simple." (PFF ¶¶134-136, 139, 141-145). Indeed, Intuit testing of comprehension of "simple tax returns" confirms that consumers understand the phrase; an Intuit qualitative study from Tax Year 2018, for example, showed that consumers found the phrase very "easy to understand." (PFF ¶134; RX304 (Intuit); Rubin (Intuit) Tr. 1544-1546). None of the participants in that study indicated that they were confused by the phrase or did not understand it. (RX304 (Intuit)). Thus, to the extent that some reasonable consumers rely on their own pre-existing definition of "simple," there is no basis for believing that those consumers would misunderstand whether their tax situation meets the

definition of “simple tax return.” Again, Complaint Counsel have not provided any evidence to the contrary. (*See* GX303 (Novemsky Expert Report) ¶223 (citing no authority)).

501. Intuit’s placement of a fuller disclaimer behind a “simple returns” hyperlink made it unlikely that consumers would reach the disclaimer. (GX749 (Novemsky Rebuttal Expert Report) ¶ 227; Novemsky (Complaint Counsel) Tr. 535, 1768).

Response to Finding No. 501:

The Proposed Finding is incorrect in that it wrongly refers to language on the TurboTax website as “disclaimers.” Complaint Counsel have not established that there was anything in the challenged ads that needed to be “disclaimed.” The Proposed Finding is also unsupported by any evidence other than Professor Novemsky’s baseless assertions, and it is incorrect. Professor Novemsky’s survey did not test the likelihood that consumers would click on a hyperlink, and he did not conduct any other analyses to assess that issue. (Novemsky (FTC) Tr. 1822). Instead, Professor Novemsky simply assumes that consumers are unlikely to click a hyperlink because he believes they are lazy and seek to “process[] as little information as possible.” (*See* GX749 (Novemsky Rebuttal Expert Report) ¶227). That is nowhere near sufficient to satisfy Complaint Counsel’s burden of proving that the TurboTax website was likely to mislead a significant minority of reasonable consumers about their ability to file for free using TurboTax.

And in any event, Intuit presented extensive evidence demonstrating why Professor Novemsky’s assumption is wrong: First, reasonable consumers are familiar with disclosures that are available by clicking a hyperlink—such as on the TurboTax website and display ads—and know in particular that hyperlinks are typically displayed in blue text and that clicking that text will lead to a webpage with additional information. (PFF ¶520; Golder (Intuit) Tr. 1116-1117; RX1018 (Golder Expert Report) ¶182; Shiller (FTC) Tr. 209-210). Even complaining consumers identified by Complaint Counsel understood that the blue text on the TurboTax website indicated that there was a hyperlink and that by clicking on that link they could learn more about the

qualifications for TurboTax's free offers. (PFF ¶520; GX124 (Bodi (Consumer) Dep.) at 17; GX128 (Benbrook (Consumer) Dep.) at 28-29; GX135 (Phyfer (Consumer) Dep.) at 93; GX137 (DuKatz (Consumer) Dep.) at 64, 67).

With this in mind, Intuit uses blue hyperlinked text on the TurboTax website for disclosures such as "simple tax returns only" to "draw [consumers'] attention to that term." (PFF ¶378; Johnson (Intuit) Tr. 594). Providing detailed qualification information through the hyperlink allows "consumers [to] control the pace at which they see that information," making it less likely that they "tune out and not try to process something that's an overwhelming message." (PFF ¶379; Golder (Intuit) Tr. 1174, 1176). As Professor Golder explained, "medium matters" because consumers interact with television and online ads differently. (Golder (Intuit) Tr. 1116-1117). Consumers viewing online ads understand, based on common sense and experience, that they can quickly access additional information by clicking on the ads, when they are prepared to digest more detailed information (in contrast to TV ads, for example, where consumers cannot "control the flow" of the information provided). (PFF ¶838; Golder (Intuit) Tr. 1105-1108, 1116).

The results from Dr. Hauser's Disclosure Efficacy Survey also indicate that the use of hyperlinks on TurboTax's website is not deceptive. (PFF ¶734). In the Revised Disclosure Group Products & Pricing Page, Dr. Hauser added the full qualifications for Vertax Free Edition on the page itself, meaning participants did not have to click a hyperlink to access those qualifications. (Hauser (Intuit) Tr. 868-869; RX1017 (Hauser Expert Report) at C-1-19, C-1-41). That change, however, did not cause any changes in consumer behavior when it came to respondents' brand consideration or product choice. (PFF ¶¶736-742; Hauser (Intuit) Tr. 869-870; RX1017 (Hauser Expert Report) ¶¶91-92). This suggests that consumers in both of Dr.

Hauser's survey groups accessed the information about Free Edition's qualifications to similar degrees, regardless of whether the information was "behind" a hyperlink.

502. Since consumers tend to be cognitive misers, they are unlikely to click on such a hyperlink or conduct further research when they think they know what a "simple return" is and are under a preexisting misimpression that they have one. (GX749 (Novemsky Rebuttal Expert Report) ¶¶ 223 & 227).

Response to Finding No. 502:

The Proposed Finding is unsupported by any evidence other than Professor Novemsky's baseless assertions, and it is incorrect. For one thing, as discussed above (Responses to CCFF ¶¶491, 494, 498), Complaint Counsel have failed to establish that reasonable consumers have a "preexisting misimpression" that they have a simple tax return. And as also discussed above (Responses to CCFF ¶¶491, 494, 498-501), Complaint Counsel have presented no evidence that reasonable consumers are cognitive misers who are unlikely to conduct research or click on hyperlinks.

The evidence instead demonstrates that reasonable consumers perform extensive research about tax-preparation products before deciding which to use, by considering a variety of sources to assess different tax-filing options, compare their features, and evaluate alternatives before finally making a decision about which product is best for their needs. (PFF ¶¶503-509; Golder (Intuit) Tr. 1064-1067, 1078-1079, 1081; RX1555 (Kirk Fair (Intuit) Trial Dep.) at 56-57; Rubin (Intuit) Tr. 1585-1586; RX1018 (Golder Expert Report) ¶¶143-145; RX1017 (Hauser Expert Report) ¶102; RX1016-A (Kirk Fair Expert Report) ¶20). Such research may entail visiting tax-preparation websites and the IRS website, speaking with friends and family, reading reviews and testimonials, conducting internet searches, and consulting articles, rankings, and third-party reviews. (PFF ¶¶505, 507-509; Johnson (Intuit) Tr. 600-601; Golder (Intuit) Tr. 1070-1071, 1078-1079, 1081-1087, 1105-1107; Yoeli (FTC) Tr. 1758-1759 (agreeing with Dr. Hauser's

Purchase Driver Survey results); RX1555 (Kirk Fair (Intuit) Trial Dep.) at 51-52, 56; RX1018 (Golder Expert Report) ¶¶143, 151, 157-161, fig. 24; RX1017 (Hauser Expert Report) ¶109; RX1016-A (Kirk Fair Expert Report) ¶¶23, 33-37; RX57-A (Intuit) at 22; RX825 (Intuit); *see also* RX72 (Hartford (Consumer) Dep.) at 57-59).

Dr. Hauser's Purchase Driver Survey confirmed that on average, consumers use no fewer than three different sources when researching tax-preparation products. (RX1017 (Hauser Expert Report) ¶109). And internal Intuit research found that it is common for consumers to "cross-shop" potential tax-filing options and simultaneously consider alternative DIY tax-preparation software and providers, along with TurboTax, with [REDACTED] [REDACTED] [REDACTED]. (PFF ¶509; RX57-A (Intuit) at 25; Rubin (Intuit) Tr. 1585-1586, 1610-1611; RX1018 (Golder Expert Report) ¶143).

Moreover, the evidence demonstrates that reasonable consumers are familiar with disclosures that are available by clicking a hyperlink—such as on the TurboTax website and display ads—and know in particular that hyperlinks are typically displayed in blue text and that clicking that text will lead to a webpage with additional information. (PFF ¶520; Golder (Intuit) Tr. 1116-1117; RX1018 (Golder Expert Report) ¶182; Shiller (FTC) Tr. 209-210). Even complaining consumers identified by Complaint Counsel understood that the blue text on the TurboTax website indicated that there was a hyperlink and that by clicking on that link they could learn more about the qualifications for TurboTax's free offers. (PFF ¶520; GX124 (Bodi (Consumer) Dep.) at 17; GX128 (Benbrook (Consumer) Dep.) at 28-29; GX135 (Phyfer (Consumer) Dep.) at 93; GX137 (DuKatz (Consumer) Dep.) at 64, 67).

With this in mind, Intuit uses blue hyperlinked text on the TurboTax website for disclosures such as “simple tax returns only” to “draw [consumers’] attention to that term.” (PFF ¶378; Johnson (Intuit) Tr. 594). Providing detailed qualification information through the hyperlink allows “consumers [to] control the pace at which they see that information,” making it less likely that they “tune out and not try to process something that’s an overwhelming message.” (PFF ¶379; Golder (Intuit) Tr. 1174, 1176). As Professor Golder explained, “medium matters” because consumers interact with television and online ads differently. (Golder (Intuit) Tr. 1116-1117). Consumers viewing online ads understand, based on common sense and experience, that they can quickly access additional information by clicking on the ads, when they are prepared to digest more detailed information (in contrast to TV ads, for example, where consumers cannot “control the flow” of the information provided). (PFF ¶838; Golder (Intuit) Tr. 1105-1108, 1116).

The results from Dr. Hauser’s Disclosure Efficacy Survey also indicate that the use of hyperlinks on TurboTax’s website is not deceptive. (PFF ¶734). In the Revised Disclosure Group Products & Pricing Page, Dr. Hauser added the full qualifications for Vertax Free Edition on the page itself, meaning participants did not have to click a hyperlink to access those qualifications. (Hauser (Intuit) Tr. 868-869; RX1017 (Hauser Expert Report) at C-1-19, C-1-41). That change, however, did not cause any changes in consumer behavior when it came to respondents’ brand consideration or product choice. (PFF ¶¶736-742; Hauser (Intuit) Tr. 869-870; RX1017 (Hauser Expert Report) ¶¶91-92). This suggests that consumers in both of Dr. Hauser’s survey groups accessed the information about Free Edition’s qualifications to similar degrees, regardless of whether the information was “behind” a hyperlink.

503. Hyperlinks are unlikely to be sufficient for presenting important information like eligibility criteria because they require more action than simply reading a description of

“simple returns” on the current webpage, and consumers are even less likely to process such information when it is relegated to a hyperlink. (GX749 (Novemsky Rebuttal Expert Report) ¶ 227).

Response to Finding No. 503:

For the reasons just described (Responses to CCF ¶¶501-502), the Proposed Finding is unsupported by any evidence other than Professor Novemsky’s baseless assertions, and it is incorrect. Professor Novemsky’s survey did not test the likelihood that consumers would click on a hyperlink, and he did not conduct any other analyses to assess that issue. (Novemsky (FTC) Tr. 1822). Instead, Professor Novemsky simply assumes that consumers are unlikely to click a hyperlink because he believes they are lazy and seek to “process[] as little information as possible.” (See GX749 (Novemsky Rebuttal Expert Report) ¶227). That is nowhere near sufficient to satisfy Complaint Counsel’s burden of proving that the TurboTax website was likely to mislead a significant minority of reasonable consumers about their ability to file for free using TurboTax.

And in any event, Intuit presented extensive evidence demonstrating why Professor Novemsky’s assumption is wrong: First, reasonable consumers are familiar with disclosures that are available by clicking a hyperlink—such as those on the TurboTax website and display ads—and know in particular that hyperlinks are typically displayed in blue text and that clicking that text will lead to a webpage with additional information. (PFF ¶520; Golder (Intuit) Tr. 1116-1117; RX1018 (Golder Expert Report) ¶182; Shiller (FTC) Tr. 209-210). Even complaining consumers identified by Complaint Counsel understood that the blue text on the TurboTax website indicated that there was a hyperlink and that by clicking on that link they could learn more about the qualifications for TurboTax’s free offers. (PFF ¶520; GX124 (Bodi (Consumer) Dep.) at 17; GX128 (Benbrook (Consumer) Dep.) at 28-29; GX135 (Phyfer (Consumer) Dep.) at 93; GX137 (DuKatz (Consumer) Dep.) at 64, 67).

With this in mind, Intuit uses blue hyperlinked text on the TurboTax website for disclosures such as “simple tax returns only” to “draw [consumers’] attention to that term.” (PFF ¶378; Johnson (Intuit) Tr. 594). Providing detailed qualification information through the hyperlink allows “consumers [to] control the pace at which they see that information,” making it less likely that they “tune out and not try to process something that’s an overwhelming message.” (PFF ¶379; Golder (Intuit) Tr. 1174, 1176). As Professor Golder explained, “medium matters” because consumers interact with television and online ads differently. (Golder (Intuit) Tr. 1116-1117). Consumers viewing online ads understand, based on common sense and experience, that they can quickly access additional information by clicking on the ads, when they are prepared to digest more detailed information (in contrast to TV ads, for example, where consumers cannot “control the flow” of the information provided). (PFF ¶838; Golder (Intuit) Tr. 1105-1108, 1116).

The results from Dr. Hauser’s Disclosure Efficacy Survey also indicate that the use of hyperlinks on TurboTax’s website is not deceptive. (PFF ¶734). In the Revised Disclosure Group Products & Pricing Page, Dr. Hauser added the full qualifications for Vertax Free Edition on the page itself, meaning participants did not have to click a hyperlink to access those qualifications. (Hauser (Intuit) Tr. 868-869; RX1017 (Hauser Expert Report) at C-1-19, C-1-41). That change, however, did not cause any changes in consumer behavior when it came to respondents’ brand consideration or product choice. (PFF ¶¶736-742; Hauser (Intuit) Tr. 869-870; RX1017 (Hauser Expert Report) ¶¶91-92). This suggests that consumers in both of Dr. Hauser’s survey groups accessed the information about Free Edition’s qualifications to similar degrees, regardless of whether the information was “behind” a hyperlink.

4. Survey Methodology

504. The goal of the perception survey was to measure the extent of taxpayers' opinions and beliefs as to whether they can file their taxes for free using TurboTax online software. (GX303 (Novemsky Expert Report) ¶ 30; Novemsky (Complaint Counsel) Tr. 358).

Response to Finding No. 504:

Intuit has no specific response, except to note that Professor Novemsky also cites his survey as evidence that Intuit's advertising and website *caused* taxpayers to have certain beliefs about their ability to file their taxes for free using TurboTax, yet his survey was not designed to test causality and he did not show his survey respondents any TurboTax ads or the TurboTax website. (PFF ¶¶531-534).

505. A central question in this matter was whether or not, and to what extent, consumers believe they can use TurboTax for free. (GX749 (Novemsky Rebuttal Expert Report) ¶ 192; *see also* Novemsky (Complaint Counsel) Tr. 1764).

Response to Finding No. 505:

Intuit has no specific response.

506. First, Professor Novemsky asked whether or not the respondents (none of whom were eligible to use TurboTax Free Edition) thought they could file their 2021 income taxes for free using TurboTax online software. (GX 303 (Novemsky Expert Report) ¶ 45; Novemsky (Complaint Counsel) Tr. 359).

Response to Finding No. 506:

The Proposed Finding is incomplete and misleading because Professor Novemsky's survey did not reliably assess this question. Professor Novemsky asked four separate questions related to whether respondents thought they could file their income taxes for free using TurboTax, but he reported his survey results based on the responses to only the last of those questions (TAT240). (PFF ¶¶567-573). As Intuit explained, the "cumulative effective of asking about free" repeatedly was to signal to respondents that the researcher wanted them to choose "I think I can file ... for free" by the time they reached TAT240. (PFF ¶573). In fact, several survey participants expressly stated that they believed they could file for free because the

“survey is suggesting that I can.” (PFF ¶576). For this reason and the others Intuit provided (PFF ¶¶567-589), Professor Novemsky’s survey does not reliably assess whether survey respondents thought they could file their taxes for free using TurboTax online software.

507. Professor Novemsky then asked the respondents which sources played a role in them forming their impression regarding their ability to use TurboTax online software for free. (GX303 (Novemsky Expert Report) ¶ 47; Novemsky (Complaint Counsel) Tr. 359).

Response to Finding No. 507:

The Proposed Finding is incomplete and misleading because Professor Novemsky’s survey did not reliably assess this question. The question that Professor Novemsky relied on to identify the sources that played a role in respondents’ forming their impressions was TAT255, which was a closed-ended multiple choice question. (PFF ¶¶591-592). And two of the five substantive answers to TAT255—“TurboTax advertisements” and “TurboTax websites”—conformed to Complaint Counsel’s allegations in this case, increasing the likelihood that participants would respond in a manner that supported those allegations. (PFF ¶593). Moreover, respondents were particularly likely to select “TurboTax advertisements” and “TurboTax websites” because Professor Novemsky’s survey had already mentioned “TurboTax” 12 times by the participants reached TAT255. (PFF ¶594). The effect of this repetition was to suggest to survey participants that the survey writer wanted them to choose the two TurboTax-related answers in response to TAT255. (PFF ¶594). For this reason and the others Intuit provided (PFF ¶¶590-607), Professor Novemsky’s survey did not reliably identify the sources that played a role in respondents forming their impression about their ability to file for free using TurboTax.

508. Professor Novemsky also asked consumers about whether they thought their 2021 tax return met TurboTax’s definition of a “simple U.S. tax return.” (GX303 (Novemsky Expert Report) ¶ 48; Novemsky (Complaint Counsel) Tr. 359, 371-372.)

Response to Finding No. 508:

The Proposed Finding is incomplete and misleading because Professor Novemsky's survey did not reliably assess this question. As explained (Responses to CCF ¶¶491-492), Professor Novemsky did not provide his survey respondents the definition of "simple tax return," did not provide his survey respondents any context about the significance of "simple tax return," and did not provide his survey respondents any of the additional information that would be presented consumers when viewing a TurboTax ad in the actual marketplace. (RX1017 (Hauser Expert Report) ¶66). Under those circumstances, many consumers be expected to guess that they do have a simple tax return. Indeed, as Professor Novemsky acknowledges, respondents were "more likely to answer 'yes' to this question because [of] motivated reasoning, wishful thinking, and optimistic bias." (GX303 (Novemsky Expert Report) ¶87; RX1017 (Hauser Expert Report) ¶¶66-67).

509. Professor Novemsky relied on best practices in the design of the perception survey to minimize the possibility of bias and avoid potential demand artifacts. (GX303 (Novemsky Expert Report) ¶¶ 5, 19, 57-59; GX749 (Novemsky Rebuttal Expert Report) ¶ 26).

Response to Finding No. 509:

The Proposed Finding—which is devoid of any factual content—is incorrect. As Dr. Hauser explained, Professor Novemsky did not follow best practices because he chose an unrepresentative survey sample, used questions that were unclear and leading, reported his data inaccurately, and employed inadequate safeguards to ensure objectivity. (Hauser (Intuit) Tr. 894-895). As a result, as Intuit explained at length (PFF ¶¶528-622), Professor Novemsky's survey was rife with likely biases and demand artifacts and does not provide any reliable evidence that reasonable consumers were likely to be deceived by TurboTax marketing.

510. As an initial matter, Professor Novemsky selected the appropriate target population of potential taxpayers who at the time the survey was conducted were considering using an

online tax software to file their 2021 taxes and would not have qualified for TurboTax Free Edition. (GX303 (Novemsky Expert Report) ¶ 21; *see also* Novemsky (Complaint Counsel) Tr. 378-379).

Response to Finding No. 510:

The Proposed Finding is incorrect because, in multiple ways, Professor Novemsky inappropriately designed his survey population to exclude include only respondents like to be unfamiliar with TurboTax's products and advertising. (PFF ¶¶541-553). For one, thing it was inappropriate to exclude all survey participants who qualified for TurboTax Free Edition because that group is the one Intuit targets with ads for free SKUs, and the one most likely to have seen the challenged ads. (PFF ¶544). Thus, Professor Novemsky focused on a population that was comparatively *less* likely to have seen the challenged ads. (PFF ¶545). And of course, Professor Novemsky did not show his survey participants the challenged ads (or any ads) during the survey. (PFF ¶¶533-534).

Moreover, it was not appropriate for Professor Novemsky to exclude from his survey population all respondents who had already filed their Tax Year 2021 tax returns by the time they took the survey in March 2022. (PFF ¶¶546-547). That group—which makes up approximately 60% of all U.S. taxpayers—were recently in the market for tax software and thus more likely to be familiar with the qualifications for filing for free with TurboTax Free Edition and other competitor products. (PFF ¶547). Professor Novemsky suggested that he excluded everyone who had already filed their Tax Year 2021 taxes because he wanted his survey to include only participants who “[were] in the market for tax software, while they’re in that market,” but his survey did not ask any questions to assess whether respondents actually were “in the market” at the time they took the survey. (PFF ¶548). Indeed, in Tax Year 2021, 40% of the U.S. taxpayers who had not filed their taxes by March 2022 ultimately obtained an extension—meaning they would not be filing their taxes anywhere near the time of the survey. (PFF ¶549). Yet Professor

Novemsky did not take any measures to determine whether any of his survey respondents were contemplating an extension. (PFF ¶549).

Finally, it was not appropriate for Professor Novemsky to design “Group A”—his “main group of interest”—to include only the survey participants who had not filed their taxes using TurboTax in at least the three previous years (and who had potentially never used TurboTax). (PFF ¶550). Those participants are particularly unlikely to have seen or paid attention to any recent TurboTax advertising, so to the extent they are under a misimpression about their ability to file their taxes for free, it is unlikely that the misimpression was caused by the challenged ads. (PFF ¶¶552-553).

511. The perception survey sample was chosen to be representative of the population of interest and the results of the survey can be generalized to the population at large with a degree of scientific certainty. (GX303 (Novemsky Expert Report) ¶¶ 5, 21-26).

Response to Finding No. 511:

The Proposed Finding is vague and incorrect. For one thing, it is not clear what Complaint Counsel mean by “the population at large.” Certainly, they cannot mean all U.S. taxpayers, because Professor Novemsky excluded from his survey all participants who qualify to file their taxes for free with TurboTax—a group that constitutes a third of all taxpayers in the United States and over half of the taxpayers who would consider an online DIY tax-preparation product. (PFF ¶543).

Presumably, then, when Complaint Counsel refer to “the population at large,” they mean all U.S. taxpayers who do not qualify for free TurboTax SKUs. But Professor Novemsky’s sample was not representative of even that population. For one thing, as noted above (Response to CCF ¶510), Professor Novemsky excluded anyone who had already filed their Tax Year 2021 taxes by the time they took the survey in March 2022; those earlier filers tend to be younger, have lower incomes, and be owed higher refunds than later filers. (RX1017 (Hauser Expert

Report) ¶40). These differences indicate that Professor Novemsky's survey participants (none of whom could be considered an early filer), were *not* representative of the population of all U.S. taxpayers who do not qualify for free TurboTax SKUs.

On top of that, as also noted above (Response to CCF ¶510), Professor Novemsky's "main group of interest" (Group A) was made up entirely of consumers who had not filed their taxes using TurboTax in at least the three previous years. The results from that survey group cannot be extrapolated to the larger population of all U.S. taxpayers who do not qualify for free TurboTax SKUs, because the larger population includes millions of consumers who have used TurboTax in the last three previous years and are thus likely to be more familiar with TurboTax's products and advertising. (See PFF ¶¶551-553).

512. Professor Novemsky screened out participants who could not file their taxes for free using Free Edition based on criteria set forth by Intuit. (GX303 (Novemsky Expert Report) ¶¶ 24-25; Novemsky (Complaint Counsel) Tr. 379-380).

Response to Finding No. 512:

Intuit has no specific response except to note that, Professor Novemsky screened these participants out by asking them a series of questions related to the types of income they received, whether respondents expect to take a standard or itemized deduction, and a variety of other tax situations. (GX303 (Novemsky Expert Report) App'x E at 5). Thus, Professor Novemsky's survey relies on survey participants to understand their financial and tax situation in a similar level of detail to which consumers have access on the TurboTax website. (PFF ¶¶364-441; RX1017 (Hauser Expert Report) ¶21). The fact that Professor Novemsky's survey respondents appear to have understood his screening questions is strong evidence that the TurboTax website is not deceptive. And Complaint Counsel concede that the website is "integrated into TurboTax's free advertising." (CCFF ¶455).

513. Professor Novemsky also excluded survey participants who had already filed their taxes since (1) such consumers may already know for a fact whether they are eligible to use TurboTax to file their returns for free, for example, by virtue of attempting to use TurboTax; and (2) the intended audience for TurboTax marketing at the time the survey was conducted was taxpayers who have not yet filed their returns. (GX303 (Novemsky Expert Report) ¶ 22).

Response to Finding No. 513:

The Proposed Finding is incorrect in one respect and incomplete and misleading in another. It is incorrect because Professor Novemsky (the only authority cited) misidentifies the intended audience of ads for free TurboTax SKUs. As Intuit explained, the intended audience for those ads is the population of taxpayers who qualify to use those free SKUs. (PFF ¶¶188-204). Professor Novemsky wholesale excluded that group from his survey population. (PFF ¶¶543-544).

The Proposed Finding is also incomplete and misleading because consumers who had already filed their taxes at the time of the survey may already know whether they qualify to use TurboTax for reasons short of “attempting to use TurboTax.” Having recent been through the high-involvement process of selecting a tax-filing method, those consumers likely knew whether they qualify to file for free because they had done the research that reasonable consumers undertake—like performing internet searches, reading the IRS website, and looking at third-party reviews. (PFF ¶¶503-509). Indeed, those consumers may have recalled recent TurboTax advertising or may have recently visited the TurboTax website (which Complaint Counsel, again, concede is integrated into the ads themselves, CCF ¶455). For these reasons, consumers who had already filed were more likely to be familiar with the qualifications for free TurboTax SKUs. (PFF ¶547). Professor Novemsky excluded all of them, and focused instead on a group that may or may not have been “in the market for tax software” at the time of the survey and was

comparatively less familiar with TurboTax's advertising and SKUs. (PFF ¶¶548-549). Doing so biased Professor Novemsky's survey results in Complaint Counsel's favor.

514. The perception survey was fielded between March 11, 2022, and March 24, 2022. (GX303 (Novemsky Expert Report) ¶ 22; Novemsky (Complaint Counsel) Tr. 375).

Response to Finding No. 514:

Intuit has no specific response.

515. Conducting the perception survey in March had the advantage of reaching potential taxpayers when tax filing is more top-of-mind and as many consumers are thinking in earnest about how they will file their taxes. It is this mindset that is most relevant to the issues at hand because this is the time when potential misperceptions about the cost filing options are most likely to be consequential. (GX303 (Novemsky Expert Report) ¶ 22; *see also* Novemsky (Complaint Counsel) Tr. 375; GX289 (Complaint Counsel) at CC-00006221 (summarizing weekly sales for Tax preparation services and stating that “[i]n 2021, 21 percent of sales year-to-date (as of the week of May 17) occurred the week of Tax Day and the week before.”)).

Response to Finding No. 515:

The Proposed Finding is incorrect because Professor Novemsky negated any advantage of conducting his survey in March by screening out those taxpayers for whom tax filing was most “top-of-mind.” (*See* PFF ¶¶547-549). As noted (Response to CCF ¶510), 60% of U.S. taxpayers had already filed their taxes by March, and Professor Novemsky excluded all of those taxpayers from his survey. (PFF ¶546). Nor did he do anything to ensure that tax filing was “top-of-mind” for those participants he did include in his survey. For example, he did not take any measures to determine whether any of his survey participants were contemplating an extension. (PFF ¶547). And he acknowledged that he did not know whether any of his survey participants, at the time of the survey, had gathered their personal information or relevant documents needed to complete the filing process. (PFF ¶548).

516. Fielding the survey much earlier in the tax season would mean that consumers who have not yet filed their tax returns may not have been thinking about tax filing or engaging with the topic of tax filing, and that as such, the attention consumers pay to advertisements about tax filing and how carefully they have thought about how they will

approach filing their taxes would not be representative of their behavior when they are actually making tax filing decisions. (GX303 (Novemsky Expert Report) ¶ 22; *see also* Novemsky (Complaint Counsel) Tr. 375, 379).

Response to Finding No. 516:

The Proposed Finding is vague, speculative, and irrelevant. It is not clear what Complaint Counsel mean by “much earlier in the tax season,” but again, 60% of U.S. taxpayers had already filed their taxes by March (PFF ¶546), and many of those taxpayers may have been thinking about their tax filing in January or even earlier. But in any event, the timing of Professor Novemsky’s survey is not what renders the survey unreliable. The survey is unreliable because (among other things) Professor Novemsky excluded a group of taxpayers who, having just been in the market for tax software, were more likely to be familiar with the qualifications for filing with free TurboTax SKUs. (PFF ¶¶546-547).

517. Within the target population, Professor Novemsky analyzed survey results for two subgroups. (GX303 (Novemsky Expert Report) ¶ 7; *see also* Novemsky (Complaint Counsel) Tr. 411-412).

Response to Finding No. 517:

Intuit has no specific response.

518. The main group of interest (Group A) consisted of respondents who indicated that they have not filed their income taxes using TurboTax within the past three years and, as such, are less likely to respond to survey questions based on their past usage of TurboTax. (GX303 (Novemsky Expert Report) ¶ 7; *see also* GX749 (Novemsky Rebuttal Expert Report) ¶ 52).

Response to Finding No. 518:

The Proposed Finding is incomplete and misleading because Group A is also the group least likely to be familiar with TurboTax’s products and TurboTax advertising. (PFF ¶551). Thus, Professor Novemsky’s “main group of interest” was not representative of the allegedly deceived population and was likely to provide unreliable responses. (PFF ¶¶551-552, 600-601). As Intuit explained (PFF ¶551), there is no way of knowing whether any Group A respondent

had ever used a TurboTax SKU or even visited the TurboTax website. On top of that, a large majority of Group A respondents (69.1%) had filed their taxes with at least one of TurboTax's competitors in the previous three years. (PFF ¶551). In light of that history, Group A participants are likely to have been influenced by TurboTax competitors, rather than by TurboTax advertising, and any misimpression among the group is unlikely to have been caused by TurboTax advertising. (PFF ¶¶551-552, 600-601).

519. Professor Novemsky also collected and analyzed results for a second group (Group B) which consisted of respondents who indicated that they have filed their income taxes using a paid online version of TurboTax within the past three years. (GX303 (Novemsky Expert Report) ¶ 7; Novemsky (Complaint Counsel) Tr. 381).

Response to Finding No. 519:

Intuit has no specific response.

520. Professor Novemsky analyzed results for Group A and Group B separately as they are distinct populations and should not be combined with one another. (GX749 (Novemsky Rebuttal Report) ¶ 52); Novemsky (Complaint Counsel) Tr. 525).

Response to Finding No. 520:

The Proposed Finding is misleading because it omits the important context that any concerns with combining the two groups are the result of the Professor Novemsky's decision to artificially inflate the size of Group A compared to Group B. Through the use of quotas, Professor Novemsky built his survey population such that roughly two-thirds would be in Group A and roughly one-third would be in Group B. (Hauser (Intuit) Tr. 917-918). But in the actual marketplace, given TurboTax's market share, Group B represents a larger share of the population. (Hauser (Intuit) Tr. 918-919). And as Intuit has explained (PFF ¶¶550-551, 600-601; Responses to CCF ¶¶510, 518), Group A's lack of experience and familiarity with TurboTax makes it a particularly biased group on which to focus when assessing the allegations in this case. Accordingly, when analyzing Professor Novemsky's results, Intuit has combined the

results from Group A and Group B in order to make the survey population more closely resemble the population in the actual marketplace—by introducing *some* respondents with recent TurboTax experience into the equation. (Hauser (Intuit) Tr. 918-919). Given Professor Novemsky’s use of quotas, Intuit acknowledges that the combined survey population is not representative of the actual marketplace. But the bias that results from combining *still favors* *Complaint Counsel*: When the groups are combined, Group A—the group, again, most infected by biases—has a larger share relative to Group B in the survey population than it would in the actual marketplace. (Hauser (Intuit) Tr. 918-919).

521. Professor Novemsky undertook a number of measures to ensure reliable survey results. (GX303 (Novemsky Expert Report) ¶ 57; Novemsky (Complaint Counsel) Tr. 386).

Response to Finding No. 521:

The Proposed Finding—which is devoid of any factual content—is incorrect because whatever measures Professor Novemsky took were insufficient to ensure that his survey results were unaffected by the numerous design flaws that Intuit has discussed at length (PFF ¶¶528-622).

522. For example, consumers had to pass “attention checks” and agree to comply with survey instructions in order to participate in the survey, which screened out inattentive survey participants. (GX303 (Novemsky Expert Report) ¶¶ 40-41).

Response to Finding No. 522:

Intuit has no specific response, except to note that this measure was insufficient to ensure that Professor Novemsky’s survey results were unaffected by the numerous design flaws that Intuit has discussed at length (PFF ¶¶528-622).

523. Professor Novemsky also ensured questions and answer choices were clear and that participants could not guess the purpose of the survey by conducting a pretest. (GX303 (Novemsky Expert Report) ¶¶ 58, 62-63; Novemsky (Complaint Counsel) Tr. 395, 396-397).

Response to Finding No. 523:

Intuit is incorrect because Professor Novemsky's pretest was insufficient to ensure that his survey results were unaffected by the numerous design flaws that Intuit has discussed at length (PFF ¶¶528-622). For one thing, the pretest interview questions did not ask whether pretest respondents believed that the questions required guessing, were leading, or caused demand artifacts. (*See* GX303 (Novemsky Expert Report) App'x G). And as Intuit has explained, survey participants' responses to one of Professor Novemsky's open-ended questions expressly revealed the existence of a demand artifact. (PFF ¶¶576-577). Blind coders' analysis of Professor Novemsky's survey results provides additional evidence that survey respondents were guessing or being led, even if they perceived the question to be clear. (PFF ¶¶579-588). Moreover, regardless of what the pretest questionnaire asked, Professor Novemsky's survey participants did not need to "guess the purpose of the survey"; Professor Novemsky expressly *told* them the purpose of the survey at the end of the questionnaire and then provided them to ability to opt out. (PFF ¶556). Participants clearly read that part of the survey carefully and understood it, as 21% of participants ultimately chose to opt out. (PFF ¶557).

524. Professor Novemsky also applied several measures to reduce participant guessing, including using "quasi-filters" ("I don't have enough information" or "don't know/not sure"), instructing consumers not to guess, and requiring consumers to agree with the instruction not to guess. (GX303 (Novemsky Expert Report) ¶ 58; Novemsky (Complaint Counsel) Tr. 391-393, 394-395, 396).

Response to Finding No. 524:

The Proposed Finding is misleading because it ignores that the wording of the questions and answers in Professor Novemsky's survey undermined the benefits of these techniques. (Hauser (Intuit) Tr. 922-923; RX1017 (Hauser Expert Report) ¶46 n.84). The instruction not to guess came earlier in the survey and there is no reason to believe participants were thinking of it by the time they reached the two key questions from which Professor Novemsky drew his survey

results (TAT240 and TAT255). (GX303 (Novemsky Expert Report) App'x E at 7; Hauser (Intuit) Tr. 922-923). The quasi-filters, moreover, were unlikely to prevent respondents from guessing in response to TAT240 because they were phrased more definitively than the substantive answer choices, which were phrased as “I think” statements. (PFF ¶569). And with respect TAT255, the quasi-filters were unlikely to cure the demand artifact or prevent guessing because, as Professor Novemsky himself acknowledged at trial, “respondents are more likely to choose an answer that is explicitly mentioned than one that is not explicitly mentioned.” (Novemsky (FTC) Tr. 475).

525. Professor Novemsky also controlled for potential “order effects” by rotating answer options. (GX303 (Novemsky Expert Report) ¶ 60; Novemsky (Complaint Counsel) Tr. 391-392, 395, 396).

Response to Finding No. 525:

Intuit has no specific response, except to note that this measure was insufficient to ensure that Professor Novemsky’s survey results were unaffected by the numerous design flaws that Intuit has discussed at length (PFF ¶¶528-622).

526. Professor Novemsky also carefully worded questions. For example, in providing answer options for question TAT240, Professor Novemsky deliberately used phrases that let respondents express their state of mind, *i.e.* “I think I can file my 2021 income taxes for free using TurboTax online software” and “I don’t think I can file my 2021 income taxes for free using TurboTax online software.” He chose these phrases rather than more definitive wording that expresses certainty or specific knowledge, such as “I can file for free” or “I am sure I can file for free” because the level of certainty in a consumer’s knowledge about the cost of filing with TurboTax does not need to be absolute for that consumer to try using TurboTax for free. (GX303 (Novemsky Expert Report) ¶ 49); *see also* Novemsky (Complaint Counsel) Tr. 391).

Response to Finding No. 526:

The Proposed Finding is incorrect because Professor Novemsky did *not* “carefully word[]” his questions. (PFF ¶¶566-607). With respect to the example cited in the Proposed Finding (TAT240), the phrases “I think” and “I don’t think” were not appropriate given the context in which they were used. Had Professor Novemsky shown his survey participants any of

the challenged ads or the TurboTax website, it may have been reasonable to use such answer choices. However, as Dr. Hauser explained in his report, “in the absence of any information provided by the survey itself [about the qualifications for free TurboTax SKUs] and having not yet filed their taxes for the year,” survey respondents would “be more prone to guessing.” (RX1017 (Hauser Expert Report) ¶48). And when a respondent guesses in a survey—having been provided none of the information that would be available in the real-world marketplace and having been presented with a question that invites guessing—that does not establish that the respondent has been deceived. (RX1017 (Hauser Expert Report) ¶48). Many consumers who guess in a survey environment would research further when making a purchase decision in the actual marketplace—research that could take mere seconds (*see* PFF ¶¶131-133).

Intuit has never argued that a consumer must be certain in their belief in order to be deceived; the problem with Professor Novemsky’s survey is instead that it *invites* participants who are uncertain about their ability to file for free to guess that they can file for free and “does not take any steps to measure or control for th[e] range in respondent certainty.” (RX1017 (Hauser Expert Report) ¶47). Absent any such steps, Professor Novemsky cannot know whether *any* of his survey respondents are sufficiently certain about their ability to file for free that they would “try using TurboTax” in the actual marketplace without doing even seconds more research.

527. After the completion of the perception survey, Professor Novemsky also conducted robustness checks to confirm that results were consistent under other reasonable approaches or assumptions, which confirmed that his baseline results are qualitatively unchanged across each of these robustness tests. (GX303 (Novemsky Expert Report) ¶¶ 92-94).

Response to Finding No. 527:

Intuit has no specific response, except to note that this measure was insufficient to ensure that Professor Novemsky’s survey results were unaffected by the numerous design flaws that

Intuit has discussed at length (PFF ¶¶528-622). Indeed, none of the robustness checks related to one of the design flaws Intuit has identified. (See GX303 (Novemsky Expert Report) ¶93).

528. The perception survey included both open and closed-ended questions. (GX303 (Novemsky Expert Report) ¶ 43; Novemsky (Complaint Counsel) Tr. 387).

Response to Finding No. 528:

Intuit has no specific response.

529. The perception survey was designed around closed-ended questions which are more suitable for assessing choices between well-identified options. (GX303 (Novemsky Expert Report) ¶ 43; *see also* Novemsky (Complaint Counsel) Tr. 387-388, 394, 446-447390-391 (“[C]losed-ended questions are standard practice when you want to get a specific categorical response.”)).

Response to Finding No. 529:

The Proposed Finding is misleading because the particular closed-ended questions that Professor Novemsky designed his survey around were not scientifically valid for numerous reasons. Those questions invited participants to guess, were plagued by demand artifacts that primed participant to select the answer choices favoring Complaint Counsel’s allegations, omitted important answer choices, posed unreliable memory tests, and concealed from participants important information that they would have been provided had they been shown any of the challenged ads. (PFF ¶¶566-589; Responses to CCF ¶¶491, 496).

530. Professor Novemsky also used open-ended questions to prompt respondents to contemplate the issues relevant for answering closed-ended questions and motivate them to invest more effort into the thoughts that inform their answers to closed-ended questions. (GX303 (Novemsky Expert Report) ¶ 43; *see also* Novemsky (Complaint Counsel) Tr. 387-388, 389-390, 393).

Response to Finding No. 530:

Intuit is misleading because it suggests that open-ended questions are useful *only* “to prompt respondents to contemplate the issues relevant for answering closed-ended questions.” Professor Novemsky himself relies on Shari Diamond’s “Reference Manual on Survey

Research” (*see, e.g.*, CCFE ¶532), which explains “[t]he advantage of open-ended questions is that they give the respondent fewer hints about expected or preferred answers.” (RX709 (Intuit) at 392). Thus, as Dr. Hauser explained, examining responses to *both* open-ended and closed-ended questions enables researchers to examine participants “unaided versus aided” answers, and get a more “complete” set of results. (RX1391 (Hauser (Intuit) Dep.) at 131). Both kinds of questions, in others, can “provide data” that is “very valuable.” (Hauser (Intuit) Tr. 921). Here, however, Professor Novemsky drew his results solely from the closed-ended questions, and more or less ignored the open-ended responses aside for anecdotal purposes. (PFF ¶¶567, 580, 591). As Intuit has explained, those open-ended responses undermined Professor Novemsky’s conclusions. (PFF ¶¶579-589).

It also bears emphasis that use of any kind of questions—open-ended or closed-ended—risks creating demanding artifacts if proper safeguards are not in place. Here, Professor Novemsky’s open-ended (and closed-ended) questions signaled to respondents that the survey writer wanted them to answer that TurboTax is free, and to attribute that belief to TurboTax’s advertising and website. (PFF ¶¶572-578, 594-596). Professor Novemsky could have safeguarded against these demand artifacts through use of a control group, but he inexplicably chose not to use a control group, rendering his survey results unreliable. (PFF ¶¶ 539, 572-578, 594-596).

531. In designing the survey, Professor Novemsky determined that a perception survey, rather than a copy test, was the appropriate design to examine Intuit’s extensive advertising campaign. (GX303 (Novemsky Expert Report) ¶ 30; *see also* Novemsky (Complaint Counsel) Tr. 385).

Response to Finding No. 531:

The Proposed Finding is irrelevant because Professor Novemsky’s determination did not conform with “reliable principles and methods.” Fed. R. Evid. 702. Given that Professor

Novemsky was testing whether TurboTax marketing has *caused* consumers to wrongly believe that they can file their taxes for free using TurboTax, he needed to use a survey design that permitted him to assess causality. (PFF ¶530). And assessing causality requires a test-control design—a perception survey does not suffice. (PFF ¶531). Indeed, as Professor Novemsky testified when serving as an expert in another case, it is “impossible” to “draw any causal inference” without “an experimental design that includes a control group and a test group.” (PFF ¶532). Absent a control group, Professor Novemsky, said under oath, one cannot test what an “ad caused consumers to understand or not understand.” (PFF ¶533). Here, Professor Novemsky did not use a test-control design, and he did not show his participants any ads—as one would in a copy test. (PFF ¶¶533-534). Thus, any causal conclusions he attempts to draw about Intuit’s advertising practices are scientifically invalid and unreliable. (PFF ¶540).

532. Consumer surveys that do not involve test/control design, the use of structural equation modelling, or the use of a quasi-experiment are routinely performed and have been found to be reliable. (GX749 (Novemsky Rebuttal Expert Report) ¶ 25 (citing Diamond, Shari S., “Reference Manual on Scientific Evidence Third Edition,” Federal Judicial Center, 2011, pp. 363–367); Novemsky (Complaint Counsel) Tr. 381-382 (“A different type of survey, the one that I used here, is called a perception survey, or sometimes an A&U in the industry, an attitudes and usage survey. We’re trying to count up how many consumers have certain beliefs or attitudes. And so that’s more appropriate when you have something that you can’t replicate in the lab. It’s something that’s used broadly, so crime victimization surveys, consumer sentiment surveys on which economic policy is based, all use this type of structure. Professor Hauser, one of the experts from TurboTax in this matter, used this structure for his purchase driver survey. It’s a commonly used structure.”)).

Response to Finding No. 532:

The Proposed Finding is not relevant because the other survey designs mentioned are not reliable for assessing causality, which is what Professor Novemsky purports to do in this case. Indeed, Shari Diamond’s “Reference Manual on Survey Research”—which the Proposed Finding cites—distinguishes surveys that are designed “simply to describe attitudes or beliefs or reported behaviors” from those that seek to “determine the *source* of those attitudes or beliefs or

behaviors” and therefore “test a causal proposition.” (RX709 (Intuit) at 396). Dr. Hauser’s Purchase Driver Survey (to which the Proposed Finding alludes) falls into the former category; it was simply a “census survey of all the various things that people do” when choosing a tax-preparation provider, and did not attempt to evaluate what causes people to do those things. (PFF ¶786).

By contrast, as just explained (Response to CCF ¶531), Professor Novemsky’s survey falls into the latter category: Professor Novemsky was testing whether TurboTax marketing has *caused* consumers to wrongly believe that they can file their taxes for free using TurboTax. (PFF ¶530). And again, assessing causality requires a test-control design—a perception survey or an “attitudes and usage survey” does not suffice. (PFF ¶531). As Diamond’s reference manual explains, “[s]urveys that merely record consumer impressions have a limited ability to answer questions about the origins of those impressions.” (RX709 (Intuit) at 397). That is because “[w]ithout a control group, it is not possible to determine” whether the survey results are “attributable” to “an “allegedly deceptive message” or “background noise.” (RX709 (Intuit) at 398-399). Professor Novemsky’s testimony in a prior false advertising case is consistent with that: Absent a control group, he said, one cannot test what an “ad caused consumers to understand or not understand.” (PFF ¶533).

533. While test/control designs have advantages, they are not appropriate when there is no suitable control group, nor is it appropriate when the nature of the deception cannot realistically be replicated in the survey environment. (GX303 (Novemsky Expert Report) ¶ 31; Novemsky (Complaint Counsel) Tr. 383-384).

Response to Finding No. 533:

The Proposed Finding is irrelevant because it relies on Professor Novemsky’s improper assumptions that (1) there would be no suitable control group here and (2) the nature of the

alleged deception could not be replicated in a survey environment. Neither assumption is supported.

First, Professor Novemsky contends that a control group would not be feasible because most consumers had “existing beliefs about their ability to file for free using TurboTax” (GX303 (Novemsky Expert Report) ¶33), but fails to explain why that matters. As Professor Novemsky himself acknowledged, one of the virtues of a test-control design is that the comparison between the test and control groups allows the researcher to “net[] out factors such as pre-existing beliefs.” (GX303 (Novemsky Expert Report) ¶30). Moreover, if Professor Novemsky was concerned about the influence of participants prior exposure to TurboTax advertising, he could have used a disguised brand, like Dr. Hauser did in his Disclosure Efficacy Survey. (RX1017 (Hauser Expert Report) ¶32). As Dr. Hauser explains, “Professor Novemsky’s claim that it would be impossible to construct a suitable control group is inaccurate given available research techniques.” (RX1017 (Hauser Expert Report) ¶32). Indeed, Shari Diamond’s “Reference Manual on Survey Research” (cited by Professor Novemsky, *see* CCF ¶533) cautions, “a survey with an imperfect control group may provide better information than a survey,” like Professor Novemsky’s, “with no control group at all.” (RX709 (Intuit) at 399).

Second, Professor Novemsky is wrong to simply assume that the nature of the alleged deception here could not be assessed in a survey environment. He argues that “the limited nature of a survey stimulus is likely to severely underrepresent the extent and the cumulative impact of Intuit’s allegedly deceptive practices” (GX303 (Novemsky Expert Report) ¶32), but in fact the opposite true. As Dr. Hauser explains, “literature on advertising effectiveness” shows that the impact of advertising “is greatest immediately following consumer exposure.” (RX1017 (Hauser Expert Report) ¶31). And on top of that, Dr. Hauser adds, “showing respondents a stimulus in a

survey context could encourage respondents to focus on the stimulus more than they might in the marketplace.” (RX1017 (Hauser Expert Report) ¶31). Together, those two dynamics mean that “the survey context could if anything in result in an overmeasurement, rather than an undermeasurement,” of consumer impressions or reactions—which a scientist could then account for when analyzing and presenting his or her survey results. (RX1017 (Hauser Expert Report) ¶31).

Thus, Professor Novemsky’s assertion that a survey stimulus would “severely underrepresent” the impact of Intuit’s ads is completely baseless. Diamond’s reference manual (which, again, Professor Novemsky cites) emphasizes that “courts have increasingly come to recognize the central role the control group can play in evaluating” “deceptive-advertising claims.” (RX709 (Intuit) at 400). Complaint Counsel and Professor Novemsky do not explain why the alleged deception in this case is meaningfully different than all the others, such that a test-control design would not be possible.

534. Not all surveys require test/control design. (Hauser (Intuit) Tr. 962; RX1391 (Hauser (Intuit) Dep.) at 31-32).

Response to Finding No. 534:

The Proposed Finding is irrelevant because of the reasons just described (Response to CCFE ¶532). The other survey designs the Proposed Finding alludes to are not reliable for assessing causality, which is what Professor Novemsky purports to do in this case. Indeed, Shari Diamond’s “Reference Manual on Survey Research”—which Professor Novemsky cites (CCFF ¶532)—distinguishes surveys that are designed “simply to describe attitudes or beliefs or reported behaviors” from those that seek to “determine the *source* of those attitudes or beliefs or behaviors” and therefore “test a causal proposition.” (RX709 (Intuit) at 396). Dr. Hauser’s Purchase Driver Survey falls into the former category; it was simply a “census survey of all the

various things that people do” when choosing a tax-preparation provider, and did not attempt to evaluate what causes people to do those things. (PFF ¶786).

By contrast, as explained (Responses to CCF ¶¶531-532), Professor Novemsky’s survey falls into the latter category: Professor Novemsky was testing whether TurboTax marketing has *caused* consumers to wrongly believe that they can file their taxes for free using TurboTax. (PFF ¶530). And again, assessing causality requires a test-control design—a perception survey or an “attitudes and usage survey” does not suffice. (PFF ¶531). As Diamond’s reference manual explains, “[s]urveys that merely record consumer impressions have a limited ability to answer questions about the origins of those impressions.” (RX709 (Intuit) at 397). That is because “[w]ithout a control group, it is not possible to determine” whether the survey results are “attributable” to “an “allegedly deceptive message” or “background noise.” (RX709 (Intuit) at 398-399). Professor Novemsky’s testimony in a prior false advertising case is consistent with that: Again, he said that absent a control group, one cannot test what an “ad caused consumers to understand or not understand.” (PFF ¶533).

535. A test/control design would not accurately measure the cumulative effect of Intuit’s marketing campaign. (GX303 (Novemsky Expert Report) ¶¶ 32-33; GX749 (Novemsky Rebuttal Expert Report) ¶¶ 17-18; Novemsky (Complaint Counsel) Tr. 385).

Response to Finding No. 535:

The Proposed Finding is incorrect because a properly designed test-control experiment could accurately estimate the effect of Intuit’s marketing campaign. As explained (Response to CCF ¶533), “literature on advertising effectiveness” shows that the impact of advertising “is greatest immediately following consumer exposure and that the impact ‘decays’ over time.” (RX1017 (Hauser Expert Report) ¶31). Repetition of an advertising message over time, on its own, would not mitigate that decay effect; to the contrary, it could lead to a “wear-out” effect, in which the message would become *less* impactful over time. (Hauser (Intuit) Tr. 891). Thus, the

impact of ads shown in a test-control experiment could *exceed* any “cumulative effect of Intuit’s marketing campaign” (CCFF ¶535; *see* RX1017 (Hauser Expert Report) ¶31). On top of that, “showing respondents a stimulus in a survey context could encourage respondents to focus on the stimulus more than they might in the marketplace.” (RX1017 (Hauser Expert Report) ¶31). That too means that a test-control survey “could if anything in result in an overmeasurement, rather than an undermeasurement,” of consumer impressions or reactions—which a scientist could then account for when analyzing and presenting his or her survey results. (RX1017 (Hauser Expert Report) ¶31).

536. Testing the incremental impact of a single or a few allegedly deceptive Intuit advertisements is not appropriate for measuring the extent of misperceptions related to TurboTax given Intuit’s extensive and repeated marketing efforts. (GX749 (Novemsky Rebuttal Expert Report) ¶ 18; *see also* Novemsky (Complaint Counsel) Tr. 521 (“I wanted to get reactions from people as they would have seen them or not seen them or paid attention or not paid attention in the real marketplace. I was not trying to artificially draw their attention to a specific ad or a specific claim in an ad as a test that shows ads would be meant to do.”)).

Response to Finding No. 536:

The Proposed Finding is incorrect for the reasons provided above (Responses to CCFF ¶¶533, 535). Again, “literature on advertising effectiveness” shows that the impact of advertising “is greatest immediately following consumer exposure and that the impact ‘decays’ over time.” (RX1017 (Hauser Expert Report) ¶31). Repetition of an advertising message over time, on its own, would not mitigate that decay effect; to the contrary, it could lead to a “wear-out” effect, in which the message would become *less* impactful over time. (Hauser (Intuit) Tr. 891). Thus, the impact of ads shown in a test-control experiment could *exceed* any cumulative, long-term effect of Intuit’s broader marketing campaign. (RX1017 (Hauser Expert Report) ¶31). On top of that “showing respondents a stimulus in a survey context could encourage respondents to focus on the stimulus more than they might in the marketplace.” (RX1017 (Hauser Expert Report) ¶31).

That too means that a survey environment “could if anything in result in an overmeasurement, rather than an undermeasurement,” of consumer impressions or reactions—which a scientist could then account for when analyzing and presenting his survey results. (RX1017 (Hauser Expert Report) ¶31).

537. Interpreting advertisements in the context of other advertisements and marketing communications (as the perception survey did)—rather than in an artificial survey setting—is representative of how consumers absorb advertising messages in the marketplace, and that artificial ads with an artificially blank slate in consumers’ minds prior to viewing the ad cannot replicate the effect an ad would have in the context of an existing brand, nor can it replicate the effect of a coordinated marketing campaign that consumers would encounter multiple times and in multiple locations. (GX749 (Novemsky Rebuttal Expert Report) ¶ 23).

Response to Finding No. 537:

The Proposed Finding is incorrect because the perception survey did *not* interpret TurboTax ads “in the context of other advertising and marketing communications.” Professor Novemsky did not show his survey participants any ads or marketing communications, from TurboTax or otherwise. (PFF ¶534). Indeed, Professor Novemsky admitted that his survey did not interpret any ads; instead, as he put it, his survey was an “unaided test of respondents’ impressions.” (PFF ¶536).

As explained (Responses to CCF ¶¶533, 535-536), The Proposed Finding is also incorrect because a properly designed test-control experiment could accurately estimate the effect of a coordinated marketing campaign. Again, “literature on advertising effectiveness” shows that the impact of advertising “is greatest immediately following consumer exposure and that the impact ‘decays’ over time.” (RX1017 (Hauser Expert Report) ¶31). Repetition of an advertising message over time, on its own, would not mitigate that decay effect; to the contrary, it could lead to a “wear-out” effect, in which the message would become *less* impactful over time. (Hauser (Intuit) Tr. 891). Thus, the impact of ads shown in a test-control experiment could

exceed any “cumulative effect of Intuit’s marketing campaign.” (RX1017 (Hauser Expert Report) ¶31). On top of that “showing respondents a stimulus in a survey context could encourage respondents to focus on the stimulus more than they might in the marketplace.” (RX1017 (Hauser Expert Report) ¶31). That too means that a test-control survey “could if anything in result in an overmeasurement, rather than an undermeasurement,” of consumer impressions or reactions—which a scientist could then account for when analyzing and presenting his or her survey results. (RX1017 (Hauser Expert Report) ¶31).

538. A key advantage of measuring existing consumer perceptions through a perception survey is that these perceptions are shaped by all the information consumers have accumulated from various sources, for example, the potentially misleading content of the TurboTax “free, free, free” advertisements, as well as any disclosures the consumers may notice and access. (GX303 (Novemsky Expert Report) ¶ 96; *see also* Novemsky (Complaint Counsel) Tr. 405 (“Consumers responding to my survey, having seen whatever they saw in the world -- so if these ads were in the marketplace prior to my survey being launched, then these may well have been something that the consumers were exposed to prior to seeing my survey and may have included in their responses to my survey.”)).

Response to Finding No. 538:

The Proposed Finding is incorrect because this aspect of Professor Novemsky’s survey is not an advantage. As the Proposed Finding concedes, Professor Novemsky has no way of isolating and measuring the effect of the challenged ads. (PFF ¶531; *see also* (GX303 (Novemsky Expert Report) ¶30 (test-control design “allows the researcher to isolate the influence of [a] single stimulus”)). Instead, as Professor Novemsky acknowledged at trial, participants answered his survey questions “having seen whatever they saw in the world”—which may or may not have included any TurboTax ads. (PFF ¶538). Thus, Professor Novemsky’s survey results include the impact of anything else beyond the challenged ads “that was in the marketplace up until the time of [the] survey.” (PFF ¶538).

Moreover, because Professor Novemsky did not use a control group, his survey results also include the impact of the ordering and phrasing of the survey question themselves—i.e., “survey noise.” (PFF ¶539). Even without a test-control design, Professor Novemsky could have asked a control group the same survey questions he asked his main survey group about TurboTax, but with a fictional brand name that does not conduct any marketing substituted for TurboTax. (PFF ¶539). That would have enabled him to estimate the portion of his survey results caused by the survey instrument itself and subtract that out from his survey results concerning TurboTax. (PFF ¶539). Without a control group, though, Professor Novemsky cannot rule out possible alternative causes within his own survey.

539. The wide dissemination of Intuit’s free TurboTax claims would make it unlikely to find an appropriate control group for a copy test design. (GX303 (Novemsky Expert Report) ¶ 32; GX 749 (Novemsky Rebuttal Expert Report) ¶ 18; *see also* Novemsky (Complaint Counsel) Tr. 385).

Response to Finding No. 539:

The Proposed Finding is incorrect for the reasons provided (Response to CCFE ¶533). As Professor Novemsky himself acknowledged, one of the virtues of a test-control design is that the comparison between the test and control groups allows the researcher to “net[] out factors such as pre-existing beliefs.” (GX303 (Novemsky Expert Report) ¶30). Moreover, if Professor Novemsky was concerned about the influence of participants prior exposure to TurboTax advertising, he could have used a disguised brand, like Dr. Hauser did in his Disclosure Efficacy Survey. (RX1017 (Hauser Expert Report) ¶32). As Dr. Hauser explains, “Professor Novemsky’s claim that it would be impossible to construct a suitable control group is inaccurate given available research techniques.” (RX1017 (Hauser Expert Report) ¶32). Indeed, Shari Diamond’s “Reference Manual on Survey Research” (cited by Professor Novemsky, *see* CCFE ¶533) cautions that “a survey with an imperfect control group may provide better information

than a survey,” like Professor Novemsky’s, “with no control group at all.” (RX709 (Intuit) at 399).

540. Preliminary testing further indicated that most consumers had existing beliefs about their ability to file for free using TurboTax and supported Professor Novemsky’s conclusion that a test / control framework was not appropriate in this case. (GX303 (Novemsky Expert Report) ¶ 33; GX749 (Novemsky Rebuttal Expert Report) ¶ 27; *see also* Novemsky (Complaint Counsel) Tr. 385-386).

Response to Finding No. 540:

The Proposed Finding is incorrect because the “preliminary testing” that Professor Novemsky conducted was not reliable. Indeed, the preliminary testing consisted of a questionnaire that was *virtually identical* to the questionnaire that Professor Novemsky ultimately used in his perception survey. (*Compare* GX303 (Novemsky Opening Report) App’x D *with* App’x E). Thus, the preliminary testing relied on the same biased and unrepresentative sample, and it did not provide respondents with any TurboTax ads, much less ask questions whether respondents had seen or remembered any particular TurboTax ads. (RX1017 (Hauser Expert Report) ¶33). Moreover, the preliminary test was subject to the same guessing biases as the perception survey, which would result in relatively few respondents selecting “Not enough information” or “Not sure” as answer choices—not necessarily because most respondents had defined existing beliefs, but instead because the questions encouraged guessing. (RX1017 (Hauser Expert Report) ¶33 & n.51). Accordingly, the preliminary testing does not demonstrate that a test-control design would have been inappropriate. (RX1017 (Hauser Expert Report) ¶33).

541. Federal law requires federal agencies to provide survey participants information about the purpose of the survey and the option to opt-out of the survey after learning about that purpose. Privacy Act, 5 U.S.C. § 552a(e)(3).

Response to Finding No. 541:

The Proposed Finding is incorrect because the cited provision of the Privacy Act applies only to “system[s] of records,” which the statute defines as “a group of any records under the

control of any agency from which information is *retrieved* by the *name of the individual* or by some identifying number, symbol, or other identifying particular *assigned to the individual.*” (5 U.S.C. §552a(a)(5) (emphasis added); *see also Maydak v. United States*, 363 F.3d 512, 518-519 (D.C. Cir. 2004) (holding that the requirements contained in §552a(e)(3) are “triggered only if the records” at issue “are actually incorporated into a system of records”). In other words, a “system of records exists only if the information contained within the body of material is both retrievable by personal identifier and actually retrieved by personal identifier.” (*Paige v. DEA*, 665 F.3d 1355, 1359 (D.C. Cir. 2012)). Here, there is no reason the FTC would need to maintain Professor Novemsky’s survey results in a system in which the information is organized and actually retrieved by individual-specific personal identifiers. Accordingly, the Privacy Act does not apply, and the Court should reject Complaint Counsel’s attempt to justify the bias Professor Novemsky introduced into his survey.

In any event, even if the Privacy Act did apply, it did not require a disclosure to be made after consumers had completed the survey and could reflect on the consequences of their responses. Nor was the disclosure required to use self-aggrandizing language about the FTC—referring to it as the “nation’s consumer protection agency” pursuing its “mission under the FTC Act to protect consumers.” (PFF ¶¶556). Nor was the disclosure required to indicate, as it did here, that the survey was sought in connection with an identified company—Intuit—to “investigate[] unfair and deceptive conduct.” (PFF ¶556). This specific language made it likely that participants with more favorable views of TurboTax would opt out—in order to avoid providing evidence that would be used *against* Intuit. (PFF ¶559). Indeed, the FTC’s own privacy impact assessment for consumer surveys recognizes that “complete[] transparen[cy] about the nature and purpose of a survey” may inadvertently “create bias in the consumers’

decision to participate,” which in turn “would affect the accuracy and validity of the information collected and effectively nullify the survey.” (PFF ¶558).

Finally, the Proposed Finding is irrelevant. Even if Complaint Counsel were right about their legal requirements, this would not allow or excuse an irrelevant and unreliable survey. If Complaint Counsel cannot conduct a reliable survey under federal law, then they cannot use a survey in evidence.

542. At the instruction of Complaint Counsel, Professor Novemsky allowed survey participants to opt out of the survey upon completion of the survey and ensured that their submissions were deleted. (GX303 (Novemsky Expert Report) ¶¶ 50-51; *see also* Novemsky (Complaint Counsel) Tr. 397).

Response to Finding No. 542:

Intuit has no specific response except to note that this “instruction” from Complaint Counsel biased Professor Novemsky’s survey and renders it unreliable. (PFF ¶¶555-559). Again, when providing participants the opportunity to opt out, Professor Novemsky informed them that that the 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. This specific language made it likely that participants with more favorable views of TurboTax would opt out—in order to avoid providing evidence that would be used *against* Intuit. (PFF ¶559). Indeed, as the FTC itself has explained, “complete[] transparen[cy] about the nature or purpose of a survey,” such as through the opt-out screen employed by Professor Novemsky, may “create bias in the consumers’ decision to participate in the survey or potentially result in biased responses” which “would affect the accuracy and validity of the information collected and

effectively nullify the survey.” (PFF ¶558). It is precisely that kind of bias that plagues Professor Novemsky’s survey here. (PFF ¶¶555-559).

543. Only a fraction of survey respondents (164 of 771) opted out. (GX303 (Novemsky Expert Report) ¶¶ 51, 71; *see also* Novemsky (Complaint Counsel) Tr. 397).

Response to Finding No. 543:

The Proposed Finding is misleading, because as a rhetorical device, the phrase “only a fraction” is typically used to describe percentages far lower than the percentage at issue here. Here, the 164 participants who opted out of Professor Novemsky’s survey constituted 21% of the total population that took the survey. (PFF ¶557). That is a significant percentage of the survey population and is likely to bias Professor Novemsky’s results, because as noted (PFF ¶559) the participants who opted out likely had more favorable views about TurboTax than those who remained in the survey population. Complaint Counsel cannot avoid that fact through empty rhetoric.

544. There was no evidence that respondents who opted out were different than those who did not. (GX303 (Novemsky Expert Report) ¶¶ 51, 71; GX749 (Novemsky Rebuttal Expert Report) ¶ 73).

Response to Finding No. 544:

The Proposed Finding is incorrect and misleading because it is entirely reasonable to expect that those who opted out chose to do so because of reasons that differentiated them from those who chose not to opt out. That is particularly true here because the opt-out screen expressly informed participants that the survey was conducted on behalf of the “nation’s consumer protection agency,” “to collect information” about Intuit, in order to “investigate[] unfair and deceptive conduct.” (*See* PFF ¶556). After seeing that language, participants with more favorable views of TurboTax were more likely than others to opt out, in order to avoid providing information that would be used *against* Intuit. (PFF ¶558).

The Proposed Finding is also misleading because it ignores that any lack of concrete evidence is attributable to Professor Novemsky's decision to delete all information about those who opted out. (See CCF ¶542; PFF ¶¶556-557; RX1017 (Hauser Expert Report) ¶41; Hauser (Intuit) Tr. 903-904). Complaint Counsel and Professor Novemsky cannot destroy evidence of possible bias and then fault Intuit for failing to come forward with such evidence. It is their burden to demonstrate that the survey provides reliable evidence. (See, e.g., *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 590-592 & n.10 (1993); *López-Ramírez v. Toledo-González*, 32 F.4th 87, 94 (1st Cir. 2022)).

545. The opt-out rate did not change any of the substantive conclusions for Professor Novemsky's survey because, even if, for arguments sake, all opted out consumers belonged in Group A (the main group of interest) and did not have a misimpression about whether they could file for free (both of which are unrealistic assumptions), survey results would still show that 37.5% of consumers who did not use TurboTax in the last three years were under the misimpression that they could use TurboTax for free even though they were not eligible. (GX303 (Novemsky Expert Report) ¶ 71; GX749 (Novemsky Rebuttal Expert Report) ¶ 74; Novemsky (Complaint Counsel) Tr. 397-398).

Response to Finding No. 545:

The Proposed Finding is incorrect because it ignores the myriad other flaws with Professor Novemsky's survey. As Intuit has explained at length, Professor Novemsky's focus on Group A was itself another source of bias because those participants were particularly unlikely to have seen or paid attention to any recent TurboTax advertising—and particularly vulnerable to the survey's flawed questions and demand artifacts. (PFF ¶¶551-552, 571-578, 592-607). Moreover, the Proposed Finding illustrates why Professor Novemsky's survey results are unreliable: Just one of the likely flaws in Professor Novemsky's survey has the potential to alter his reported survey results by 15%. Given the wide range of additional flaws with the survey, the entire survey is not scientifically valid and should be given no weight whatsoever.

5. Other Materials Considered by Professor Novemsky

546. In forming his opinions, Professor Novemsky reviewed many different TurboTax advertisements that make “free” claims, including video and television advertisements. (See GX303 (Novemsky Expert Report) ¶¶ 3, 99, Appendix C; *see also* Novemsky (Complaint Counsel) Tr. 354-355).

Response to Finding No. 546:

Intuit has no specific response except to note that Professor Novemsky did not show any of those advertisements to his survey participants. (PFF ¶¶533-534).

547. Professor Novemsky also reviewed the TurboTax website, internal TurboTax marketing materials and other documents, Intuit expert reports, and considered academic literature, as well as relying on his own expertise. (GX303 (Novemsky Expert Report) ¶¶18, 99, Appendix C; GX749 (Novemsky Rebuttal Expert Report) ¶¶ 1, 10, Appendix A; *see also* Novemsky (Complaint Counsel) Tr. 363, 407-408).

Response to Finding No. 547:

The Proposed Finding is misleading for two reasons. First, it is misleading because Professor Novemsky did not show the TurboTax website to any of his survey participants. (PFF ¶534). Thus, it is entirely unclear how the website could have formed a basis for his opinions in this matter, which must be based on “reliable principles and methods.” (Fed. R. Evid. 702). Certainly, Professor Novemsky’s own personal views about the website do not meet that legal standard. Having said that, Professor Novemsky admits that he was able to determine the qualifications for TurboTax Free Edition by visiting the website, which demonstrates that the website is not deceptive. (See PFF ¶534). And Complaint Counsel concede that the TurboTax website—and all of the additional information it provides about qualifications—is integrated into the challenged ads themselves. (CCFF ¶455).

Second, the Proposed Finding is misleading because, as discussed throughout these responses, Professor Novemsky’s opinion in this matter is often nothing more than baseless assertions—unsupported by any relevant “academic literature” or relevant “expertise.”

Regardless of the materials Professor Novemsky reviewed, all of those baseless assertions should be ignored, as they are not based on “reliable principles and methods.” (Fed. R. Evid. 702).

548. Professor Novemsky also considered and analyzed advertising dissemination data from iSpot.tv. (GX749 (Novemsky Rebuttal Expert Report) ¶ 45; Novemsky (Complaint Counsel) Tr. 355-355, 366-367).

Response to Finding No. 548:

The Proposed Finding is irrelevant because Professor Novemsky’s use of the iSpot dissemination data does not conform with “reliable principles and methods.” (Fed. R. Evid. 702). Professor Novemsky contends that the iSpot data enables him “to rule out competitor advertising as a source of beliefs related to TurboTax” (CCFF ¶558), but that is wrong. As Dr. Hauser explained, the iSpot data merely shows “that TurboTax has a large share-of-voice”—i.e., that Intuit conducted more TV advertising for free SKUs (and therefore generated more impressions) than its competitors. (Hauser (Intuit) Tr. 911). The iSpot data is incomplete, though: It is limited to television advertising and does not include other advertising channels, like social media display ads, paid search, email, and radio. (CCFF ¶¶549-551). Complaint Counsel have not provided any evidence about TurboTax’s share of voice when those other forms of advertising are accounted for. And even looking at only TV advertising, competitors’ ads still generated billions of impressions (GX749 (Novemsky Expert Report) fig. 4), so it is entirely plausible that they were a source of consumers’ beliefs.

Professor Novemsky’s iSpot analysis is also particularly irrelevant in this case because of the way he designed his survey population. As noted (PFF ¶¶551-552, 600-601), Professor Novemsky’s main survey group of interest (Group A) was made up entirely of participants who had not filed their taxes using TurboTax in at least the three previous years. But during that same time period, 69.1% of Group A participants had filed their taxes with a TurboTax competitor. (PFF ¶551). As Dr. Hauser explained, if one were to “believe Complaint Counsel’s allegations

that advertising affects choice,” then Group A “are the people who are mostly affected by competitive advertising, not by TurboTax’s advertising.” (Hauser (Intuit) Tr. 911). In other words, the segment of the population Professor Novemsky that focuses on is exactly who one would “expect[] to have been influenced by competitive advertising,” irrespective of that advertising’s share of voice compared to TurboTax. (Hauser (Intuit) Tr. 911). Given that, Dr. Hauser testified, it is particularly unreliable for Professor Novemsky to use the iSpot data to simply say “well, there was more advertising” by TurboTax; Professor Novemsky instead “has to look at how his sample related to the advertising that was done.” (Hauser (Intuit) Tr. 911).

In any event, even if Professor Novemsky’s use of the iSpot data were scientifically reliable, it still would not rule out many possible alternative causes for his survey results. The iSpot data says nothing about whether competitors’ websites or other non-TV marketing could have accounted for survey participants’ answers. (*See* PFF ¶598). Nor does the data rule out survey participants’ personal experiences as a possible alternative cause. (*See* PFF ¶597). And perhaps most importantly, the data does not rule out the numerous possible alternative causes from within Professor Novemsky’s survey—like the invitations to guess and the demand artifacts that primed participants to select the answer choices favoring Complaint Counsel’s allegations. (PFF ¶¶566-607). Again, without a control group, Professor Novemsky has no way of eliminating that survey noise from his results. (PFF ¶539).

Finally, if the above reasons were not enough, Professor Novemsky’s analysis of the iSpot data should not be given any weight because it was not properly disclosed. Professor Novemsky made no mention of the iSpot data until his rebuttal report in this matter. And as this Court has recognized, “the function of rebuttal is to explain, repel, counteract or disprove *the evidence of the adverse party.*” (*In re Pom Wonderful LLC*, 2011 WL 1429882, at *2 (F.T.C.

Apr. 5, 2011) (emphasis added)). It is not an opportunity to “bolster” opinions offered in support of Complaint Counsel’s “case-in-chief.” (*In re ECM BioFilms Inc.*, 2014 WL 4651910 (F.T.C. Sept. 5, 2014)). Yet that is precisely how Complaint Counsel attempt to use the iSpot data here: They seek to bolster the reliability of Professor Novemsky’s survey, which on its own, has no mechanism to rule out possible alternative causes (PFF ¶¶530-540). Moreover, Professor Novemsky should have known of the need to rule out possible alternative causes as soon as he conducted his survey in March 2022 (*see* CCF ¶470). And Dr. Hauser identified the survey’s inability to test causality on April 4, 2022. (RX403 (Intuit) ¶¶30-48). Thus, Professor Novemsky has no excuse for waiting until late January 2023 to conduct and disclose his iSpot analysis. The Court should disregard the analysis as untimely and improperly disclosed.

549. iSpot.tv is a commercially available service used by many advertisers to monitor and measure the performance of advertisements across linear and streaming TV. (GX749 (Novemsky Rebuttal Expert Report) ¶ 45 n. 87; *see also* Novemsky (Complaint Counsel) Tr. 366).

Response to Finding No. 549:

Intuit has no specific response other than to note that it does not know about what other advertisers do or whether they use iSpot.tv data, and there is no evidence offered to support the point.

550. Professor Novemsky reviewed iSpot.tv’s estimated impressions data for TV advertisements to proxy Intuit’s advertising share of voice (or how much advertising in an industry is coming from any one competitor) for free tax preparation software advertisements. (GX749 (Novemsky Rebuttal Expert Report) ¶ 45; Novemsky (Complaint Counsel) Tr. 366-367).

Response to Finding No. 550:

The Proposed Finding is irrelevant because Professor Novemsky’s use of the iSpot dissemination data does not conform with “reliable principles and methods.” (Fed. R. Evid. 702). As just described (Response to CCF ¶548), evidence of “share of voice” merely shows

that Intuit conducted more TV advertising for free SKUs than its competitors. (Hauser (Intuit) Tr. 911). That has nothing to do with the content of the ads and is not evidence that those ads “influenced consumers” to mistakenly believe that they could file for free. (Hauser (Intuit) Tr. 911). Nor does it enable Professor Novemsky to “rule[] out competitor advertising as a source of beliefs related to TurboTax” (CCFF ¶558). For one thing, the iSpot data is incomplete: It is limited to television advertising and does not include other advertising channels, like social media display ads, paid search, email, and radio. (CCFF ¶¶549-551). Complaint Counsel have not provided any evidence about TurboTax’s share of voice when those other forms of advertising are accounted for. And even looking at only TV advertising, competitors’ ads still generated billions of impressions (GX749 (Novemsky Expert Report) fig. 4), so it is entirely plausible that they were a source of consumers’ beliefs.

Professor Novemsky’s iSpot analysis is also particularly irrelevant in this case because of the way he designed his survey population. As noted (PFF ¶¶551-552, 600-601), Professor Novemsky’s main survey group of interest (Group A) was made up entirely of participants who had not filed their taxes using TurboTax in at least the three previous years. But during that same time period, 69.1% of Group A participants had filed their taxes with a TurboTax competitor. (PFF ¶551). As Dr. Hauser explained, if one were to “believe Complaint Counsel’s allegations that advertising affects choice,” then Group A “are the people who are mostly affected by competitive advertising, not by TurboTax’s advertising.” (Hauser (Intuit) Tr. 911). In other words, the segment of the population Professor Novemsky that focuses on is exactly who one would “expect[] to have been influenced by competitive advertising,” irrespective of that advertising’s share of voice compared to TurboTax. (Hauser (Intuit) Tr. 911).

In any event, even if Professor Novemsky's use of the iSpot data were scientifically reliable, it still would not rule out many possible alternative causes for his survey results. The iSpot data says nothing about whether competitors' websites or other non-TV marketing could have accounted for survey participants' answers. (*See* PFF ¶598). Nor does the data rule out survey participants' personal experiences as a possible alternative cause. (*See* PFF ¶597). And perhaps most importantly, the data does not rule out the numerous possible alternative causes from within Professor Novemsky's survey—like the invitations to guess and the demand artifacts that primed participants to select the answer choices favoring Complaint Counsel's allegations. (PFF ¶¶566-607). Again, without a control group, Professor Novemsky has no way of eliminating that survey noise from his results. (PFF ¶539).

Finally, if the above reasons were not enough, Professor Novemsky's analysis of the iSpot data should not be given any weight because it was not properly disclosed. Professor Novemsky made no mention of the iSpot data until his rebuttal report in this matter. And as this Court has recognized, "the function of rebuttal is to explain, repel, counteract or disprove *the evidence of the adverse party*." (*In re Pom Wonderful LLC*, 2011 WL 1429882, at *2 (F.T.C. Apr. 5, 2011) (emphasis added)). It is not an opportunity to "bolster" opinions offered in support of Complaint Counsel's "case-in-chief." (*In re ECM BioFilms Inc.*, 2014 WL 4651910 (F.T.C. Sept. 5, 2014)). Yet that is precisely how Complaint Counsel attempt to use the iSpot data here: They seek to bolster the reliability of Professor Novemsky's survey, which on its own, has no mechanism to rule out possible alternative causes (PFF ¶¶530-540). Moreover, Professor Novemsky should have known of the need to rule out possible alternative causes as soon as he conducted his survey in March 2022 (*see* CCFF ¶470). And Dr. Hauser identified the survey's inability to test causality on April 4, 2022. (RX403 (Intuit) ¶¶30-48). Thus, Professor

Novemsky has no excuse for waiting until late January 2023 to conduct and disclose his iSpot analysis. The Court should disregard the analysis as untimely and improperly disclosed.

551. “Impressions” are reported directly by iSpot.tv and represent the total number of times an ad was played on TV devices across the U.S. (GX749 (Novemsky Rebuttal Expert Report) Figure 4).

Response to Finding No. 551:

Intuit has no specific response except to note that iSpot data is limited to television advertising; it does not account for other advertising mediums, like social media display ads, paid search, email, and radio. (GX749 (Novemsky Rebuttal Expert Report) ¶45 n.87).

552. Professor Novemsky determined that on average between 2018 and 2022, TurboTax accounted for 72% of impressions related to “free” tax preparation messaging, reaching up to 99.1% of advertising in 2021, with 5.4 billion impressions. (GX749 (Novemsky Rebuttal Expert Report) ¶ 45 & Figure 4; *see also* GX762 (Complaint Counsel); *see also* Novemsky (Complaint Counsel) Tr. 368, 369-370).

Response to Finding No. 552:

The Proposed Finding is irrelevant because Professor Novemsky’s use of the iSpot dissemination data does not conform with “reliable principles and methods.” (Fed. R. Evid. 702). As just described (Responses to CCF ¶¶548, 550), evidence of “share of voice” merely shows that Intuit conducted more TV advertising for free SKUs than its competitors. (Hauser (Intuit) Tr. 911). That has nothing to do with the content of the ads and is not evidence that those ads “influenced consumers” to mistakenly believe that they could file for free. (Hauser (Intuit) Tr. 911). Nor does it enable Professor Novemsky to “rule[] out competitor advertising as a source of beliefs related to TurboTax” (CCFF ¶558). For one thing, the iSpot data is incomplete: It is limited to television advertising and does not include other advertising channels, like social media display ads, paid search, email, and radio. (CCFF ¶¶549-551). Complaint Counsel have not provided any evidence about TurboTax’s share of voice when those other forms of advertising are accounted for. And even looking at only TV advertising, competitors’ ads still

generated billions of impressions (GX749 (Novemsky Expert Report) fig. 4), so it is entirely plausible that they were a source of consumers' beliefs.

If anything, the number of TurboTax impressions helps to illustrate that the challenged ads were not deceptive: For example, according to Professor Novemsky's presentation of the iSpot data, TV ads for free TurboTax SKUs generated 8.9 billion impressions in Tax Years 2020 and 2021 alone (*see* GX749 (Novemsky Rebuttal Expert Report) fig. 4), but the FTC's comprehensive Sentinel database collected only 44 potentially relevant complaints over that time period. (PFF ¶637). That miniscule number of complaints is strong evidence that the challenged ads were not likely to mislead a significant minority of reasonable consumers about their ability to file for free using TurboTax. (*See* PFF ¶¶623-647).

Professor Novemsky's iSpot analysis is also particularly irrelevant in this case because of the way he designed his survey population. As noted (PFF ¶¶551-552, 600-601), Professor Novemsky's main survey group of interest (Group A) was made up entirely of participants who had not filed their taxes using TurboTax in at least the three previous years. But during that same time period, 69.1% of Group A participants had filed their taxes with a TurboTax competitor. (PFF ¶551). As Dr. Hauser explained, if one were to "believe Complaint Counsel's allegations that advertising affects choice," then Group A "are the people who are mostly affected by competitive advertising, not by TurboTax's advertising." (Hauser (Intuit) Tr. 911). In other words, the segment of the population Professor Novemsky that focuses on is exactly who one would "expect[] to have been influenced by competitive advertising," irrespective of that advertising's share of voice compared to TurboTax. (Hauser (Intuit) Tr. 911).

In any event, even if Professor Novemsky's use of the iSpot data were scientifically reliable, it still would not rule out many possible alternative causes for his survey results. The

iSpot data says nothing about whether competitors' websites or other non-TV marketing could have accounted for survey participants' answers. (*See* PFF ¶598). Nor does the data rule out survey participants' personal experiences as a possible alternative cause. (*See* PFF ¶597). And perhaps most importantly, the data does not rule out the numerous possible alternative causes from within Professor Novemsky's survey—like the invitations to guess and the demand artifacts that primed participants to select the answer choices favoring Complaint Counsel's allegations. (PFF ¶¶566-607). Again, without a control group, Professor Novemsky has no way of eliminating that survey noise from his results. (PFF ¶539).

Finally, if the above reasons were not enough, Professor Novemsky's analysis of the iSpot data should not be given any weight because it was not properly disclosed. Professor Novemsky made no mention of the iSpot data until his rebuttal report in this matter. And as this Court has recognized, "the function of rebuttal is to explain, repel, counteract or disprove *the evidence of the adverse party.*" (*In re Pom Wonderful LLC*, 2011 WL 1429882, at *2 (F.T.C. Apr. 5, 2011) (emphasis added)). It is not an opportunity to "bolster" opinions offered in support of Complaint Counsel's "case-in-chief." (*In re ECM BioFilms Inc.*, 2014 WL 4651910 (F.T.C. Sept. 5, 2014)). Yet that is precisely how Complaint Counsel attempt to use the iSpot data here: They seek to bolster the reliability of Professor Novemsky's survey, which on its own, has no mechanism to rule out possible alternative causes (PFF ¶¶530-540). Moreover, Professor Novemsky should have known of the need to rule out possible alternative causes as soon as he conducted his survey in March 2022 (*see* CCF ¶470). And Dr. Hauser identified the survey's inability to test causality on April 4, 2022. (RX403 (Intuit) ¶¶30-48). Thus, Professor Novemsky has no excuse for waiting until late January 2023 to conduct and disclose his iSpot analysis. The Court should disregard the analysis as untimely and improperly disclosed.

553. In 2018, Intuit's "free" TurboTax advertising accounted for 52.8% of impressions related to "free" tax preparation with 2.6 billion impressions. (GX762 (Complaint Counsel) at Tabs 2 & 4; GX749 (Novemsky Rebuttal Expert Report) Figure 4).

Response to Finding No. 553:

The Proposed Finding is irrelevant because Professor Novemsky's use of the iSpot dissemination data does not conform with "reliable principles and methods." (Fed. R. Evid. 702). As described (Responses to CCFF ¶¶548, 550), evidence of "share of voice" merely shows that Intuit conducted more TV advertising for free SKUs than its competitors. (Hauser (Intuit) Tr. 911). That has nothing to do with the content of the ads and is not evidence that those ads "influenced consumers" to mistakenly believe that they could file for free. (Hauser (Intuit) Tr. 911). Nor does it enable Professor Novemsky to "rule[] out competitor advertising as a source of beliefs related to TurboTax" (CCFF ¶558). For one thing, the iSpot data is incomplete: It is limited to television advertising and does not include other advertising channels, like social media display ads, paid search, email, and radio. (CCFF ¶¶549-551). Complaint Counsel have not provided any evidence about TurboTax's share of voice when those other forms of advertising are accounted for. And even looking at only TV advertising, competitors' ads still generated billions of impressions (GX749 (Novemsky Expert Report) fig. 4), so it is entirely plausible that they were a source of consumers' beliefs.

If anything, the number of TurboTax impressions helps to illustrate that the challenged ads were not deceptive: According to Professor Novemsky's presentation of the iSpot data, TV ads for free TurboTax SKUs generated 2.6 billion impressions in 2018 (*see* GX749 (Novemsky Rebuttal Expert Report) fig. 4), but Complaint Counsel identified only 23 potentially relevant complaints from the FTC's comprehensive Sentinel database collected over that time period. (CCFF ¶¶676-677). That miniscule number of complaints is strong evidence that the challenged

ads were not likely to mislead a significant minority of reasonable consumers about their ability to file for free using TurboTax. (*See* PFF ¶¶623-647).

Professor Novemsky's iSpot analysis is also particularly irrelevant in this case because of the way he designed his survey population. As noted (PFF ¶¶551-552, 600-601), Professor Novemsky's main survey group of interest (Group A) was made up entirely of participants who had not filed their taxes using TurboTax in at least the three previous years. But during that same time period, 69.1% of Group A participants had filed their taxes with a TurboTax competitor. (PFF ¶551). As Dr. Hauser explained, if one were to "believe Complaint Counsel's allegations that advertising affects choice," then Group A "are the people who are mostly affected by competitive advertising, not by TurboTax's advertising." (Hauser (Intuit) Tr. 911). In other words, the segment of the population Professor Novemsky that focuses on is exactly who one would "expect[] to have been influenced by competitive advertising," irrespective of that advertising's share of voice compared to TurboTax. (Hauser (Intuit) Tr. 911).

In any event, even if Professor Novemsky's use of the iSpot data were scientifically reliable, it still would not rule out many possible alternative causes for his survey results. The iSpot data says nothing about whether competitors' websites or other non-TV marketing could have accounted for survey participants' answers. (*See* PFF ¶598). Nor does the data rule out survey participants' personal experiences as a possible alternative cause. (*See* PFF ¶597). And perhaps most importantly, the data does not rule out the numerous possible alternative causes from within Professor Novemsky's survey—like the invitations to guess and the demand artifacts that primed participants to select the answer choices favoring Complaint Counsel's allegations. (PFF ¶¶566-607). Again, without a control group, Professor Novemsky has no way of eliminating that survey noise from his results. (PFF ¶539).

Finally, if the above reasons were not enough, Professor Novemsky's analysis of the iSpot data should not be given any weight because it was not properly disclosed. Professor Novemsky made no mention of the iSpot data until his rebuttal report in this matter. And as this Court has recognized, "the function of rebuttal is to explain, repel, counteract or disprove *the evidence of the adverse party.*" (*In re Pom Wonderful LLC*, 2011 WL 1429882, at *2 (F.T.C. Apr. 5, 2011) (emphasis added)). It is not an opportunity to "bolster" opinions offered in support of Complaint Counsel's "case-in-chief." (*In re ECM BioFilms Inc.*, 2014 WL 4651910 (F.T.C. Sept. 5, 2014)). Yet that is precisely how Complaint Counsel attempt to use the iSpot data here: They seek to bolster the reliability of Professor Novemsky's survey, which on its own, has no mechanism to rule out possible alternative causes (PFF ¶¶530-540). Moreover, Professor Novemsky should have known of the need to rule out possible alternative causes as soon as he conducted his survey in March 2022 (*see* CCFF ¶470). And Dr. Hauser identified the survey's inability to test causality on April 4, 2022. (RX403 (Intuit) ¶¶30-48). Thus, Professor Novemsky has no excuse for waiting until late January 2023 to conduct and disclose his iSpot analysis. The Court should disregard the analysis as untimely and improperly disclosed.

554. In 2019, Intuit's "free" TurboTax advertising accounted for 76.2% of impressions related to "free" tax preparation with 3.9 billion impressions. (GX762 (Complaint Counsel) at Tabs 2 & 5; GX749 (Novemsky Rebuttal Expert Report) Figure 4).

Response to Finding No. 554:

The Proposed Finding is irrelevant because Professor Novemsky's use of the iSpot dissemination data does not conform with "reliable principles and methods." (Fed. R. Evid. 702). As described (Responses to CCFF ¶¶548, 550), evidence of "share of voice" merely shows that Intuit conducted more TV advertising for free SKUs than its competitors. (Hauser (Intuit) Tr. 911). That has nothing to do with the content of the ads and is not evidence that those ads "influenced consumers" to mistakenly believe that they could file for free. (Hauser (Intuit) Tr.

911). Nor does it enable Professor Novemsky to “rule[] out competitor advertising as a source of beliefs related to TurboTax” (CCFF ¶558). For one thing, the iSpot data is incomplete: It is limited to television advertising and does not include other advertising channels, like social media display ads, paid search, email, and radio. (CCFF ¶¶549-551). Complaint Counsel have not provided any evidence about TurboTax’s share of voice when those other forms of advertising are accounted for. And even looking at only TV advertising, competitors’ ads still generated billions of impressions (GX749 (Novemsky Expert Report) fig. 4), so it is entirely plausible that they were a source of consumers’ beliefs.

If anything, the number of TurboTax impressions helps to illustrate that the challenged ads were not deceptive: According to Professor Novemsky’s presentation of the iSpot data, TV ads for free TurboTax SKUs generated 3.9 billion impressions in 2019 (*see* GX749 (Novemsky Rebuttal Expert Report) fig. 4), but Complaint Counsel identified only 67 potentially relevant complaints from the FTC’s comprehensive Sentinel database over that time period. (CCFF ¶¶676-677). That miniscule number of complaints is strong evidence that the challenged ads were not likely to mislead a significant minority of reasonable consumers about their ability to file for free using TurboTax. (*See* PFF ¶¶623-647).

Professor Novemsky’s iSpot analysis is also particularly irrelevant in this case because of the way he designed his survey population. As noted (PFF ¶¶551-552, 600-601), Professor Novemsky’s main survey group of interest (Group A) was made up entirely of participants who had not filed their taxes using TurboTax in at least the three previous years. But during that same time period, 69.1% of Group A participants had filed their taxes with a TurboTax competitor. (PFF ¶551). As Dr. Hauser explained, if one were to “believe Complaint Counsel’s allegations that advertising affects choice,” then Group A “are the people who are mostly affected by

competitive advertising, not by TurboTax’s advertising.” (Hauser (Intuit) Tr. 911). In other words, the segment of the population Professor Novemsky that focuses on is exactly who one would “expect[] to have been influenced by competitive advertising,” irrespective of that advertising’s share of voice compared to TurboTax. (Hauser (Intuit) Tr. 911).

In any event, even if Professor Novemsky’s use of the iSpot data were scientifically reliable, it still would not rule out many possible alternative causes for his survey results. The iSpot data says nothing about whether competitors’ websites or other non-TV marketing could have accounted for survey participants’ answers. (*See* PFF ¶598). Nor does the data rule out survey participants’ personal experiences as a possible alternative cause. (*See* PFF ¶597). And perhaps most importantly, the data does not rule out the numerous possible alternative causes from within Professor Novemsky’s survey—like the invitations to guess and the demand artifacts that primed participants to select the answer choices favoring Complaint Counsel’s allegations. (PFF ¶¶566-607). Again, without a control group, Professor Novemsky has no way of eliminating that survey noise from his results. (PFF ¶539).

Finally, if the above reasons were not enough, Professor Novemsky’s analysis of the iSpot data should not be given any weight because it was not properly disclosed. Professor Novemsky made no mention of the iSpot data until his rebuttal report in this matter. And as this Court has recognized, “the function of rebuttal is to explain, repel, counteract or disprove *the evidence of the adverse party*.” (*In re Pom Wonderful LLC*, 2011 WL 1429882, at *2 (F.T.C. Apr. 5, 2011) (emphasis added)). It is not an opportunity to “bolster” opinions offered in support of Complaint Counsel’s “case-in-chief.” (*In re ECM BioFilms Inc.*, 2014 WL 4651910 (F.T.C. Sept. 5, 2014)). Yet that is precisely how Complaint Counsel attempt to use the iSpot data here: They seek to bolster the reliability of Professor Novemsky’s survey, which on its own, has no

mechanism to rule out possible alternative causes (PFF ¶¶530-540). Moreover, Professor Novemsky should have known of the need to rule out possible alternative causes as soon as he conducted his survey in March 2022 (*see* CCFF ¶470). And Dr. Hauser identified the survey's inability to test causality on April 4, 2022. (RX403 (Intuit) ¶¶30-48). Thus, Professor Novemsky has no excuse for waiting until late January 2023 to conduct and disclose his iSpot analysis. The Court should disregard the analysis as untimely and improperly disclosed.

555. In 2020, Intuit's "free" TurboTax advertising accounted for 67.5% of impressions related to "free" tax preparation with 4 billion impressions. (GX762 (Complaint Counsel) at Tabs 2 & 6; GX749 (Novemsky Rebuttal Expert Report) Figure 4).

Response to Finding No. 555:

The Proposed Finding is irrelevant because Professor Novemsky's use of the iSpot dissemination data does not conform with "reliable principles and methods." (Fed. R. Evid. 702). As described (Responses to CCFF ¶¶548, 550), evidence of "share of voice" merely shows that Intuit conducted more TV advertising for free SKUs than its competitors. (Hauser (Intuit) Tr. 911). That has nothing to do with the content of the ads and is not evidence that those ads "influenced consumers" to mistakenly believe that they could file for free. (Hauser (Intuit) Tr. 911). Nor does it enable Professor Novemsky to "rule[] out competitor advertising as a source of beliefs related to TurboTax" (CCFF ¶558). For one thing, the iSpot data is incomplete: It is limited to television advertising and does not include other advertising channels, like social media display ads, paid search, email, and radio. (CCFF ¶¶549-551). Complaint Counsel have not provided any evidence about TurboTax's share of voice when those other forms of advertising are accounted for. And even looking at only TV advertising, competitors' ads still generated billions of impressions (GX749 (Novemsky Expert Report) fig. 4), so it is entirely plausible that they were a source of consumers' beliefs.

If anything, the number of TurboTax impressions helps to illustrate that the challenged ads were not deceptive: According to Professor Novemsky's presentation of the iSpot data, TV ads for free TurboTax SKUs generated 4 billion impressions in 2020 (*see* GX749 (Novemsky Rebuttal Expert Report) fig. 4), but Complaint Counsel identified only 59 potentially relevant complaints from the FTC's comprehensive Sentinel database over that time period. (CCFF ¶¶676-677). That miniscule number of complaints is strong evidence that the challenged ads were not likely to mislead a significant minority of reasonable consumers about their ability to file for free using TurboTax. (*See* PFF ¶¶623-647).

Professor Novemsky's iSpot analysis is also particularly irrelevant in this case because of the way he designed his survey population. As noted (PFF ¶¶551-552, 600-601), Professor Novemsky's main survey group of interest (Group A) was made up entirely of participants who had not filed their taxes using TurboTax in at least the three previous years. But during that same time period, 69.1% of Group A participants had filed their taxes with a TurboTax competitor. (PFF ¶551). As Dr. Hauser explained, if one were to "believe Complaint Counsel's allegations that advertising affects choice," then Group A "are the people who are mostly affected by competitive advertising, not by TurboTax's advertising." (Hauser (Intuit) Tr. 911). In other words, the segment of the population Professor Novemsky that focuses on is exactly who one would "expect[] to have been influenced by competitive advertising," irrespective of that advertising's share of voice compared to TurboTax. (Hauser (Intuit) Tr. 911).

In any event, even if Professor Novemsky's use of the iSpot data were scientifically reliable, it still would not rule out many possible alternative causes for his survey results. The iSpot data says nothing about whether competitors' websites or other non-TV marketing could have accounted for survey participants' answers. (*See* PFF ¶598). Nor does the data rule out

survey participants' personal experiences as a possible alternative cause. (*See* PFF ¶597). And perhaps most importantly, the data does not rule out the numerous possible alternative causes from within Professor Novemsky's survey—like the invitations to guess and the demand artifacts that primed participants to select the answer choices favoring Complaint Counsel's allegations. (PFF ¶¶566-607). Again, without a control group, Professor Novemsky has no way of eliminating that survey noise from his results. (PFF ¶539).

Finally, if the above reasons were not enough, Professor Novemsky's analysis of the iSpot data should not be given any weight because it was not properly disclosed. Professor Novemsky made no mention of the iSpot data until his rebuttal report in this matter. And as this Court has recognized, "the function of rebuttal is to explain, repel, counteract or disprove *the evidence of the adverse party*." (*In re Pom Wonderful LLC*, 2011 WL 1429882, at *2 (F.T.C. Apr. 5, 2011) (emphasis added)). It is not an opportunity to "bolster" opinions offered in support of Complaint Counsel's "case-in-chief." (*In re ECM BioFilms Inc.*, 2014 WL 4651910 (F.T.C. Sept. 5, 2014)). Yet that is precisely how Complaint Counsel attempt to use the iSpot data here: They seek to bolster the reliability of Professor Novemsky's survey, which on its own, has no mechanism to rule out possible alternative causes (PFF ¶¶530-540). Moreover, Professor Novemsky should have known of the need to rule out possible alternative causes as soon as he conducted his survey in March 2022 (*see* CCFF ¶470). And Dr. Hauser identified the survey's inability to test causality on April 4, 2022. (RX403 (Intuit) ¶¶30-48). Thus, Professor Novemsky has no excuse for waiting until late January 2023 to conduct and disclose his iSpot analysis. The Court should disregard the analysis as untimely and improperly disclosed.

556. In 2021 Intuit's "free" TurboTax advertising accounted for 99.1% of impressions related to "free" tax preparation with 5.4 billion impressions. (GX762 (Complaint Counsel) at Tabs 2 & 7; GX749 (Novemsky Rebuttal Expert Report) Figure 4).

Response to Finding No. 556:

The Proposed Finding is irrelevant because Professor Novemsky's use of the iSpot dissemination data does not conform with "reliable principles and methods." (Fed. R. Evid. 702). As described (Responses to CCF ¶¶548, 550), evidence of "share of voice" merely shows that Intuit conducted more TV advertising for free SKUs than its competitors. (Hauser (Intuit) Tr. 911). That has nothing to do with the content of the ads and is not evidence that those ads "influenced consumers" to mistakenly believe that they could file for free. (Hauser (Intuit) Tr. 911). Nor does it enable Professor Novemsky to "rule[] out competitor advertising as a source of beliefs related to TurboTax" (CCFF ¶558). For one thing, the iSpot data is incomplete: It is limited to television advertising and does not include other advertising channels, like social media display ads, paid search, email, and radio. (CCFF ¶¶549-551). Complaint Counsel have not provided any evidence about TurboTax's share of voice when those other forms of advertising are accounted for. And even looking at only TV advertising, competitors' ads still generated billions of impressions (GX749 (Novemsky Expert Report) fig. 4), so it is entirely plausible that they were a source of consumers' beliefs.

If anything, the number of TurboTax impressions helps to illustrate that the challenged ads were not deceptive: According to Professor Novemsky's presentation of the iSpot data, TV ads for free TurboTax SKUs generated 5.4 billion impressions in 2021 (*see* GX749 (Novemsky Rebuttal Expert Report) fig. 4), but Complaint Counsel identified only 19 potentially relevant complaints from the FTC's comprehensive Sentinel database over that time period. (CCFF ¶¶676-677). That miniscule number of complaints is strong evidence that the challenged ads were not likely to mislead a significant minority of reasonable consumers about their ability to file for free using TurboTax. (*See* PFF ¶¶623-647).

Professor Novemsky's iSpot analysis is also particularly irrelevant in this case because of the way he designed his survey population. As noted (PFF ¶¶551-552, 600-601), Professor Novemsky's main survey group of interest (Group A) was made up entirely of participants who had not filed their taxes using TurboTax in at least the three previous years. But during that same time period, 69.1% of Group A participants had filed their taxes with a TurboTax competitor. (PFF ¶551). As Dr. Hauser explained, if one were to "believe Complaint Counsel's allegations that advertising affects choice," then Group A "are the people who are mostly affected by competitive advertising, not by TurboTax's advertising." (Hauser (Intuit) Tr. 911). In other words, the segment of the population Professor Novemsky that focuses on is exactly who one would "expect[] to have been influenced by competitive advertising," irrespective of that advertising's share of voice compared to TurboTax. (Hauser (Intuit) Tr. 911).

In any event, even if Professor Novemsky's use of the iSpot data were scientifically reliable, it still would not rule out many possible alternative causes for his survey results. The iSpot data says nothing about whether competitors' websites or other non-TV marketing could have accounted for survey participants' answers. (See PFF ¶598). Nor does the data rule out survey participants' personal experiences as a possible alternative cause. (See PFF ¶597). And perhaps most importantly, the data does not rule out the numerous possible alternative causes from within Professor Novemsky's survey—like the invitations to guess and the demand artifacts that primed participants to select the answer choices favoring Complaint Counsel's allegations. (PFF ¶¶566-607). Again, without a control group, Professor Novemsky has no way of eliminating that survey noise from his results. (PFF ¶539).

Finally, if the above reasons were not enough, Professor Novemsky's analysis of the iSpot data should not be given any weight because it was not properly disclosed. Professor

Novemsky made no mention of the iSpot data until his rebuttal report in this matter. And as this Court has recognized, “the function of rebuttal is to explain, repel, counteract or disprove *the evidence of the adverse party.*” (*In re Pom Wonderful LLC*, 2011 WL 1429882, at *2 (F.T.C. Apr. 5, 2011) (emphasis added)). It is not an opportunity to “bolster” opinions offered in support of Complaint Counsel’s “case-in-chief.” (*In re ECM BioFilms Inc.*, 2014 WL 4651910 (F.T.C. Sept. 5, 2014)). Yet that is precisely how Complaint Counsel attempt to use the iSpot data here: They seek to bolster the reliability of Professor Novemsky’s survey, which on its own, has no mechanism to rule out possible alternative causes (PFF ¶¶530-540). Moreover, Professor Novemsky should have known of the need to rule out possible alternative causes as soon as he conducted his survey in March 2022 (*see* CCFF ¶470). And Dr. Hauser identified the survey’s inability to test causality on April 4, 2022. (RX403 (Intuit) ¶¶30-48). Thus, Professor Novemsky has no excuse for waiting until late January 2023 to conduct and disclose his iSpot analysis. The Court should disregard the analysis as untimely and improperly disclosed.

557. In 2022, Intuit’s “free” TurboTax advertising accounted for 63.3% of impressions related to “free” tax preparation with 3.5 billion impressions. (GX762 (Complaint Counsel) at Tabs 2 & 8; GX749 (Novemsky Rebuttal Expert Report) Figure 4).

Response to Finding No. 557:

The Proposed Finding is irrelevant because Professor Novemsky’s use of the iSpot dissemination data does not conform with “reliable principles and methods.” (Fed. R. Evid. 702). As described (Responses to CCFF ¶¶548, 550), evidence of “share of voice” merely shows that Intuit conducted more TV advertising for free SKUs than its competitors. (Hauser (Intuit) Tr. 911). That has nothing to do with the content of the ads and is not evidence that those ads “influenced consumers” to mistakenly believe that they could file for free. (Hauser (Intuit) Tr. 911). Nor does it enable Professor Novemsky to “rule[] out competitor advertising as a source of beliefs related to TurboTax” (CCFF ¶558). For one thing, the iSpot data is incomplete: It is

limited to television advertising and does not include other advertising channels, like social media display ads, paid search, email, and radio. (CCFF ¶¶549-551). Complaint Counsel have not provided any evidence about TurboTax's share of voice when those other forms of advertising are accounted for. And even looking at only TV advertising, competitors' ads still generated billions of impressions (GX749 (Novemsky Expert Report) fig. 4), so it is entirely plausible that they were a source of consumers' beliefs.

If anything, the number of TurboTax impressions helps to illustrate that the challenged ads were not deceptive: According to Professor Novemsky's presentation of the iSpot data, TV ads for free TurboTax SKUs generated 3.5 billion impressions in 2022 (*see* GX749 (Novemsky Rebuttal Expert Report) fig. 4), but Complaint Counsel identified only 25 potentially relevant complaints from the FTC's comprehensive Sentinel database over that time period. (CCFF ¶¶676-677). That miniscule number of complaints is strong evidence that the challenged ads were not likely to mislead a significant minority of reasonable consumers about their ability to file for free using TurboTax. (*See* PFF ¶¶623-647).

Professor Novemsky's iSpot analysis is also particularly irrelevant in this case because of the way he designed his survey population. As noted (PFF ¶¶551-552, 600-601), Professor Novemsky's main survey group of interest (Group A) was made up entirely of participants who had not filed their taxes using TurboTax in at least the three previous years. But during that same time period, 69.1% of Group A participants had filed their taxes with a TurboTax competitor. (PFF ¶551). As Dr. Hauser explained, if one were to "believe Complaint Counsel's allegations that advertising affects choice," then Group A "are the people who are mostly affected by competitive advertising, not by TurboTax's advertising." (Hauser (Intuit) Tr. 911). In other words, the segment of the population Professor Novemsky that focuses on is exactly who one

would “expect[] to have been influenced by competitive advertising,” irrespective of that advertising’s share of voice compared to TurboTax. (Hauser (Intuit) Tr. 911).

In any event, even if Professor Novemsky’s use of the iSpot data were scientifically reliable, it still would not rule out many possible alternative causes for his survey results. The iSpot data says nothing about whether competitors’ websites or other non-TV marketing could have accounted for survey participants’ answers. (*See* PFF ¶598). Nor does the data rule out survey participants’ personal experiences as a possible alternative cause. (*See* PFF ¶597). And perhaps most importantly, the data does not rule out the numerous possible alternative causes from within Professor Novemsky’s survey—like the invitations to guess and the demand artifacts that primed participants to select the answer choices favoring Complaint Counsel’s allegations. (PFF ¶¶566-607). Again, without a control group, Professor Novemsky has no way of eliminating that survey noise from his results. (PFF ¶539).

Finally, if the above reasons were not enough, Professor Novemsky’s analysis of the iSpot data should not be given any weight because it was not properly disclosed. Professor Novemsky made no mention of the iSpot data until his rebuttal report in this matter. And as this Court has recognized, “the function of rebuttal is to explain, repel, counteract or disprove *the evidence of the adverse party*.” (*In re Pom Wonderful LLC*, 2011 WL 1429882, at *2 (F.T.C. Apr. 5, 2011) (emphasis added)). It is not an opportunity to “bolster” opinions offered in support of Complaint Counsel’s “case-in-chief.” (*In re ECM BioFilms Inc.*, 2014 WL 4651910 (F.T.C. Sept. 5, 2014)). Yet that is precisely how Complaint Counsel attempt to use the iSpot data here: They seek to bolster the reliability of Professor Novemsky’s survey, which on its own, has no mechanism to rule out possible alternative causes (PFF ¶¶530-540). Moreover, Professor Novemsky should have known of the need to rule out possible alternative causes as soon as he

conducted his survey in March 2022 (*see* CCFF ¶470). And Dr. Hauser identified the survey's inability to test causality on April 4, 2022. (RX403 (Intuit) ¶¶30-48). Thus, Professor Novemsky has no excuse for waiting until late January 2023 to conduct and disclose his iSpot analysis. The Court should disregard the analysis as untimely and improperly disclosed.

558. The analysis of the iSpot.tv data supported Professor Novemsky's opinions that TurboTax advertising was the cause of consumer misimpressions that they could file their taxes for free with TurboTax because it ruled out competitor advertising as a source of beliefs related to TurboTax. (GX749 (Novemsky Rebuttal Expert Report) ¶¶ 44-45; Novemsky (Complaint Counsel) Tr. 367-368).

Response to Finding No. 558:

The Proposed Finding is incorrect because the iSpot data does *not* enable Professor Novemsky to “rule[] out competitor advertising as a source of beliefs related to TurboTax.” As noted (Responses to CCFF ¶¶548, 550), the iSpot data merely shows “that TurboTax has a large share-of-voice”—i.e., that Intuit conducted more TV advertising for free SKUs (and therefore generated more impressions) than its competitors. (Hauser (Intuit) Tr. 911). The iSpot data is incomplete, though: It is limited to television advertising and does not include other advertising channels, like social media display ads, paid search, email, and radio. (CCFF ¶¶549-551). Complaint Counsel have not provided any evidence about TurboTax's share of voice when those other forms of advertising are accounted for. And even looking at only TV advertising, competitors' ads still generated billions of impressions (GX749 (Novemsky Expert Report) fig. 4), so it is entirely plausible that they were a source of consumers' beliefs.

Professor Novemsky's iSpot analysis is also particularly irrelevant in this case because of the way he designed his survey population. As noted (PFF ¶¶551-552, 600-601), Professor Novemsky's main survey group of interest (Group A) was made up entirely of participants who had not filed their taxes using TurboTax in at least the three previous years. But during that same time period, 69.1% of Group A participants had filed their taxes with a TurboTax competitor.

(PFF ¶551). As Dr. Hauser explained, if one were to “believe Complaint Counsel’s allegations that advertising affects choice,” then Group A “are the people who are mostly affected by competitive advertising, not by TurboTax’s advertising.” (Hauser (Intuit) Tr. 911). In other words, the segment of the population Professor Novemsky that focuses on is exactly who one would “expect[] to have been influenced by competitive advertising,” irrespective of that advertising’s share of voice compared to TurboTax. (Hauser (Intuit) Tr. 911).

In any event, even if Professor Novemsky’s use of the iSpot data were scientifically reliable, it still would not rule out many possible alternative causes for his survey results. The iSpot data says nothing about whether competitors’ websites or other non-TV marketing could have accounted for survey participants’ answers. (See PFF ¶598). Nor does the data rule out survey participants’ personal experiences as a possible alternative cause. (See PFF ¶597). And perhaps most importantly, the data does not rule out the numerous possible alternative causes from within Professor Novemsky’s survey—like the invitations to guess and the demand artifacts that primed participants to select the answer choices favoring Complaint Counsel’s allegations. (PFF ¶¶566-607). Again, without a control group, Professor Novemsky has no way of eliminating that survey noise from his results. (PFF ¶539).

Finally, if the above reasons were not enough, Professor Novemsky’s analysis of the iSpot data should not be given any weight because it was not properly disclosed. Professor Novemsky made no mention of the iSpot data until his rebuttal report in this matter. And as this Court has recognized, “the function of rebuttal is to explain, repel, counteract or disprove *the evidence of the adverse party*.” (*In re Pom Wonderful LLC*, 2011 WL 1429882, at *2 (F.T.C. Apr. 5, 2011) (emphasis added)). It is not an opportunity to “bolster” opinions offered in support of Complaint Counsel’s “case-in-chief.” (*In re ECM BioFilms Inc.*, 2014 WL 4651910 (F.T.C.

Sept. 5, 2014)). Yet that is precisely how Complaint Counsel attempt to use the iSpot data here: They seek to bolster the reliability of Professor Novemsky's survey, which on its own, has no mechanism to rule out possible alternative causes (PFF ¶¶530-540). Moreover, Professor Novemsky should have known of the need to rule out possible alternative causes as soon as he conducted his survey in March 2022 (*see* CCF ¶470). And Dr. Hauser identified the survey's inability to test causality on April 4, 2022. (RX403 (Intuit) ¶¶30-48). Thus, Professor Novemsky has no excuse for waiting until late January 2023 to conduct and disclose his iSpot analysis. The Court should disregard the analysis as untimely and improperly disclosed.

559. It is extremely implausible that the 72% of impressions related to free online tax software from TurboTax did not cause the substantial misimpressions measured in the perception survey, but the 28% of remaining impressions from Intuit's competitors did. (GX749 (Novemsky Rebuttal Expert Report) ¶ 45).

Response to Finding No. 559:

The Proposed Finding is incorrect and unsupported because the supposed "substantial misimpressions" referenced are based entirely on Professor Novemsky's scientifically invalid and unreliable survey. Among other things, Professor Novemsky did not show his survey participants *any* TurboTax ads or marketing communications, so respondents would have been answering entirely from memory—even though Professor Novemsky conceded that survey participants "could have forgotten anything" they had seen about TurboTax in the past. (PFF ¶¶533-534, 536). Professor Novemsky's questions primed participants to guess that they could file for free—which respondents confirmed by saying that they believed they could file for free because "[b]ecause this survey is suggesting that I can." (PFF ¶576; *see also* PFF ¶¶567-577). That is not evidence of a genuine misimpression.

The Proposed Finding is also incorrect because it is entirely plausible that competitors' advertising or other factors apart from TurboTax's ads caused Professor Novemsky's survey

results. As noted (Responses to CCF ¶¶548, 550, 558), the fact that Intuit conducted “more advertising” has nothing to do with the content of the ads and is not evidence that those ads “influenced consumers” to mistakenly believe that they could file for free. (Hauser (Intuit) Tr. 911). Indeed, competitors’ ads still generated billions of impressions (GX749 (Novemsky Expert Report) fig. 4), so it is entirely plausible that they were a source of consumers’ beliefs. Complaint Counsel concede, moreover, that the iSpot data is limited to television advertising; it does not account for other advertising channels, like social media display ads, paid search, email, and radio. Complaint Counsel have not provided any evidence about TurboTax’s share of voice when those other forms of advertising are accounted for.

Professor Novemsky’s iSpot analysis is also particularly irrelevant in this case because of the way he designed his survey population. As noted (PFF ¶¶551-552, 600-601), Professor Novemsky’s main survey group of interest (Group A) was made up entirely of participants who had not filed their taxes using TurboTax in at least the three previous years. But during that same time period, 69.1% of Group A participants had filed their taxes with a TurboTax competitor. (PFF ¶551). As Dr. Hauser explained, if one were to “believe Complaint Counsel’s allegations that advertising affects choice,” then Group A “are the people who are mostly affected by competitive advertising, not by TurboTax’s advertising.” (Hauser (Intuit) Tr. 911). In other words, the segment of the population Professor Novemsky that focuses on is exactly who one would “expect[] to have been influenced by competitive advertising,” irrespective of that advertising’s share of voice compared to TurboTax. (Hauser (Intuit) Tr. 911).

In any event, even if Professor Novemsky’s use of the iSpot data were scientifically reliable, it still would not rule out many possible alternative causes for his survey results. Indeed, Complaint Counsel concede that the iSpot data is relevant only for whether competitor

television ads were a plausible alternative cause. (See CCFF ¶557). The iSpot data says nothing about whether competitors’ websites or other non-TV marketing could have accounted for survey participants’ answers. (See PFF ¶598). Nor does the data rule out survey participants’ personal experiences as a possible alternative cause. (See PFF ¶597). And perhaps most importantly, the data does not rule out the numerous possible alternative causes from within Professor Novemsky’s survey—like the invitations to guess and the demand artifacts that primed participants to select the answer choices favoring Complaint Counsel’s allegations. (PFF ¶¶566-607). Again, without a control group, Professor Novemsky has no way of eliminating that survey noise from his results. (PFF ¶539).

Finally, if the above reasons were not enough, Professor Novemsky’s analysis of the iSpot data should not be given any weight because it was not properly disclosed. Professor Novemsky made no mention of the iSpot data until his rebuttal report in this matter. And as this Court has recognized, “the function of rebuttal is to explain, repel, counteract or disprove *the evidence of the adverse party*.” (*In re Pom Wonderful LLC*, 2011 WL 1429882, at *2 (F.T.C. Apr. 5, 2011) (emphasis added)). It is not an opportunity to “bolster” opinions offered in support of Complaint Counsel’s “case-in-chief.” (*In re ECM BioFilms Inc.*, 2014 WL 4651910 (F.T.C. Sept. 5, 2014)). Yet that is precisely how Complaint Counsel attempt to use the iSpot data here: They seek to bolster the reliability of Professor Novemsky’s survey, which on its own, has no mechanism to rule out possible alternative causes (PFF ¶¶530-540). Moreover, Professor Novemsky should have known of the need to rule out possible alternative causes as soon as he conducted his survey in March 2022 (*see* CCFF ¶470). And Dr. Hauser identified the survey’s inability to test causality on April 4, 2022. (RX403 (Intuit) ¶¶30-48). Thus, Professor

Novemsky has no excuse for waiting until late January 2023 to conduct and disclose his iSpot analysis. The Court should disregard the analysis as untimely and improperly disclosed.

560. Moreover, competitors' ads focused on the competitors' own products, while TurboTax ads were focused on TurboTax products and brand, making the latter much more likely to leave an impression about TurboTax than the former. (GX749 (Novemsky Rebuttal Expert Report) ¶ 45; Novemsky (Complaint Counsel) Tr. 370-371 (discussing GX782 (Complaint Counsel) ("Again, to the question of whether H&R Block could have caused the false impression that people could file for free with TurboTax, you can see here that when TurboTax is mentioned by a competitor like H&R Block, it's mentioned in the context of you cannot file for free with TurboTax. In this case they talk about itemized deductions. So H&R Block, to the extent they're saying "free," they're saying H&R Block is free, TurboTax is not free. Again, casting doubt on the idea that a competitor's ad is substantially responsible for this false impression in the marketplace.")); *see also* Novemsky (Complaint Counsel) Tr. 477, 485).

Response to Finding No. 560:

The Proposed Finding is incorrect because competitors' advertising frequently focused on TurboTax, as Intuit has explained. (*See* PFF ¶599). H&R Block, for example has run multiple ads saying: "More people can file free with H&R Block online than TurboTax." (PFF ¶559). And H&R Block's website likewise has included a page titled "H&R Block Free Online vs. TurboTax Free Edition: Get more FREE with Block." (PFF ¶559). Thus, contrary to the Proposed Finding, it is entirely plausible that competitor ads would "leave an impression about TurboTax." Importantly, moreover, Professor Novemsky's main survey group of interest was made up of customers of these other competitors companies rather than TurboTax, making it not only plausible but likely that these other companies' ads—along with the other flaws in survey design—are the cause of any misimpression. (PFF ¶¶551-552).

561. Further evidence that Professor Novemsky relied on in forming his opinions is GX460, an Intuit marketing research document ("TY20 Campaign Copy Testing"). (GX303 (Novemsky Expert Report) ¶ 97; Novemsky (Complaint Counsel) Tr. 364).

Response to Finding No. 561:

The Proposed Finding is misleading because Professor Novemsky's reliance on the TY20 Test is misplaced. As Intuit explained (PFF ¶¶687-701), the results of the TY20 Test do not suggest that TurboTax ads misled consumers about their ability to file their taxes for free using TurboTax. For context, the TY20 Test's survey population was divided into one control group and four test groups. (PFF ¶691). The control group was provided the TurboTax brand name but was not shown any TurboTax ads, while the test groups were shown one of four draft versions of TurboTax Free Edition ads. (PFF ¶691). One of those draft ads was the Tax Year 2018 version of the ad (with the Tax Year 2018 version of the written disclosure), and the other three included no written disclosure at all. (PFF ¶699). After exposure to the brand name or one of the draft ads, the TY20 Test participants were asked questions about TurboTax, including whether TurboTax "Allows me to file my taxes for free." (PFF ¶¶692-693). Responses to that question in both the control and test groups suggest that consumers were not misled or deceived by TurboTax advertising. (PFF ¶694).

In the control group, only 33% of respondents reported believing that TurboTax "Allows me to file my taxes for free." (PFF ¶¶691, 695). That percentage matches the approximately 33% of all U.S. taxpayers who qualify to use TurboTax Free Edition, and it is less than the roughly 50% of consumers in the online-tax preparation market who qualify to use Free Edition. (PFF ¶695). The 33% figure is also likely lower than the percentage of respondents who actually were eligible to use Free Edition because the survey population skewed younger and thus were more likely to have simple tax returns. (PFF ¶¶689-690, 695). The results from the control group thus indicate that, as of September 2020 (when the test was conducted), TurboTax marketing either had not reached many consumers who qualify to file for free or had not successfully persuaded many of those consumers who do qualify that they qualify. (PFF ¶696).

That is not what one would expect to see if TurboTax's advertising was deceptive in the manner alleged. (PFF ¶696).

In the test groups, the percentage of respondents reported as believing that TurboTax "Allows me to file my taxes for free" was not substantially higher than in the control group and did not cause Intuit to believe that the respondents in the test groups had a misimpression about their ability to file for free. (PFF ¶697). After viewing a draft ad, an average of about 48% of participants in the four test groups indicated that TurboTax "Allows me to file my taxes for free." (GX460 (Intuit) at 28). Again, that is less than the approximately 50% of consumers in the tax-preparation market who qualify to use Free Edition. (See PFF ¶695). And as Cathleen Ryan testified, "[g]iven the younger demographic of this copy testing, I would expect that the majority of respondents could file their taxes for free." (Ryan (Intuit) Tr. 740). Thus, the test group results do not suggest that a significant number of participants in the TY20 Test were under a misimpression that they could file for free when they actually could not. (PFF ¶698).

562. The TY20 Campaign Copy Testing showed that when a single "free" ad was shown to consumers, it caused a statistically significant increase in the consumer perception regarding being able to file taxes for free using TurboTax (compared to a control group), as well as increasing usage intent. (GX303 (Novemsky Expert Report) ¶¶ 97-98 (citing GX460 (Intuit) at CC-00009543- CC-00009545, CC-00009563); Novemsky (Complaint Counsel) Tr. 364-365).

Response to Finding No. 562:

The Proposed Finding is incorrect and misleading insofar as it suggests that the "increase[s] in the consumer perception perceptions that they can use TurboTax free" and in "usage intent" are evidence of deception. They are not. Beginning with the former, as just explained (Response to CCF ¶561), less than half of the participants in the four TY20 Test test groups indicated that TurboTax "Allows me to file my taxes for free" after viewing a draft ad. That is less than the approximately 50% of consumers in the online tax-preparation market who

qualify to use Free Edition. (See PFF ¶¶695). And as Cathleen Ryan testified, “[g]iven the younger demographic of this copy testing, I would expect that the majority of respondents could file their taxes for free.” (Ryan (Intuit) Tr. 740). Thus, the test group results do not suggest that a significant number of participants in the TY20 Test were under a misimpression that they could file for free when they actually could not. (PFF ¶¶698).

As for “usage intent,” the survey question driving that metric asked consumers whether they would consider using “TurboTax,” not “TurboTax Free Edition.” (GX460 (Intuit) at 8, 10). That an ad for a specific product might generate interest in a brand more broadly is unremarkable and does not bear on what claims the ad conveyed about the specific product advertised or whether consumers were likely to be misled. And even if respondents *were* asked about Free Edition, that a consumer “would consider” using Free Edition does not indicate that the draft ads tested (to say nothing of the final ads that eventually ran) were misleading. Nor are the “usage intent” results high enough to suggest deception. In all four TY20 Test test groups, less than half of the participants indicated that they “definitely would consider using [TurboTax].” (GX460 (Intuit) at 10). That is less than the approximately 50% of consumers in the online tax-preparation market who qualify to use Free Edition and likely in line with the percentage of TY20 Test respondents who actually were eligible to use Free Edition, because the survey population skewed young. (PFF ¶¶689-690, 695, Ryan (Intuit) Tr. 740). Thus, the TY20 Test’s “usage intent” results do not suggest that a significant number of participants in the TY20 Test were under a misimpression that they could file for free when they actually could not.

The Proposed Finding is also incorrect, misleading, and incomplete because it ignores that the four ads tested in the TY20 Test were draft ads. (PFF ¶¶691). The “Spelling Bee” ad that was tested included the Tax Year 2018 version of the eligibility disclosures, and the other three

ads were drafts that included no written disclosures at all. (PFF ¶699). Accordingly, the results do not reflect how consumers would have reacted to final Tax Year 2020 Free Edition ads with complete and up-to-date disclosure language.

Furthermore, the Proposed Finding is incorrect, misleading, and incomplete because it ignores that the T20 Test test group results depict only the *short-term* impact of an ad immediately after exposure—and that those short-term effects would be expected to decay. (PFF ¶700). The TY20 Test’s only evidence of the *long-term* impact of TurboTax advertising are the control group results. (PFF ¶700). Even though control group participants were not shown any ads during the test itself, they were consumers who may have “seen ads natively in the environment” (Hauser (Intuit) Tr. 882) because the test was conducted multiple years after Intuit had begun advertising its free SKUs. (PFF ¶696). Thus, Professor Novemsky and Dr. Hauser agreed that the control group results measured the cumulative impact of “anything [the survey participants] would have seen prior to entering the study,” including TurboTax ads. (Novemsky (FTC) Tr. 505; *see also* Hauser (Intuit) Tr. 882 (TY20 Test control group measures “the cumulative impact of all the marketing that’s come up to that point.”)).

Bringing all of those sources of information into the test, only 33% of control group participants reported believing that TurboTax allowed them to file for free. (PFF ¶¶691, 695). That percentage matches the approximately 33% of taxpayers in the general population who qualify to use TurboTax Free Edition, and it is significantly less than the roughly 50% of consumers in the market for online tax-preparation products who qualify to use Free Edition. (PFF ¶695). Furthermore, like the test group results, the control group’s 33% figure is likely lower than the percentage of respondents who actually were eligible to use Free Edition, because the survey population skewed young. (PFF ¶¶689-690, 695). Thus, the control group results

show that, as of September 2020, TurboTax marketing either had not reached many consumers who qualify to file for free or had not successfully persuaded many of those consumers that they would qualify. (PFF ¶696). That is not one would expect to see if TurboTax's advertising was deceptive in the manner Complaint Counsel allege. (PFF ¶696).

563. The TY20 Campaign Copy Testing indicates that Intuit understands not only that "free" messaging drives tax filers to try TurboTax, but that the messaging differentiates TurboTax from its competitors. (GX303 (Novemsky Expert Report) ¶ 98 (citing GX460 (Intuit) at CC-00009543)).

Response to Finding No. 563:

The Proposed Finding is irrelevant because the fact that consumers would be interested in trying TurboTax is not evidence that they were misled about whether they qualified for a free offer. The survey question referenced in the Proposed Finding asked consumers whether they would consider using "TurboTax," not "TurboTax Free Edition." (GX460 (Intuit) at 8, 10). That an ad for a specific product might generate interest in a brand more broadly is unremarkable and does not bear on what claims the ad conveyed about the specific product advertised or whether consumers were misled.

Even if respondents *were* asked about Free Edition, that a consumer "would consider" using Free Edition does not indicate that the draft ads tested (to say nothing of the final ads that eventually ran) were misleading. Consumers might be interested in trying a free offer, for example, even they understood that it was unlikely that they would qualify. Moreover, most consumers do not proceed directly from viewing a TV advertisement to filing their taxes online, instead conducting additional research about products they "would consider." (PFF ¶¶503-505; *see also* PFF ¶502). "[O]n top of [consumers] already being highly involved" in researching tax preparation products, "[t]he opportunity to be able to [file] for free," as well as general skepticism about free offers, motivates consumers to conduct research about those free products'

qualifications. (PFF ¶506; Golder (Intuit) Tr. 1085). The final versions of the tested ads also contained prominent written disclosures stating, “Simple returns only. See if you qualify at TurboTax.com.” (PFF 337). This language explains where to find additional information and reinforces what consumers “considering” a tax-preparation product routinely do: go to the product’s website for further details. (PFF ¶¶325-326).

Moreover, the results of the TY20 Test do not show the impact of final Tax Year 2020 TurboTax ads on consumers. The group of respondents who were shown Free Edition ads were shown draft versions of those ads. (PFF ¶691). The “Spelling Bee” ad that was tested included the Tax Year 2018 version of the eligibility disclosures, and the other three ads were drafts that included no written disclosures at all. (PFF ¶699). Accordingly, the results do not reflect how consumers would have reacted to final Tax Year 2020 Free Edition ads with complete and up-to-date disclosure language.

In any event, that an average of 48% of participants in the test groups (versus 37% in the control group) indicated that they “Definitely would consider using TT” is not evidence of deception. (GX460 (Intuit) at 10). That percentage is less than the roughly 50% of consumers in the online-tax preparation market who qualify to use Free Edition. (PFF ¶695). It also likely aligns with the percentage of respondents who actually were eligible to use Free Edition, given that the survey population skewed younger and thus were more likely to have simple tax returns. (PFF ¶¶689-690, 695). And the “lift” in respondents indicating that “definitely would consider using TurboTax” from the control group to the test groups (GX340 (Intuit) at 8, 10) depicts only the short-term effects of TurboTax advertising, which typically decay over time. (*See* PFF ¶700). Because consumers may only experience this “lift” immediately or shortly after viewing the ad,

the TY20 Test results for the test groups do not provide evidence of consumers long-term beliefs about whether they would consider trying TurboTax.

564. According to Professor Novemsky, the TY20 Campaign Copy Testing shows that exposure to Intuit's video advertisements with "free" messaging causes an increase in viewers' perceptions that they can use TurboTax for free. (GX303 (Novemsky Expert Report) ¶ 97 (citing GX460 (Intuit) at CC-00009563); *see also* GX749 (Novemsky Rebuttal Expert Report) ¶ 15; Novemsky (Complaint Counsel) Tr. 365).

Response to Finding No. 564:

The Proposed Finding is misleading insofar as it suggests that the "increase in viewers' perceptions that they can use TurboTax free" is evidence of deception. It is not. As explained (Responses to CCFF ¶¶561-562), less than half of the participants in the four TY20 Test test groups indicated that TurboTax "Allows me to file my taxes for free" after viewing a draft ad. That is less than the approximately 50% of consumers in the online tax-preparation market who qualify to use Free Edition. (*See* PFF ¶695). And as Cathleen Ryan testified, "[g]iven the younger demographic of this copy testing, I would expect that the majority of respondents could file their taxes for free." (Ryan (Intuit) Tr. 740). Thus, the test group results do not suggest that a significant number of participants in the TY20 Test were under a misimpression that they could file for free when they actually could not. (PFF ¶698).

Moreover, the Proposed Finding is incorrect, misleading, and incomplete because it ignores that the T20 Test test group results depict only the *short-term* impact of an ad immediately after exposure—and that those short-term effects would be expected to decay. (PFF ¶700). The TY20 Test's only evidence of the *long-term* impact of TurboTax advertising are the control group results. (PFF ¶700). Even though control group participants were not shown any ads during the test itself, they were consumers who may have "seen ads natively in the environment" (Hauser (Intuit) Tr. 882) because the test was conducted multiple years after Intuit had begun advertising its free SKUs. (PFF ¶696). Thus, Professor Novemsky and Dr. Hauser

agreed that the control group results measured the cumulative impact of “anything [the survey participants] would have seen prior to entering the study,” including TurboTax ads. (Novemsky (FTC) Tr. 505; *see also* Hauser (Intuit) Tr. 882 (TY20 Test control group measures “the cumulative impact of all the marketing that’s come up to that point.”)).

Bringing all of those sources of information into the test, only 33% of control group participants reported believing that TurboTax allowed them to file for free. (PFF ¶¶691, 695). That percentage matches the approximately 33% of taxpayers in the general population who qualify to use TurboTax Free Edition, and it is significantly less than the roughly 50% of consumers in the market for online tax-preparation products who qualify to use Free Edition. (PFF ¶695). Furthermore, like the test group results, the control group’s 33% figure is likely lower than the percentage of respondents who actually were eligible to use Free Edition because the survey population skewed young. (PFF ¶¶689-690, 695). Thus, the control group results show that, as of September 2020, TurboTax marketing either had not reached many consumers who qualify to file for free or had not successfully persuaded many of those consumers that they would qualify. (PFF ¶696). That is not one would expect to see if TurboTax’s advertising was deceptive in the manner Complaint Counsel allege. (PFF ¶696).

565. Each of the “free, free, free” ads tested during the TY20 Campaign Copy Testing caused a statistically significant increase in “usage intent,” as measured by the percentage of respondents who indicate they “[d]efinitely would consider using TT,” resulting in the conclusion that the “simple ‘free’ message communicates the main idea clearly and effectively, helping to drive awareness of the TurboTax Free offer and as a result, intent to use.” (GX303 (Novemsky Expert Report) ¶ 98 (citing GX460 (Intuit) at CC-00009544-45)).

Response to Finding No. 565:

The Proposed Finding is irrelevant because the fact that consumers would be interested in trying TurboTax is not evidence that they were misled about whether they qualified for a free offer. The survey question referenced in the Proposed Finding asked consumers whether they

would consider using “TurboTax,” not “TurboTax Free Edition.” (GX460 (Intuit) at 8, 10). That an ad for a specific product might generate interest in a brand more broadly is unremarkable and does not bear on what claims the ad conveyed about the specific product advertised or whether consumers were misled.

Even if respondents *were* asked about Free Edition, that a consumer “would consider” using Free Edition does not indicate that the draft ads tested (to say nothing of the final ads that eventually ran) were misleading. Consumers might be interested in trying a free offer, for example, even they understood that it was unlikely that they would qualify. Moreover, most consumers do not proceed directly from viewing a TV advertisement to filing their taxes online, instead conducting additional research about products they “would consider.” (PFF ¶¶503-505; *see also* PFF ¶502). “[O]n top of [consumers] already being highly involved” in researching tax preparation products, “[t]he opportunity to be able to [file] for free,” as well as general skepticism about free offers, motivates consumers to conduct research about those free products’ qualifications. (PFF ¶506; Golder (Intuit) Tr. 1085). The final versions of the tested ads also contained prominent written disclosures stating, “Simple returns only. See if you qualify at TurboTax.com.” (PFF 337). This language explains where to find additional information and reinforces what consumers “considering” a tax-preparation product routinely do: go to the product’s website for further details. (PFF ¶¶325-326).

In any event, that an average of 48% of participants in the test groups (versus 37% in the control group) indicated that they “Definitely would consider using TT” is not evidence of deception. (GX460 (Intuit) at 10). That percentage is less than the roughly 50% of consumers in the online-tax preparation market who qualify to use Free Edition. (PFF ¶695). It also likely aligns with the percentage of respondents who actually were eligible to use Free Edition, given

that the survey population skewed younger and thus were more likely to have simple tax returns. (PFF ¶¶689-690, 695). And the “lift” in respondents indicating that “definitely would consider using TurboTax” from the control group to the test groups (GX340 (Intuit) at 8, 10) depicts only the short-term effects of TurboTax advertising, which typically decay over time. (*See* PFF ¶700). Because consumers may only experience this “lift” immediately or shortly after viewing the ad, the TY20 Test results for the test groups do not provide evidence of consumers long-term beliefs about whether they would consider trying TurboTax.

566. The TY20 Campaign Copy Testing causally links Intuit’s “free” advertising messaging to the consumer perception that TurboTax would allow the consumer to file taxes for free. (GX749 (Novemsky Rebuttal Expert Report) ¶ 32 (citing GX460 (Intuit) at CC-00009563); *see also* Novemsky (Complaint Counsel) Tr. 366 (“[T]his is certainly an example of TurboTax marketing, that TurboTax marketing is responsible for consumers’ perception that they can file for free.”)).

Response to Finding No. 566:

The Proposed Finding is misleading insofar as it suggests that the TY20 Test’s evidence of “consumer perception that TurboTax would allow the consumer to file taxes for free” is indicative deception. It is not, for the reasons already provided (Responses to CCF ¶¶561-562, 564). Again, less than half of the participants in the four TY20 Test test groups indicated that TurboTax “Allows me to file my taxes for free” after viewing a draft ad. That is less than the approximately 50% of consumers in the online tax-preparation market who qualify to use Free Edition. (*See* PFF ¶695). And as Cathleen Ryan testified, “[g]iven the younger demographic of this copy testing, I would expect that the majority of respondents could file their taxes for free.” (Ryan (Intuit) Tr. 740). Thus, although the TY20 Test causally links draft ads to an increase in consumer perception that they can file for free, the results do not suggest that a significant number of participants in the TY20 Test were under a misimpression that they could file for free when they actually could not. (PFF ¶698).

Moreover, the Proposed Finding is misleading and incomplete because it ignores that the T20 Test test group results depict only the short-term impact of an ad immediately after exposure—such short term effects would be expected to decay. (PFF ¶¶700). The TY20 Test’s only evidence of the long-term impact of TurboTax advertising are the control group results. (PFF ¶¶700). Even though control group participants were not shown any ads during the test itself, they were consumers who may have “seen ads natively in the environment” (Hauser (Intuit) Tr. 882) because the test was conducted multiple years after Intuit had begun advertising its free SKUs. (PFF ¶¶696). Thus, Professor Novemsky and Dr. Hauser agreed that the control group results measured the cumulative impact of “anything [the survey participants] would have seen prior to entering the study,” including TurboTax ads. (Novemsky (FTC) Tr. 505; see also Hauser (Intuit) Tr. 882 (TY20 Test control group measures “the cumulative impact of all the marketing that’s come up to that point.”)).

Bringing all of those sources of information into the test, only 33% of control group participants reported believing that TurboTax allowed them to file for free. (PFF ¶¶691, 695). That percentage matches the approximately 33% of taxpayers in the general population who qualify to use TurboTax Free Edition, and it is significantly less than the roughly 50% of consumers in the market for online tax-preparation products who qualify to use Free Edition. (PFF ¶¶695). Furthermore, like the test group results, the control group’s 33% figure is likely lower than the percentage of respondents who actually were eligible to use Free Edition, because the survey population skewed young. (PFF ¶¶689-690, 695). Thus, the control group results show that, as of September 2020, TurboTax marketing either had not reached many consumers who qualify to file for free or had not successfully persuaded many of those consumers that they

would qualify. (PFF ¶¶696). That is not one would expect to see if TurboTax’s advertising was deceptive in the manner Complaint Counsel allege. (PFF ¶¶696).

567. Intuit’s marketing messages were reinforced over time, across different tax seasons. (GX303 (Novemsky Expert Report) ¶ 31).

Response to Finding No. 567:

The Proposed Finding is misleading insofar as it suggests that “reinforce[ment]” of Intuit’s marketing messages is evidence of deception. It is not. As Intuit explained, all of Intuit’s video ads (the type of ads at issue in the TY20 Test) stated (1) that the ad was for a specific TurboTax SKU that was actually free, (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 ¶¶215-218, 244, 248-251, 262). Reinforcement of those “marketing messages” was not likely to mislead a significant minority of reasonable consumers about their ability to file their taxes for free with TurboTax.

Moreover, the Proposed Finding is unsupported by any evidence other than Professor Novemsky’s baseless assertions. Although it is true that Intuit advertised its free SKUs “across different tax seasons,” Complaint Counsel have done nothing to establish that those practices “reinforced” the messages (Professor Novemsky’s scientifically invalid and unreliable survey certainly does not suffice). As Dr. Hauser explained, an ad’s impact on consumers is most powerful immediately after exposure, and it is “well established” that this immediate response will decay over time. (Hauser (Intuit) Tr. 884-885, 890-891; RX1017 (Hauser Expert Report) ¶31). Dr. Hauser further explained that “simple repetition” of an advertising “alone” would not mitigate the decay effect; to the contrary, repetition could lead to a “wear-out” effect, in which the message would become *less* impactful over time. (Hauser (Intuit) Tr. 891). Accordingly,

Complaint Counsel cannot establish that Intuit’s advertising was “reinforced” merely by showing that it was repeated.

568. Repeat advertising reinforces marketing messages, compounding their impact and mitigating decay of impact. (GX749 (Novemsky Rebuttal Expert Report) ¶¶ 15, 33-34).

Response to Finding No. 568:

The Proposed Finding is misleading insofar as it suggests that “reinforce[ment]” of Intuit’s marketing messages is evidence of deception. It is not. As Intuit explained, all of Intuit’s video ads (the type of ads at issue in the TY20 Test) stated (1) that the ad was for a specific TurboTax SKU that was actually free, (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 ¶¶215-218, 244, 248-251, 262). Reinforcement of those “marketing messages” was not likely to mislead a significant minority of reasonable consumers about their ability to file their taxes for free with TurboTax.

The Proposed Finding is also incorrect, misleading, and incomplete because “simple repetition alone” does not reinforce marketing messages, compound their impact, or mitigate decay of impact. (Hauser (Intuit) Tr. 891). Instead, whether repetition will mitigate decay depends on numerous variables—like whether the ads are “memorable,” and “get the consumers’ attention.” (Hauser (Intuit) Tr. 891). Moreover, as Dr. Hauser explained, repetition can lead to a “wear-out” effect, in which an ad’s message becomes less impactful over time. (Hauser (Intuit) Tr. 891). Accordingly, Complaint Counsel cannot establish that the impact of Intuit’s ads was “compound[ed]” merely by showing that the ads were repeated.

In fact, the available evidence belies Complaint Counsel’s suggestion that the impact of Intuit’s ads were “compound[ed]” over time. In the TY22 Copy Test—[REDACTED]

[REDACTED]

[REDACTED]. (PFF ¶709;
RX1543 (Intuit) at 19)). [REDACTED]

[REDACTED]. (PFF
¶710). [REDACTED]

[REDACTED]” Instead, the TY22 Test shows that consumers are not under a misimpression about their ability to file their taxes for free with TurboTax. (PFF ¶¶711, 713).

In any event, the Proposed Finding should not be given any weight because it was not properly disclosed. The only authority cited is Professor Novemsky’s rebuttal report. And as this Court has recognized, “the function of rebuttal is to explain, repel, counteract or disprove *the evidence of the adverse party*.” (*In re Pom Wonderful LLC*, 2011 WL 1429882, at *2 (F.T.C. Apr. 5, 2011) (emphasis added)). It is not an opportunity to “bolster” opinions offered in support of Complaint Counsel’s “case-in-chief.” (*In re ECM BioFilms Inc.*, 2014 WL 4651910 (F.T.C. Sept. 5, 2014)). Yet that is precisely how Complaint Counsel attempt to use this Proposed Finding: They seek to bolster Professor Novemsky’s prior opinions, offered in his opening report, about the TY20 Test. Professor Novemsky had no basis for waiting until his rebuttal report to disclose this aspect of his opinion about the TY20 Test. The Court should disregard this aspect of his opinion as untimely and improperly disclosed.

569. In addition to showing that Intuit’s “free” messaging causes subjects to believe that they can file for free, the TY20 Campaign Copy Testing also shows why a test / control survey design is the wrong tool for studying the question of interest in this case. While this study does report a measure of the impact of “free” advertising that can be causally interpreted, that effect is limited to the incremental contribution of one additional ad exposure to subjects’ pre-existing beliefs and does not measure the impact of Intuit’s years-long marketing activities on overall impressions in the market. (GX303 (Novemsky Expert Report) ¶ 97 n. 128).

Response to Finding No. 569:

The Proposed Finding is incorrect, misleading, and incomplete. Although the TY20 Test measures the “incremental contribution of one additional ad exposure to subjects’ pre-existing beliefs,” that does not mean “a test / control survey design is the wrong tool for studying the question of interest in this case.” The TY20 Test measure consumer impression immediately after exposure to the draft TurboTax ads, when the ad’s impact would have been most powerful. (Hauser (Intuit) Tr. 885, 890-891; RX1017 (Hauser Expert Report) ¶31). As Dr. Hauser explained, it is “well established” that this immediate response will decay over time, and “simple repetition alone” over the course of years would not combat that decay. (Hauser (Intuit) Tr. 884, 891). To the contrary, such repetition could lead to a “wear-out” effect, in which the ads’ impact would decrease over time. (Hauser (Intuit) Tr. 891). Thus, if anything, the TY20 Test overmeasures the impact of TurboTax’s ads in the real-world marketplace. (See PFF ¶701).

With that overmeasurement effect in mind, the TY20 Test *can* be used to assess “the question of interest in this case.” And as explained (PFF ¶¶687-701), the results undermine Complaint Counsel’s allegations. Again, immediately after viewing a draft ad, an average of about 48% of participants in the four test groups indicated that TurboTax “Allows me to file my taxes for free.” (GX460 (Intuit) at 28). That percentage—which would be expected to decay—is less than the approximately 50% of consumers in the tax-preparation market who qualify to use Free Edition. (See PFF ¶695). And as Cathleen Ryan testified, “[g]iven the younger demographic of this copy testing, I would expect that the majority of respondents could file their taxes for free.” (Ryan (Intuit) Tr. 740). Thus, the test group results do not suggest that a significant number of participants in the TY20 Test were under a misimpression that they could file for free when they actually could not. (PFF ¶698).

570. Academics hold the view that the effect of repetitive exposure to long-running advertising campaigns increases customer responses to advertising. (GX749 (Novemsky Rebuttal Expert Report) ¶ 24 (citing S. Schmidt and M. Eisend, “Advertising Repetition: A Meta-Analysis on Effective Frequency in Advertising,” *Journal of Advertising*, 2015, Vol. 44 (4), at pp. 415-428); *see also* RX1391 (Hauser (Intuit) Dep.) at 52 (“Q. ... [I]f you repeat the ad, can you then extend the recall? A. That certainly would be your goal. And it would depend upon how often you repeat it, how much weight you put upon it, where you – ‘weight’ meaning the total spending, total impressions, but also where those advertising is allocated.”)).

Response to Finding No. 570:

The Proposed Finding is incomplete, misleading, and irrelevant. For one thing, academics *also* hold the view that the impact of an ad is greatest immediately following consumer exposure and that the impact decays over time. (RX1017 (Hauser Expert Report) ¶31 & n.46 (citing RX560, Philip Kotler & Kevin Lane Keller, *Marketing Management* 194 (15th ed. 2016); Hauser (Intuit) Tr. 884-885, 890-891)). As Dr. Hauser explained in his deposition (which the Proposed Finding cites), firms repeat ads with the goal of extending consumer recall, but whether repetition actually does extend recall “would depend” on a number of variables. (RX1391 (Hauser (Intuit) Dep.) at 52). Indeed, contrary to the Proposed Finding, “simple repetition alone” is insufficient. (Hauser (Intuit) Tr. 891). Instead, whether repetition will mitigate decay depends on numerous variables—like whether the ads are “memorable” and “get the consumers’ attention.” (Hauser (Intuit) Tr. 891). Moreover, as Dr. Hauser explained, repetition can lead to a “wear-out” effect, in which an ad’s message becomes less impactful over time. (Hauser (Intuit) Tr. 891). Accordingly, Complaint Counsel cannot establish that the impact of Intuit’s ads was increased merely by showing that the ads were repeated.

In fact, the available evidence belies Complaint Counsel’s suggestion that the impact of Intuit’s ads increased over time. In the TY22 Copy Test—

[REDACTED]

[REDACTED]. (PFF ¶709; RX1543

(Intuit) at 19)). [REDACTED]

[REDACTED] (PFF ¶710).

[REDACTED]. Instead, the TY22 Test shows that consumers are not under a misimpression about their ability to file their taxes for free with TurboTax. (PFF ¶¶711, 713).

In any event, the Proposed Finding should not be given any weight because it was not properly disclosed. The only “[a]cademics” that the Proposed Finding cites were discussed in Professor Novemsky’s rebuttal report (aside from Dr. Hauser’s deposition, which as explained, does not support the Proposed Finding). And as this Court has recognized, “the function of rebuttal is to explain, repel, counteract or disprove *the evidence of the adverse party.*” (*In re Pom Wonderful LLC*, 2011 WL 1429882, at *2 (F.T.C. Apr. 5, 2011) (emphasis added)). It is not an opportunity to “bolster” opinions offered in support of Complaint Counsel’s “case-in-chief.” (*In re ECM BioFilms Inc.*, 2014 WL 4651910 (F.T.C. Sept. 5, 2014)). Yet that is precisely how Complaint Counsel attempt to use this Proposed Finding: They seek to bolster Professor Novemsky’s prior opinions, offered in his opening report, about the TY20 Test. Professor Novemsky had no basis for waiting until his rebuttal report to disclose this aspect of his opinion about the TY20. The Court should disregard this aspect of his opinion as untimely and improperly disclosed.

571. Additional materials relied on by Professor Novemsky are Intuit documents that show the wide dissemination of “free” advertising. (GX303 (Novemsky Expert Report) ¶ 96 (citing GX431 (Intuit), GX432 (Intuit) and GX433 (Intuit)); *see also* GX749 (Novemsky Rebuttal Expert Report) ¶ 15).

Response to Finding No. 571:

The Proposed Finding is misleading insofar as it suggests that the “wide dissemination” of Intuit’s marketing messages is evidence of deception. It is not. As Intuit explained, all of

Intuit’s video ads stated (1) that the ad was for a specific TurboTax SKU that was actually free, (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 ¶¶215-218, 244, 248-251, 262). The “wide dissemination” of those ads was not likely to mislead a significant minority of reasonable consumers about their ability to file their taxes for free with TurboTax.

6. Hauser Criticisms of Novemsky Survey Are Unfounded and Unpersuasive

572. Professor Hauser presents a number of criticisms of Professor Novemsky’s survey and conclusions, (RX1017 (Hauser Expert Report) Section IV), which are unfounded and unpersuasive. (GX749 (Novemsky Rebuttal Expert Report) ¶ 3).

Response to Finding No. 572:

The Proposed Finding—which is devoid of any factual content—is incorrect because Dr. Hauser’s criticisms of Professor Novemsky’s survey are both well-founded and persuasive, for the numerous reasons Intuit has provided (PFF ¶¶530-622).

b. Sampling and Target Population

573. Professor Hauser claims that the perception survey has a sampling bias (RX1017 (Hauser Expert Report) Section IV.C.; Hauser (Intuit) Tr. 894) but his claims are speculative and not supported by any evidence. (GX749 (Novemsky Rebuttal Expert Report) ¶ 72).

Response to Finding No. 573:

The Proposed Finding—which is devoid of any factual content—is incorrect because Dr. Hauser’s concerns about sampling bias are supported by evidence and are by no means speculative. For example, Dr. Hauser’s criticisms of Professor Novemsky’s focus on participants who had not filed with TurboTax in at least three years are supported by the results of Professor Novemsky’s own screening questions. (*See* PFF ¶551). Responses to those questions revealed that 69.1% of those Group A respondents had filed their taxes with a competitor in the previous

three years. (PFF ¶551 (citing GX757 (FTC) at S120, S130; RX Summary 1). Given that, Group A members are likely to have been influenced by advertising from TurboTax competitors, rather than by TurboTax advertising, and any misimpression among Group A members is unlikely to have been caused by TurboTax advertising. (PFF ¶552).

Likewise, Dr. Hauser's criticisms of Professor's Novemsky's decision to exclude participants who had already filed their taxes is supported by evidence. For one thing, Professor Novemsky appears to agree with Dr. Hauser's common-sense assertion that consumers who had already filed were more likely to be familiar with the qualifications for free TurboTax SKUs. (GX303 (Novemsky Expert Report) ¶22; *see also* PFF ¶547). Moreover, Dr. Hauser has cited a 2018 study demonstrating that early filers tend to be younger and have lower incomes than later filers. (RX1017 (Hauser Expert Report) ¶40 (citing RX772 (Intuit)). As Dr. Hauser explained, those "discrepancies in demographics" indicate that Professor Novemsky's survey population was "not representative of the population of 'taxpayers who do not qualify to use TurboTax Free Edition.'" (RX1017 (Hauser Expert Report) ¶40).

Finally, Dr. Hauser has provided evidence of bias due to litigation awareness. As explained, 24.1% of respondents in his Disclosure Efficacy Survey indicated possible litigation awareness. (PFF ¶562; Hauser (Intuit) Tr. 905-906; RX1017 (Hauser Expert Report) ¶42 n.75). Dr. Hauser, however, safeguarded against such awareness by disguising the TurboTax brand name and using a test and control group. (RX1017 Hauser Expert Report) ¶42 n.75). Professor Novemsky, by contrast has no way of safeguarding against litigation awareness. (PFF ¶539).

574. Professor Hauser expressed concern that the perception survey population did not include tax filers who had already filed their taxes, in part because such taxpayers would be very familiar with TurboTax or competitive products and would already know whether or not they can file for free, and in part because such taxpayers may differ from other taxpayers, (RX1017 (Hauser Expert Report) ¶ 40; Hauser (Intuit) Tr. 901), but Professor Hauser provides no reliable evidence that later tax filers are different from tax filers who file

early in the season, (GX749 (Novemsky Rebuttal Expert Report) ¶ 76), and ignores the purpose of the perception survey: to test perceptions in the marketplace *prior* to purchase of a tax preparation option. (GX303 (Novemsky Expert Report) ¶ 22).

Response to Finding No. 574:

The Proposed Finding is incorrect because Dr. Hauser has provided “reliable evidence that later tax filers are different from tax filers who file early in the season.” For one thing, as just explained (Response to CCFF ¶573), Professor Novemsky appears to agree with Dr. Hauser’s common-sense assertion that consumers who had already filed were more likely to be familiar with the qualifications for free TurboTax SKUs. (GX303 (Novemsky Expert Report) ¶22; *see also* PFF ¶547). Moreover, Dr. Hauser has cited a 2018 study demonstrating that early filers tend to be younger and have lower incomes than later filers. (RX1017 (Hauser Expert Report) ¶40 (citing RX772 (Intuit)). As Dr. Hauser explained, those “discrepancies in demographics” indicate that Professor Novemsky’s survey population was “not representative of the population of ‘taxpayers who do not qualify to use TurboTax Free Edition.’” (RX1017 (Hauser Expert Report) ¶40).

The Proposed Finding is also incorrect in that it misstates the claimed purpose of Professor Novemsky’s survey. As Professor Novemsky himself put it in his report, the purpose was to assess consumers “when tax filing is more top-of-mind.” (GX303 (Professor Novemsky Report) ¶22). Professor Novemsky fails to explain why recent filers do not fit that criteria and should have been excluded from the survey.

Finally, the Proposed Finding is that Dr. Hauser has “ignore[d] the purpose of the perception survey.” As Dr. Hauser explained at trial, Professor Novemsky “put a lot of emphasis on the fact that taxpayers would be filing their taxes very soon after his survey, but yet we know a large number of people in the sample ... will not have filed their taxes for another seven months” because of obtaining an extension. (Hauser (Intuit) Tr. 902-903). Indeed, as discussed

in Intuit's proposed findings (PFF ¶548), about 40% of the taxpayers in the United States who had not filed their taxes by March ultimately obtained an extension, and Professor Novemsky did not take any measures to determine whether any of his survey respondents were getting an extension. There is no reason to believe that those taxpayers were actively thinking about the taxes at the time of the survey. (PFF ¶588). As Dr. Hauser testified, Professor Novemsky's inclusion of such taxpayers undermined his claimed purpose. (Hauser (Intuit) 902-903).

575. Professor Hauser also pointed out that Professor Novemsky did not screen out "litigation aware" consumers, (RX1017 (Hauser Expert Report) ¶ 42; Hauser (Intuit) Tr. 905-906), but there is no evidence of litigation aware consumers and no basis to believe that litigation aware respondents would systematically differ from the others with respect to the extent of their misperceptions about TurboTax, and thus there is no reason to think that their existence would bias or negate the perception survey results. (GX749 (Novemsky Rebuttal Expert Report) ¶ 75; *see also* Novemsky (Complaint Counsel) Tr. 469 ("Q. So you didn't do anything to identify whether or not any of the people that participated in your survey were aware of the litigation, right? A. I did. I looked at thousands of open-ended responses to see if there was any mention of the litigation and I found exactly one out of the thousand.")).

Response to Finding No. 575:

The Proposed Finding is incorrect because Dr. Hauser has provided evidence of bias due to litigation awareness. As explained (Response to CCF ¶573), 24.1% of respondents in Dr. Hauser's Disclosure Efficacy Survey indicated possible litigation awareness. (PFF ¶562; Hauser (Intuit) Tr. 905-906; RX1017 (Hauser Expert Report) ¶42 n.75). The only reason Dr. Hauser cannot cite a corresponding percentage in Professor Novemsky's survey is because Professor Novemsky failed to ask the relevant questions. And although the Proposed Finding cites testimony from Professor Novemsky stating that he "looked at thousands of open-ended responses to see if there was any mention of the litigation," none of those open-ended questions related to litigation, so there is no reason to expect participants to have revealed litigation awareness in their answers. (Hauser (Intuit) Tr. 906).

The Proposed Finding is also incorrect because there are obvious “reason[s] to think that [litigation awareness] would bias or negate” Professor Novemsky’s survey results. The survey asked about the source(s) of consumers’ beliefs about their ability to file for free using TurboTax; for litigation-aware respondents, the source of that belief could be their understanding (incomplete, mistaken, or otherwise) of allegations in litigation or of media reporting about those allegations. (See RX1017 (Hauser Expert Report) ¶42 & n.74). Or more generally, litigation-aware respondents may have come into the survey with existing beliefs about TurboTax that would have led them to answer the questions differently than consumers who were not aware of litigation. (RX1017 (Hauser Expert Report) ¶42). It is precisely for reasons like these that “it is typical in surveys for the purpose of litigation to ask respondents if they are familiar with” any relevant litigation. (RX1017 (Hauser Expert Report) ¶42).

576. Professor Hauser also discussed that respondents were able to opt out of the perception survey at the conclusion of the survey, (RX1017 (Hauser Expert Report) ¶ 41; Hauser (Intuit) Tr. 903-904), but Professor Hauser has no basis or evidence for the notion that opt-out respondents may be systematically different from remaining respondents in a way that would impact the results of the perception survey, and does not propose a reason why such an impact would exist. (GX749 (Novemsky Rebuttal Expert Report) ¶ 73).

Response to Finding No. 576:

The Proposed Finding is incorrect because Dr. Hauser has a well-founded basis for believing that those who opted out chose to do so because of reasons that differentiated them from those who chose not to opt out. For one thing, the FTC itself has explained that “complete[] transparen[cy] about the nature or purpose of a survey,” such as through the opt-out screen employed by Professor Novemsky, may “create bias in the consumers’ decision to participate in the survey or potentially result in biased responses” which “would affect the accuracy and validity of the information collected and effectively nullify the survey.” (PFF ¶558). That risk is particularly acute here because the opt-out screen expressly informed

participants of Professor Novemksy's specific purpose: The screen stated that the survey was conducted on behalf of the "nation's consumer protection agency," "to collect information" about Intuit, in order to "investigate[] unfair and deceptive conduct." (See PFF ¶556). After seeing that language, it is entirely reasonable to infer that participants with more favorable views of TurboTax were more likely than others to opt out, in order to avoid providing information that would be used *against* Intuit. (PFF ¶558).

The Proposed Finding is also misleading because it ignores that any lack of concrete evidence is attributable to Professor Novemsky's decision to delete all information about those who opted out. (See CCFF ¶542; PFF ¶¶556-557; RX1017 (Hauser Expert Report) ¶41; Hauser (Intuit) Tr. 903-904). Complaint Counsel and Professor Novemsky cannot destroy evidence of possible bias and then fault Intuit for failing to come forward with such evidence. It is their burden to demonstrate that the survey is reliable. (See, e.g., *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 590-592 & n.10 (1993); *López-Ramírez v. Toledo-González*, 32 F.4th 87, 94 (1st Cir. 2022)).

Finally, the Proposed Finding is incorrect that Dr. Hauser has no basis for believing that Professor Novemsky's opt-out mechanism could have "impact[ed] the results" of Professor Novemsky's survey. As Professor Novemsky acknowledges (see CCFF ¶545), the opt-out flaw has the potential to alter his reported survey results in Group A by 15%. Given the wide range of additional flaws with the survey and their independent impacts on the survey results, the entire survey is not scientifically valid and should be given no weight whatsoever.

577. Making conservative assumptions about survey respondents who opted out would still show that 37.5% of consumers who did not use TurboTax in the last three years were under the misimpression that they could use TurboTax for free. (GX303 (Novemsky Expert Report) ¶ 71; GX749 (Novemsky Rebuttal Expert Report) ¶ 74; Novemsky (Complaint Counsel) Tr. 397-398).

Response to Finding No. 577:

The Proposed Finding is incorrect because it ignores the myriad other flaws with Professor Novemsky's survey. As Intuit has explained at length, Professor Novemsky's focus on Group A (those who had not used TurboTax in the last three years) was itself another source of bias because those participants were particularly unlikely to have seen or paid attention to any recent TurboTax advertising—and particularly vulnerable to the survey's flawed questions and demand artifacts. (PFF ¶¶551-552, 571-578, 592-607). Moreover, the Proposed Finding illustrates why Professor Novemsky's survey results are unreliable: Just one of the likely flaws in Professor Novemsky's survey has the potential to alter his reported survey results by 15%. Given the wide range of additional flaws with the survey and their independent impacts on the survey results, the entire survey is not scientifically valid and should be given no weight whatsoever.

c. Survey Structure

578. Professor Hauser criticizes the perception survey for not using a test / control design, stating that Professor Novemsky could not establish if there was anything about any one particular ad that was causing a misimpression (RX1017 (Hauser Expert Report) ¶ 26; Hauser (Intuit) Tr. 896, 900), but he ignores that this is precisely the objective of the perception survey, to measure the cumulative effect of Intuit's marketing campaign (GX749 (Novemsky Rebuttal Expert Report) ¶¶ 21-23), and the survey design was appropriate for that objective. (GX749 (Novemsky Rebuttal Expert Report) ¶¶ 17-28).

Response to Finding No. 578:

The Proposed Finding is incorrect because Professor Novemsky's survey design was *not* appropriate for measuring the “the cumulative effect of Intuit's marketing campaign.” To the contrary, as Professor Novemsky himself acknowledged, his survey measured the cumulative effect of “*everything*”—i.e., every possible source of information—“that was in the marketplace up until the time of [the] survey.” (Novemsky (FTC) Tr. 1827 (emphasis added)). Professor Novemsky also stated that participants answered his survey questions “having seen whatever

they saw in the world”—which may or may not have included any TurboTax words, participants. (Novemsky (FTC) Tr. 405). And as Dr. Hauser explained, without a test-control design, Professor Novemsky had no way of isolating TurboTax’s marketing from whatever else his participants may have seen and no way of measuring the specific effect of that TurboTax marketing. (PFF ¶551 (citing Hauser (Intuit) Tr. 847-850; RX1017 (Hauser Expert Report) ¶27)).

In fact, without a control group, Dr. Hauser explained, Professor Novemsky’s results also include the impact of the ordering and phrasing of the survey question themselves—i.e., “survey noise.” (PFF ¶539 (citing Hauser (Intuit) Tr. 849-850, 896-897, 920-926, 940-945; RX1017 (Hauser Expert Report) ¶¶27-28, 33). Even without a test-control design, Professor Novemsky could have asked a control group the same survey questions he asked his main survey group about TurboTax, but with a fictional brand name that does not conduct any marketing substituted for TurboTax. (PFF ¶539). That would have enabled him to estimate the portion of his survey results caused by the survey instrument itself and subtract that out from his survey results concerning TurboTax. (PFF ¶539). Without a control group, though, Professor Novemsky cannot rule out possible alternative causes within his own survey.

Finally, the Proposed Finding is incorrect in saying that Dr. Hauser “ignores” Professor Novemsky’s “objective” “to measure to measure the cumulative effect of Intuit’s marketing campaign.” To the contrary, Dr. Hauser has persuasively explained why Professor Novemsky could have accomplished that objective in a test-control study. As noted in Dr. Hauser’s report, “literature on advertising effectiveness” shows that the impact of advertising “is greatest immediately following consumer exposure and that the impact ‘decays’ over time.” (RX1017 (Hauser Expert Report) ¶31). Repetition alone, moreover, in a long-term “marketing campaign”

would not mitigate that decay effect; to the contrary, it could lead to a “wear-out” effect, in which the message would become *less* impactful over time. (Hauser (Intuit) Tr. 891). On top of that, Dr. Hauser explained, “showing respondents a stimulus in a survey context could encourage respondents to focus on the stimulus more than they might in the marketplace.” (RX1017 (Hauser Expert Report) ¶31). Together, these two dynamics mean that a test-control survey “could if anything in result in an overmeasurement, rather than an undermeasurement,” of consumer impressions or reactions—which a scientist could then account for when analyzing and presenting his or her survey results. (RX1017 (Hauser Expert Report) ¶31). Thus, a properly designed test-control experiment could accurately estimate the cumulative effect of TurboTax’s marketing. (*See* RX1017 (Hauser Expert Report) ¶¶31-32).

579. Professor Hauser also claims that sources other than TurboTax advertising could cause consumer misimpressions (RX1017 (Hauser Expert Report) ¶ 38), but Professor Hauser fails to provide any evidence of a plausible alternative and is refuted by data about advertising dissemination. (GX749 (Novemsky Rebuttal Expert Report) ¶¶ 16, 43-46, Figure 4; Novemsky (Complaint Counsel) Tr. 369-370, 485).

Response to Finding No. 579:

The Proposed Finding is incorrect because Dr. Hauser has identified numerous plausible alternative causes of Professor Novemsky’s dubious survey results (*see* PFF ¶¶608-612). He has, for example, identified the ads and websites of TurboTax’s competitors, as well as his survey respondents’ past experiences. (PFF ¶598). And perhaps most importantly, he has identified numerous possible alternative causes within Professor Novemsky’s survey itself—like the invitations to guess and the demand artifacts that primed participants to select the answer choices favoring Complaint Counsel’s allegations. (PFF ¶¶566-607). Again, without a control group, Professor Novemsky has no way of eliminating that survey noise from his results. (PFF ¶539).

The “data about advertising dissemination” referenced in the Proposed Finding does absolutely nothing to eliminate survey noise as a possible alternative cause, and Professor

Novemsky does not argue otherwise. Instead, Professor Novemsky argues that dissemination data enables him “to rule out competitor advertising as a source of beliefs related to TurboTax” (CCFF ¶558), but that is wrong. As Dr. Hauser explained, dissemination data merely shows “that TurboTax has a large share-of-voice”—i.e., that Intuit conducted more TV advertising for free SKUs (and therefore generated more impressions) than its competitors. (Hauser (Intuit) Tr. 911). The dissemination data is incomplete, though: It is limited to television advertising and does not include other advertising channels, like social media display ads, paid search, email, and radio. (CCFF ¶¶549-551). The dissemination data therefore cannot rule out competitors’ websites and competitors’ non-TV marketing as possible alternative sources. And even looking at only TV advertising, competitors’ ads still generated billions of impressions (GX749 (Novemsky Expert Report) Figure 4), so it is entirely plausible that they were a source of consumers’ beliefs.

d. Hauser’s Flawed Coding of Open-Ended Survey Responses

580. Professor Hauser instructed blind coders to code responses to open-ended questions in the perception survey. (RX1017 (Hauser Expert Report) ¶ 53; Hauser (Intuit) Tr. 226-227).

Response to Finding No. 580:

Intuit has no specific response, except to note that Professor Novemsky did not use blind-coders to review the responses to the open-ended questions in his survey, and he did consider those open-ended responses in determining who had a misimpression about their ability to file for free using TurboTAX. (See PFF ¶580).

581. He instructed coders to review responses to the following open-ended questions:

- 1) TAT220: “What is your understanding about whether or not there is a cost to filing your own income taxes using TurboTax online software?”
- 2) TAT230: “You may have already said this above, but please tell us again, in your understanding, who, if anyone, can file their taxes for free using TurboTax online software?”

(RX1017 (Hauser Expert Report) ¶ 53 & fn. 101).

Response to Finding No. 581:

Intuit has no specific response except to note that these two questions directly preceded TAT240, Professor Novemsky’s closed-ended question about whether participants believed they could file for free using TurboTax. (RX1017 (Hauser Expert Report) ¶53).

582. Professor Hauser’s coding methodology of open-ended responses to the perception survey relies on a faulty procedure that includes a disconnect between coding instructions and interpretations of the results. (GX749 (Novemsky Rebuttal Expert Report) ¶¶ 53, 58). Professor Hauser instructed the coders to code responses to the two different open-ended questions to response options provided in a third question, TAT240 (“You may have already said this above, but please tell us again, which of the following best describes your understanding of filing your 2021 income taxes for free using TurboTax online software?”). (RX1017 (Hauser Expert Report) ¶ 54, Figure 2; Hauser (Intuit) Tr. 228-229).

Response to Finding No. 582:

The Proposed Finding is incorrect. It is entirely unclear what Complaint Counsel when they say that Dr. Hauser’s coding methodology “includes a disconnect between coding instructions and interpretations of the results,” but it suffices to say that Complaint Counsel have not identified *anything* about Dr. Hauser’s coding methodology and instructions that was “faulty” or scientifically improper. Instead, Complaint Counsel merely highlight isolated examples of decisions the blind coders made with which Professor Novemsky disagrees.

Those isolated examples do not change Dr. Hauser’s ultimate conclusion—which was that the number of inconsistent responses (44% across both of Professor Novemsky’s survey groups) reinforced that TAT240 was a scientifically invalid and unreliable means of measuring consumers’ impressions (PFF ¶588). Indeed, Dr. Hauser testified that if that 44% was reduced to 22% or even 11%, that would still be “a real concern about the reliability and validity of Professor Novemsky’s survey.” (Hauser (Intuit) Tr. 932).

Moreover, as Dr. Hauser has explained, it is Professor Novemsky's methodology of double-checking the blind coders that is scientifically improper—because Professor Novemsky is not blind to the facts of the case. Dr. Hauser testified at trial that “[i]t would be inappropriate and unscientific for either me or Professor Novemsky to read through those answers and categorize them one way or another, because we are not blind to the hypotheses. Try as we might, our subconscious biases may come in.” (Hauser (Intuit) Tr. 927). For that reason, the “standard scientific method is to recruit coders who are totally blind to the hypothesis,” which is what Dr. Hauser did. (Hauser (Intuit) Tr. 927). Professor Novemsky never did that, and his approach of re-coding the responses himself is scientifically inappropriate.

583. Illustrative of the flawed methodology is that the coding resulted in a number of open-ended responses being categorized as inconsistent when they were not clearly inconsistent. (GX749 (Novemsky Rebuttal Expert Report) ¶¶ 57-60, Figures 5-8); *see also* Novemsky (Complaint Counsel) Tr. 525-526).

Response to Finding No. 583:

The Proposed Finding is incorrect. As an initial matter, have not identified *anything* about Dr. Hauser's coding methodology and instructions that was “flawed” or scientifically improper. Furthermore, the authorities cited in the Proposed Finding merely identify isolated examples of decisions the blind coders made with which Professor Novemsky disagrees. Indeed, the cited paragraphs of Professor Novemsky's rebuttal report identify just 22 examples. Even if those 22 examples were not considered inconsistent, Dr. Hauser's ultimate conclusion would remain the same: It would merely reduce the population of inconsistent respondents from 44% (across both of Professor Novemsky's survey groups) to 40.3%. And Dr. Hauser testified that if the population of inconsistent respondents were as low as 22% or even 11%, that would be “a real concern about the reliability and validity of Professor Novemsky's survey.” (Hauser (Intuit) Tr. 932). Elsewhere in his rebuttal report, Professor Novemsky contends that “[m]y review of

the purported 267 ‘inconsistencies’ revealed that 161 of them were inaccurately categorized.” (See GX749 (Novemsky Rebuttal Report) ¶61). But even if all 161 respondents were not considered inconsistent, it would still leave 106 respondents (or 16%) of survey respondents whom Professor Novemsky concedes were properly categorized as inconsistent—well within the range that Dr. Hauser testified would cause concerns.

Moreover, as Dr. Hauser has explained, Professor Novemsky’s methodology of double-checking the blind coders is scientifically improper—because Professor Novemsky is not blind to the facts of the case. Dr. Hauser testified at trial that “[i]t would be inappropriate and unscientific for either me or Professor Novemsky to read through those answers and categorize them one way or another, because we are not blind to the hypotheses. Try as we might, our subconscious biases may come in.” (Hauser (Intuit) Tr. 927). For that reason, the “standard scientific method is to recruit coders who are totally blind to the hypothesis,” which is what Dr. Hauser did. (Hauser (Intuit) Tr. 927). Professor Novemsky never did that, and his approach of re-coding the responses himself is not scientifically appropriate.

584. For example, Professor Hauser coded a survey respondent as “inconsistent” when the respondent who did not have a simple return as Intuit defines it stated in open-ended responses that “[s]ome filings are free” and that TurboTax was free for “[a]nyone with a simple return” and went on to say in response to a third open-ended question that they had “just simple income forms.” (GX749 (Novemsky Rebuttal Expert Report) Figure 5).

Response to Finding No. 584:

The Proposed Finding is incorrect because Dr. Hauser did not “code[]” any survey respondents’ answers. As Intuit explained (PFF ¶¶582-583), the blind coders assigned each survey participant to one of six categories based only on their review of TAT220 and TAT230; and if the assigned category differed from the response the participant gave to TAT240, the respondent was deemed to have provided inconsistent responses.

The Proposed Finding is also misleading because the blind coders did not have access to the referenced “third open-ended” response. (RX1017 (Hauser Expert Report) ¶53). As Dr. Hauser explained, he provided the blind coders the responses to only TAT220 and TAT230 because those were the open-ended questions that immediately preceded TAT240, the closed-ended question that Dr. Hauser was evaluating for possible flaws. (RX1017 (Hauser Expert Report) ¶53; Hauser (Intuit) Tr. 931-932). Providing the blind coders additional open-ended responses that came *after* TAT240 “would have contaminated their evaluation” of TAT240, because those open-ended responses could have been influenced by participants’ prior exposure to TAT240. (Hauser (Intuit) Tr. 931-932).

Relatedly, the Proposed Finding is misleading insofar as it suggests that the blind coders’ categorization of this particular survey participant was somehow unreasonable or indefensible. Again, the blind coders only had access to the TAT220 response (“[s]ome filings are free”) and the TAT230 response (that TurboTax was free for “[a]nyone with a simple return”). Based on those responses, the blind coders coded this participant as “I’m not sure,” which was inconsistent with the respondent’s answer to TAT240. (GX760 (FTC) (survey participant 1291). Given the universe of information available to the blind coders, there is nothing inherently reasonable about their coding determination. As Dr. Hauser explained, “I’m not going to agree with every categorization” and “there’s going to be some particularly at the borderline that we can argue one way or the other, but on average, [the methodology] is going to be correct.” (Hauser (Intuit) Tr. 930). This isolated example does not cast any doubt on that testimony.

The Proposed Finding is also incorrect and misleading in suggesting that this one example would change the conclusion Dr. Hauser draws from the blind coders’ analysis. Even if this isolated example were removed from the group of inconsistent respondents, the remaining

population of inconsistent responses would still be close to 44%. And as noted (Responses to CCF ¶¶582-583), Dr. Hauser testified that if the population of inconsistent respondents were as low as 22% or even 11%, that would be “a real concern about the reliability and validity of Professor Novemsky’s survey.” (Hauser (Intuit) Tr. 932).

Finally, it bears emphasis again that Professor Novemsky’s methodology of double-checking the blind coders is scientifically improper—because Professor Novemsky is not blind to the facts of the case. Dr. Hauser testified at trial that “[i]t would be inappropriate and unscientific for either me or Professor Novemsky to read through those answers and categorize them one way or another, because we are not blind to the hypotheses. Try as we might, our subconscious biases may come in.” (Hauser (Intuit) Tr. 927). For that reason, the “standard scientific method is to recruit coders who are totally blind to the hypothesis,” which is what Dr. Hauser did. (Hauser (Intuit) Tr. 927). Professor Novemsky did not do that, and his approach of re-coding the responses himself is not scientifically appropriate.

585. Professor Hauser also discusses that coding of open-ended responses shows that some consumers are aware of eligibility restrictions (RX1017 (Hauser Expert Report) ¶ 71) but does not address that the survey shows that consumers are under the misimpression about what those criteria mean for them. (GX749 (Novemsky Rebuttal Expert Report) ¶¶ 68-69).

Response to Finding No. 585:

The Proposed Finding is incorrect because Dr. Hauser *does* “address Professor Novemsky’s conclusion that “consumers are under a misimpression about what [the eligibility] criteria mean for them.” Although the Proposed Finding does not specify, Complaint Counsel appear to be referring to the results from question TAT290 of Professor Novemsky’s survey, which was Professor Novemsky’s question about “simple U.S. returns” and is discussed at length above with numerous citations to Dr. Hauser’s report (*See* Responses to CCF ¶¶491-497). Again, in that question, Professor Novemsky provided his survey respondents no context about

the significance of “simple U.S. return,” and he provided them none of the additional information that would be presented to consumers viewing a TurboTax ad in the actual marketplace. (RX1017 (Hauser Expert Report) ¶¶66). As explained at length in Intuit’s proposed findings (PFF ¶¶244, 262, 275, 290, 299), the use of “simple tax returns” in TurboTax’s marketing was almost always accompanied by (1) an express reference to a specific TurboTax SKU that was actually free, and (2) language stating that there was additional information about the SKU and its qualifications on the TurboTax website (or a hyperlink taking consumers directly to the TurboTax website). Indeed, Complaint Counsel concede that the TurboTax website—and all of the additional information it provides about “simple tax returns”—is integrated into the challenged ads themselves. (*See* CCFF¶455; PFF ¶¶364-441). Having concealed all of that additional information from his survey participants, Professor Novemsky’s survey results are meaningless for assessing the use of “simple returns only” in TurboTax’s ads.

Professor Novemsky’s decision to conceal this information from his survey participants is particularly egregious because in the marketplace, any reasonable consumers who are unsure about whether their tax situation qualifies as a simple tax return would know to conduct research and seek out additional information. (PFF ¶131; Golder (Intuit) Tr. 1084-1085, 1120-1121). By inviting consumers to the TurboTax website, TurboTax’s ads simply reinforce that natural consumer behavior. (PFF ¶326). Consumer research about “simple tax returns,” moreover, would likely take mere seconds, as the answer is easily accessible through Internet search engines and the TurboTax website. (PFF ¶¶131-133). And consumers would know what kind of information to be looking for: As Professor Novemsky himself acknowledged, consumers understand that “simple returns only” conveys that the ability to use free TurboTax SKUs or offers depends on the “complexity or simplicity” of the taxpayer’s return. (PFF ¶136).

In his survey, though, Professor Novemsky prevented participants from engaging in this natural information-search process—instead asking them to make a low-stakes judgment (indeed, the participants in his survey were not making an actual purchase decision), based on only a fraction of the information they would have at their fingertips when actually choosing a tax-preparation provider. (RX1017 (Hauser Expert Report) ¶¶66 (“respondents in the Novemsky Survey ... are not given any means or incentives to obtain information”). Under those circumstances, it is hardly surprising that many consumers would guess that they do have a simple tax return. Indeed, as Professor Novemsky acknowledges, respondents were “more likely to answer ‘yes’ to this question [TAT290] because [of] motivated reasoning, wishful thinking, and optimistic bias.” (GX303 (Novemsky Expert Report) ¶87; RX1017 (Hauser Expert Report) ¶¶66-67).

586. Moreover, variances between open and closed ended survey responses is common and to be expected. (RX1391 (Hauser (Intuit) Dep.) at 109-110).

Response to Finding No. 586:

The Proposed Finding is misleading because it takes Dr. Hauser’s deposition out of context, and it is irrelevant. The blind coders’ analysis of Professor Novemsky’s open-ended responses was not designed to identify “variances” between the open- and closed-ended responses; it was designed to identify inconsistencies. And in a portion of Dr. Hauser’s deposition that Complaint Counsel ignore, Dr. Hauser made clear that outright inconsistencies across open- and closed-ended responses are not to be expected. (*See* RX1391 (Hauser (Intuit) Dep. at 131).

As for the part of the deposition that Complaint Counsel do cite in the Proposed Finding, the point that Dr. Hauser was making was that researchers expect differences “between what people can pull from memory and what they can do with respect to a prompt.” (RX1391 (Hauser

(Intuit) Dep.) at 109-110). And the example he gave was the difference between how participants would respond to an open-ended question asking them to name as many brands of deodorant as they can, in contrast to a closed-ended question asking them to identify the brands they are familiar with from a list of 35 brands. (RX1391 (Hauser (Intuit) Dep.) at 109-110). As Dr. Hauser explained, researchers would expect participants to identify fewer brands in response to the open-ended question than in response to the closed-ended question. (RX1391 (Hauser (Intuit) Dep.) at 109-110). Nothing about the responses would be inconsistent, though—i.e., outright contradictory. Moreover, unlike the deodorant example, Professor Novemsky’s closed-ended answer options did not provide survey participants any information that would jog their memory; instead, the closed-ended question encouraged participants to guess that they could file for free. (See PFF ¶¶568-578). The cited deposition testimony from Dr. Hauser is accordingly irrelevant to Professor Novemsky’s survey, and it does not justify the inconsistencies between Professor Novemsky’s open-ended and closed-ended responses.

e. Survey Questions

587. Professor Hauser claims that question TAT240 emphasizing “free” in the question and providing answer options that start with “I think” creates demand artifacts and encourages guessing, (RX1017 (Hauser Expert Report) ¶ 46; Hauser Tr. 222-223), but Professor Novemsky employed best practices to discourage guessing. (GX303 (Novemsky Expert Report) ¶¶ 58, 81; GX749 (Novemsky Rebuttal Expert Report) ¶ 48; Novemsky (Complaint Counsel) Tr. 391-393, 394-395, 396).

Response to Finding No. 587:

The Proposed Finding—which is devoid of any factual content—is incorrect because Professor Novemsky did not employ best practices to discourage guessing. With respect to TAT240, the phrases “I think” and “I don’t think” *encouraged* guessing. Had Professor Novemsky shown his survey participants any of the challenged ads or the TurboTax website, it may have been reasonable to use such answer choices. However, as Dr. Hauser explained in his

report, “in the absence of any information provided by the survey itself [about the qualifications for free TurboTax SKUs] and having not yet filed their taxes for the year,” survey respondents would “be more prone to guessing.” (RX1017 (Hauser Expert Report) ¶48).

In this context, the practices Professor Novemsky took to discourage guessing were insufficient. The instruction not to guess came earlier in the survey and there is no reason to believe participants were thinking of it by the time they reached the two key questions from which Professor Novemsky drew his survey results (TAT240 and TAT255). (GX303 (Novemsky Expert Report) App’x E at 7; Hauser (Intuit) Tr. 922-923). The quasi-filters, moreover, were unlikely to prevent respondents from guessing in response to TAT240 because they were phrased more definitively than the substantive answer choices, which were phrased as “I think” statements. (PFF ¶569).

588. Additionally, Professor Hauser ignores that whether consumers “think” they can or cannot file for free is a relevant standard to determine whether consumers might act on their beliefs. (GX303 (Novemsky Expert Report) ¶ 49; GX749 (Novemsky Rebuttal Expert Report) ¶ 82).

Response to Finding No. 588:

The Proposed Finding is incorrect because Dr. Hauser does not ignore this issue whatsoever, and has instead explained why TAT240’s use of the word “think” was inappropriate in the context in which it was used. As noted (Response to CCFF ¶526), had Professor Novemsky shown his survey participants any of the challenged ads or the TurboTax website, it may have been reasonable to use “I think” answer choices. But as Dr. Hauser explained, “in the absence of any information provided by the survey itself [about the qualifications for free TurboTax SKUs] and having not yet filed their taxes for the year,” survey respondents would “be more prone to guessing.” (RX1017 (Hauser Expert Report) ¶48). And when a respondent guesses in a survey—having been provided none of the information that would be available in

the real-world marketplace and having been presented with a question that invites guessing—that does not establish that the respondent is under a misimpression. (RX1017 (Hauser Expert Report) ¶48). Many consumers who guess in a survey environment would research further when making a purchase decision in the actual marketplace—research that could take mere seconds (*see* PFF ¶¶131-133).

Intuit has never argued that a consumer must be certain in their belief in order to be deceived; instead, as Dr. Hauser explained, the problem with Professor Novemsky’s survey is that it *invites* participants who are uncertain about their ability to file for free to guess that they can file for free and “does not take any steps to measure or control for th[e] range in respondent certainty.” (RX1017 (Hauser Expert Report) ¶47). Absent any such steps, Professor Novemsky cannot know whether *any* of his survey respondents are sufficiently certain about their ability to file for free that they would “try using TurboTax” in the actual marketplace without doing even seconds more research.

589. Professor Hauser also claims that because six survey respondents mentioned the survey instrument in open-ended responses, the perception survey suffered from demand artifacts (RX1017 (Hauser Expert Report) ¶ 44; Hauser (Intuit) Tr. 224-225), but that represents less than 1% of the survey respondents and is not evidence of any pervasive demand artifacts (GX749 (Novemsky Rebuttal Expert Report) ¶ 47; Novemsky (Complaint Counsel) Tr. 524 (“Q. And what proportion of your total survey population are those six respondents? A. They are less than 1 percent. Q. And what does that proportion say to you about the reliability of your survey? A. It says the reliability is very good. They were asked directly why do you think this, and if less than 1 percent say it was something about the survey, it suggests that the survey was not a substantial cause of this misperception.”)).

Response to Finding No. 589:

The Proposed Finding is incorrect because the six survey responses that mentioned the survey instrument is evidence of a potentially pervasive demand artifact. Those six responses—which came in response to questions that did not reference the survey instrument—strongly suggest that many other respondents were influenced in the same way but did not voice it. (PFF

¶577). Moreover, many survey participants may have been influenced by the demand artifact subconsciously, without realizing it; those survey participants would not be expected to voice the effect. Thus, as Dr. Hauser put it in his report, “[t]o have respondents actively note the impact of the survey on their answers without prompting is strongly indicative of a more widespread demand artifact issue.” (RX1017 (Hauser Expert Report) ¶44).

590. Professor Hauser also claims that question TAT255 suffers from a demand artifact because TurboTax is mentioned a number of times in the survey instrument, (RX1017 (Hauser Expert Report) ¶ 57; Hauser (Intuit) Tr. 940-941), but Professor Novemsky designed his survey in accordance with best practices, including framing the questions in a way that was clear and not leading, and by providing quasi-filter answer options and instructing survey participants not to guess. (GX749 (Novemsky Rebuttal Expert Report) ¶¶ 93-94).

Response to Finding No. 590:

The Proposed Finding is incorrect because Professor Novemsky did not design his survey in accordance with best practices, and he did not adequately safeguard against demand artifacts. For one thing, the quasi-filter in question TAT255 was insufficient because, as Professor Novemsky acknowledged at trial, “respondents are more likely to choose an answer that is explicitly mentioned than one that is not explicitly mentioned.” (Novemsky (FTC) Tr. 475). As for the “framing” of Professor Novemsky’s questions, whether certain ones were “clear” or “not leading” does not address Dr. Hauser’s criticism. What matters is that, by the time participants reached question TAT255, “TurboTax” had already been mentioned twelve times—which had the effect of suggesting to survey participants that the survey writer wanted them to choose “TurboTax advertisements” and “TurboTax website” in response to TAT255. (PFF ¶594). As Dr. Hauser explained, if Professor Novemsky had used a control group with a fictional tax brand (or even other real tax brands), he could have measured the magnitude of this effect and removed it from his results. (PFF ¶595). But because Professor Novemsky did not use a control group, his results are infected by the demand artifact. (PFF ¶595).

591. Professor Hauser also claims that question TAT255 is missing answer options, like competitors and own experience (RX1017 (Hauser Expert Report) ¶ 58; Hauser (Intuit) Tr. 943-944), but the question was pretested and consumers did not indicate that any answer options were missing. (GX749 (Novemsky Rebuttal Expert Report) ¶ 96; GX303 (Novemsky Expert Report) ¶¶ 58, 62-63; Novemsky (Complaint Counsel) Tr. 395, 396-397).

Response to Finding No. 591:

The Proposed Finding is irrelevant because participants in the pretest could not have been expected to reliably answer whether any answer options were missing. It is well-established that individuals have “source amnesia,” meaning difficulty accurately recalling the source from which they obtained information. (PFF ¶604). Given that, respondents would not have been able to reliably identify the source of their impression in response to TAT255, much less reliably propose additional answer options to an open-ended pretest question. (See PFF ¶604-606).

592. Professor Hauser also claims that question TAT255 is unreliable because consumers have “source amnesia” (RX1017 (Hauser Expert Report) ¶ 59; Hauser (Intuit) Tr. 946), but psychologists regularly ask respondents to record the source of their beliefs or impressions and respondents are able to indicate when they do not remember the source of their impressions in these studies. (GX749 (Novemsky Rebuttal Expert Report) ¶ 91).

Response to Finding No. 592:

The Proposed Finding is unsupported by any evidence other than Professor Novemsky’s baseless assertions. Indeed, his rebuttal report cites no authority whatsoever for this assertion. Tellingly, moreover, the rebuttal report never says that psychologists would consider subjects’ answers concerning the sources of their beliefs or impressions to be *reliable* or *accurate*—which is what Professor Novemsky must establish.

Meanwhile, Dr. Hauser’s report has cited extensive scientific literature showing that source amnesia is “well-known construct,” and he has ably explained why source amnesia is applicable to TAT255. (RX1017 (Hauser Expert Report) ¶59 & nn.115-117; PFF ¶¶603-606). Professor Novemsky’s *ipse dixit* assertion does nothing to undermine that evidence.

f. Intuit's Marketing Materials

593. While Professor Hauser claims that Intuit's internal marketing studies only show that "free" ads cause a short-term bump in beliefs about free TurboTax that decay over time (RX1017 (Hauser Expert Report) ¶¶ 77, 80; Hauser (Intuit) Tr. 881-882), he fails to address that since TurboTax undertakes pervasive marketing campaigns year after year, putting its free-themed ads in heavy rotation across the country, exposing consumers to the exact same or very similarly themed ads repeatedly, reinforcing its marketing message, the incremental impact of individual ads reinforce one another and with each successive exposure, resulting in accumulated impact. (GX749 (Novemsky Rebuttal Expert Report) ¶ 33).

Response to Finding No. 593:

The Proposed Finding is incorrect because Dr. Hauser has in fact thoroughly addressed why Complaint Counsel have failed to establish that "the incremental impact of individual ads reinforce one another and with each successive exposure, resulting in accumulated impact." As Dr. Hauser explained, "simple repetition alone" does not reinforce marketing messages, compound their impact, or mitigate decay of impact. (Hauser (Intuit) Tr. 891). Instead, whether repetition will mitigate decay depends on numerous variables—like whether the ads are "memorable" and "get the consumers' attention." (Hauser (Intuit) Tr. 891). Moreover, as Dr. Hauser explained, repetition can lead to a "wear-out" effect, in which an ad's message becomes less impactful over time. (Hauser (Intuit) Tr. 891). Accordingly, Complaint Counsel cannot establish that the impact of Intuit's ads was "accumulated" merely by showing that the ads were repeated.

594. Professor Hauser also fails to present evidence that an advertisement that changes impressions in the short run cannot change perceptions in the long run especially when repeated both as the identical advertisement and as a thematically identical advertisement over a period of time. (GX749 (Novemsky Rebuttal Expert Report) ¶ 34).

Response to Finding No. 594:

The Proposed Finding is incorrect, misleading, and irrelevant because it is not Intuit's or Dr. Hauser's burden to "present evidence" of anything—much less prove that something is

impossible, as the Proposed Finding would apparently have Intuit do. Rather, it is Complaint Counsel's burden to demonstrate that the repetition of Intuit's ads had the accumulated, long-term effect that they claim. *See* 16 C.F.R. §3.43(a). And for the reasons just provided (Response to CCFF ¶594), they have not done so because "simple repetition alone" does not reinforce marketing messages, compound their impact, or mitigate decay of impact. (Hauser (Intuit) Tr. 891).

595. Professor Hauser also claims that the results for the control group in Intuit's marketing research study shows that only approximately one third of consumers thought TurboTax was free, which he contrasts with results from Professor Novemsky's survey, (RX1017 (Hauser Expert Report) ¶ 79; Hauser (Intuit) Tr. 882-883, 912-914), but Professor Hauser fails to account for the numerous differences between the perception survey and the Intuit marketing research study, including the age of the survey respondents, the timing of when the survey was conducted, and the billions of "free" ad impressions that occurred between the time of the Intuit study and the perception survey. (GX750 (Novemsky Rebuttal Report Errata) ¶ 42 (correcting GX 749 (Novemsky Rebuttal Report) ¶ 42)).

Response to Finding No. 595:

The Proposed Finding is incorrect and unsupported because Professor Novemsky fails to establish how the identified differences between the TY20 Test and his perception survey could reasonably explain the substantial disparity in the results (*see* PFF ¶¶609-610). For one thing, he does not even attempt to articulate why the TY20 Test's focus on 18-49 year-olds would lead to such profound differences in results. (GX750 (Novemsky Rebuttal Report Errata) ¶42). As for his focus on "the timing of the survey" and "the billions of 'free' ad impressions that occurred between the time" of the TY20 Test and Professor Novemksy, TurboTax ads for free SKUs had already generated billions of impressions by September 2020, when the TY20 Test was conducted. (*See* PFF ¶696). Professor Novemsky assumes that additional impressions would necessarily compound their impact, but again "simple repetition alone" does not reinforce marketing messages, compound their impact, or mitigate decay of impact. (Hauser (Intuit) Tr. 891). And the difference between the results of the TY20 Test and Professor Novemsky's survey

is enormous—far greater than any compounded impact could explain. Ultimately, irrespective of timing and ad impressions, the TY20 Test control group and Professor Novemsky’s survey were measuring the same basic “construct,” so a scientist would expect them to be “in about the same place.” (Hauser (Intuit) Tr. 913). Professor Novemsky’s identified distinctions do not explain why the two metrics are instead a gulf apart.

B. Intuit’s Marketing Research

596. Price matters to consumers and is highly motivating. (Golder (Intuit) Tr. 1085, 1183); *see also* RX1391 (Hauser (Intuit) Dep.) at 112 (“Q. Okay. And 70.4 percent of the respondents selected price as one of the things that was important to them; is that correct? A. That’s correct. And not at all surprising for any product sold anywhere.”)).

Response to Finding No. 596:

The Proposed Finding is not supported by the cited sources. The cited testimony from Intuit’s expert witnesses does not establish that price is “highly motivating” when it comes to reasonable consumers’ decisions to select a tax-preparation product. Complaint Counsel misconstrue Professor Golder’s testimony (at Tr. 1085) and take it entirely out of context. Professor Golder was discussing how Dr. Hauser’s conclusion—that consumers consider a variety of sources in selecting a tax-preparation product—had influenced his own opinions. (Golder (Intuit) Tr. 1081-1086; *see also* PFF ¶¶505, 786 (discussing results of Purchase Driver Survey)). In the context of Dr. Hauser’s results, Professor Golder was asked if he would expect consumers to research “whether they happen to qualify for a particular free tax preparation product.” (Golder (Intuit) Tr. 1084-1085). He responded that “on top of [consumers] already being highly involved” in researching tax preparation products, “[t]he opportunity to be able to [file] for free,” motivates consumers to conduct research about those free products. (Golder (Intuit) Tr. 1085). This response does not convey that price is a motivating factor for consumers in *choosing* a tax preparation product, but that it provides additional motivation for consumers to

engage in *researching* certain products' qualification as part of their high-involvement buying process, further illustrating the absence of deception.

Professor Golder's remaining testimony (at Tr. 1183) and Dr. Hauser's deposition testimony likewise do not support the Proposed Finding. Professor Golder answered the question of whether it is "important to tell consumers how much a product costs" by stating, "Yes. Consumers are--are very interested in price." (Golder (Intuit) Tr. 1183). That consumers are generally interested in the prices of products, however, is unremarkable, and it does not follow that price is a "highly motivating" factor in consumers' decisions to select a particular product. Similarly, Dr. Hauser's testimony reflects only that price was "one of the things that was important to" 70.4% of his survey respondents (RX1391 (Hauser (Intuit) Dep.) at 112), and it does not follow that price was a "highly motivating" factor for any of these respondents.

Moreover, the Proposed Finding is inaccurate and misleading insofar as it implies that price is the only factor, or even the most important factor, in consumers' decision to use a certain tax-preparation product. According to a 2022 report published on behalf of the IRS, the top three factors cited by taxpayers as influencing their choice of a tax filing method are: "data protection (88%), ease of use/level of effort required (84%), and finding every possible deduction and credit (79%)." (RX975 (Intuit) at -0583). An Intuit survey similarly reflects [REDACTED] [REDACTED]. (RX579 (Intuit); *see also* RX401 (Golder (Intuit) Decl.) ¶176). Survey respondents' primary considerations when choosing a tax-preparation service included [REDACTED] [REDACTED] [REDACTED] (RX579 (Intuit)).

Reliable expert survey evidence confirms that price is not the sole or even primary driver of consumers' choice of a tax-preparation product. (PFF ¶¶759; RX1017 (Hauser Expert Report) ¶¶112-116). Dr. Hauser's Purchase Driver Survey found that consumers do not focus exclusively on price in selecting a tax-preparation provider. (RX1017 (Hauser Expert Report) ¶113). Respondents to the survey frequently cited non-price factors such as ease of use (86 out of 125 respondents, 68.8%), confidence in the accuracy and reliability of the results (66 out of 125 respondents, 52.8%), and data security (57 out of 125 respondents, 45.6%) as important factors in their choice of a tax preparation method/provider. (RX1017 (Hauser Expert Report) ¶113). In fact, only six out of 125 respondents (4.8%) selected price as the only important factor. (RX1017 (Hauser Expert Report) ¶113).

Further, even consumers identified by Complaint Counsel acknowledged that factors other than price influenced their choice of tax-preparation product. These consumers testified that the factors that were important to them when selecting a tax-preparation product included clarity and ease of use (GX125 (Beck (Consumer) Dep.) at 15; GX128 (Benbrook (Consumer) Dep.) at 22; GX137 (DuKatz (Consumer) Dep.) at 22-23; GX134 (Hobson (Consumer) Dep.) at 20; GX135 (Phyfer (Consumer) Dep.) at 24-25; GX130 (Tew (Consumer) Dep.) at 16); accuracy (GX125 (Beck (Consumer) Dep.) at 16; GX128 (Benbrook (Consumer) Dep.) at 22; GX132 (Dougher (Consumer) Dep.) at 24-25; GX137 (DuKatz (Consumer) Dep.) at 23; GX135 (Phyfer (Consumer) Dep.) at 24-25; GX130 (Tew (Consumer) Dep.) at 16-17); the ability to import prior year tax data (GX125 (Beck (Consumer) Dep.) at 17; GX132 (Dougher (Consumer) Dep.) at 24; GX137 (DuKatz (Consumer) Dep.) at 23); the ability to receive personalized help (GX128 (Benbrook (Consumer) Dep.) at 22; GX132 (Dougher (Consumer) Dep.) at 24); and maximizing their tax refund amount (GX132 (Dougher (Consumer) Dep.) at 23-24; GX137 (DuKatz

(Consumer) Dep.) at 23; GX135 (Phyfer (Consumer) Dep.) at 25). Some of these consumers even testified that cost was not the primary or even a significant factor they considered when deciding which tax-preparation product to use. (GX130 (Tew (Consumer) Dep.) at 15-16 (citing familiarity as the “key driver”); GX132 (Dougher (Consumer) Dep.) at 24 (citing accuracy as the “most important”); GX137 (DuKatz (Consumer) Dep.) at 22-23 (citing the user interface and clear instructions as “really important”); *see also* RX369 (Goldstein (Consumer) Dep.) at 69-70 (“And even if I have to pay the money, you know, 40, \$80 is not the big issue for me.”)).

In any event, that consumers might consider price as one of many factors they consider when choosing a tax-preparation product is unremarkable and meaningless. That fact does not establish that the allegedly misleading claims in the challenged ads were material. This case is not about “[w]hether TurboTax is free.” It is undisputed that consumers using any of the free TurboTax SKUs do not—and cannot—pay a penny to do so. (PFF ¶¶67, 69; CCFF ¶9). This case is instead about whether Intuit adequately disclosed the *qualifications* for consumers to use the free TurboTax SKUs. The claim at issue thus is not, as Complaint Counsel contend, about the *price* of TurboTax. In fact, more than a year ago, U.S. District Judge Charles Breyer chastised Complaint Counsel for eliding the distinction between price and qualifications, recognizing that Complaint Counsel were actually arguing about the adequacy of disclosures and not about whether TurboTax Free Edition was in fact free. (RX73 (Intuit) at 15-16).

Complaint Counsel’s still erroneous view that the claims at issue pertain to price is self-defeating for their materiality arguments. Complaint Counsel have not put forward evidence showing that any claim in the challenged ads was “likely to affect a consumer’s choice of or conduct regarding a product” (*FTC Policy Statement on Deception*, 103 F.T.C. 174, 182 (1984), *appended to Cliffdale Associates, Inc.*, 103 F.T.C. 110 (1984)). The evidence instead reflects that

very few consumers decide to use a tax-preparation product based on an advertisement. (*See* PFF ¶786; *see also* PFF ¶¶779-785, 787-794).

597. 2019 marketing research conducted by Intuit showed that 49% of consumers “are confident that Free Edition is truly free.” (RX597 (Intuit) at INTUIT-FTC-PART3-000601665).

Response to Finding No. 597:

The Proposed Finding is misleading. It is uncontested that TurboTax Free Edition is free for consumers, and that consumers cannot pay to use it under any circumstances. (PFF ¶69). Thus, 100% of consumers would be correct in stating “that Free Edition is truly free,” regardless of whether they qualified to use Free Edition. The fact that only 49% of consumers were confident that Free Edition was “truly free,” even though it indisputably is free (*see* RX597 (Intuit) at -1665; *see also* PFF ¶¶488, 490), shows that reasonable consumers are skeptical of free offers and do not automatically assume that a free offer will be available for them. (RX597 (Intuit) at -1665). That reasonable consumers are skeptical of free offers in the tax-preparation industry, and do not believe that a legitimately free product is in fact free, demonstrates that reasonable consumers were not likely to be deceived by the challenged ads. (*See* PFF ¶¶485-493).

Tellingly, Complaint Counsel did not present RX597 to any witness during discovery or at trial in this case. (*See* Complaint Counsel’s Exhibit Index at 64 (May 23, 2023)). Therefore, Complaint Counsel should not be permitted to rely on their mistaken inferences from it.

598. A study from 2018 showed that 22% of consumers were confident that Free Edition was actually free. (RX595 (Intuit) at FTC-PART3-000602725).

Response to Finding No. 598:

The Proposed Finding is incorrect and misleading because it provides an incomplete summary of the cited market research and implies that the challenged ads misled consumers. As

an initial matter, Complaint Counsel are wrong about the date of the exhibit—it was drafted in 2019, not 2018. (RX595 (Intuit) at -2709). Moreover, rather than providing evidence that reasonable consumers were likely misled by the challenged ads, the survey instead demonstrates that consumers are skeptical of free offers in the tax-preparation industry and do not automatically assume that a free offer will be available for them. (RX595 (Intuit) at -2725; *see also* PFF ¶¶488, 490). It is uncontested that TurboTax Free Edition is free for consumers, and that consumers cannot pay to use it under any circumstances. (PFF ¶69). Thus, 100% of consumers would be correct in stating “that Free Edition is truly free,” regardless of whether they qualified to use Free Edition. The fact that only 22% of survey respondents in Intuit marketing research from Tax Year 2018 were confident that Free Edition was actually free, even though it indisputably is free (*see* RX595 (Intuit) at -2725), shows that reasonable consumers are skeptical of free offers and do not automatically assume that a free offer will be available for them. That reasonable consumers are skeptical of free offers in the tax-preparation industry, and do not believe that a legitimately free product is in fact free, demonstrates that reasonable consumers were not likely to be deceived by the challenged ads. (*See* PFF ¶¶485-493).

The 22% of respondents who indicated that they believed Free Edition was actually free is a smaller percentage than either the approximately 50% of consumers in the online tax-preparation market who qualify to use Free Edition and the roughly 33% of all taxpayers who qualify. (*See* PFF ¶¶127-129, 690, 695, 706, 744). In fact, the research indicates that only 15% of consumers even recalled a free message from TurboTax ads. (RX595 (Intuit) at -2725). The fact that most consumers did not recall a free message, and that fewer respondents believed that TurboTax Free Edition was free than the proportion of consumers who actually qualify to file for free with that product, undercuts Complaint Counsel’s claim that the challenged ads misled

consumers into believing that all TurboTax is free or that consumers could file for free when that was not the case.

Further, Complaint Counsel did not present RX595 to any witness during discovery or at trial in this case. (Complaint Counsel's Exhibit Index at 64 (May 23, 2023)). Therefore, Complaint Counsel should not be permitted to rely on its mistaken inferences from it.

599. The 2018 study showed that TurboTax brand awareness of "free" increased from 37% to 44% year-over-year. (RX595 (Intuit) at FTC-PART3-000602725).

Response to Finding No. 599:

The Proposed Finding is incorrect. The cited research does not provide that "TurboTax brand awareness of 'free'" increased year-over-year. Instead, RX595 states that awareness of "TurboTax Free"—TurboTax's free SKU—increased from pre-tax season, meaning November/December 2018, to mid-tax season, meaning late February 2019. (*See* RX595 (Intuit) at -2711, -2725). Accordingly, the research discussed indicates only that awareness of TurboTax Free Edition increased slightly over the course of several months in Tax Year 2018. The fact that the majority of consumers were not even aware of TurboTax Free Edition, which on its own says nothing about whether those consumers were misled into believing they could file their taxes for free with Free Edition when they could not, undermines Complaint Counsel's claim that a significant minority of reasonable consumers were likely deceived by the challenged ads. And even if 100% of consumers were aware of TurboTax Free Edition, that would not indicate that the challenged ads were misleading consumers. Consumers can be aware of a product without having a belief about whether they qualify to use it.

Moreover, it is likely that Free Edition awareness grew most among consumers who are likely eligible to use that TurboTax SKU, and Complaint Counsel presented no evidence to the contrary. Intuit targets advertising for free TurboTax SKUs toward consumers who are likely to

qualify. (PFF ¶191). For example, Intuit targets younger taxpayers who are more likely to have simple tax returns both by (1) advertising through media channels that skew heavily toward that demographic, and (2) using creative concepts that “resonate” with that group. (PFF ¶¶193-194). Intuit also uses “exclusionary targeting” to avoid showing ads to consumers who are unlikely to qualify for a free TurboTax SKU. (PFF ¶197). For example, if Intuit has an indication that a consumer bought or sold cryptocurrency, Intuit will not show that consumer a Free Edition ad. (PFF ¶197). Given those efforts, any increase in awareness of TurboTax Free Edition is likely to be reflected primarily in consumers who likely qualify for Free Edition. That consumers who are likely to qualify for Free Edition became more aware of that product is not evidence of deception.

Further, Complaint Counsel did not present RX595 to any witness during discovery or at trial in this case (Complaint Counsel’s Exhibit Index at 64 (May 23, 2023)). Therefore, Complaint Counsel should not be permitted to rely on its mistaken inferences from it.

600. Intuit’s internal copy testing (the “TY20 Campaign Copy Testing”) further shows that a significant percentage of consumers perceive they can use TurboTax for free after viewing Intuit’s TurboTax “free” video ads. (See GX460 (Intuit) at CC-00009563).

Response to Finding No. 600:

The Proposed Finding is incorrect because, regardless of what Complaint Counsel mean by “a significant percentage,” the results of the referenced copy test (the “TY20 Test”) do not show the impact of any challenged ads on consumers. The group of respondents who were shown Free Edition television ads were shown draft versions of those ads. (PFF ¶691). The “Spelling Bee” ad that was tested included the Tax Year 2018 version of the eligibility disclosures, and the other three ads were drafts that included no written disclosures at all. (PFF ¶699). Accordingly, the results do not reflect how consumers would have reacted to final versions of those ads.

Moreover, the Proposed Finding is incorrect insofar as it implies that the TY20 Test is evidence that reasonable consumers were likely misled by the challenged ads. (PFF ¶¶694). To the contrary, the test shows that the challenged ads did not mislead reasonable consumers into believing that all TurboTax was free or that TurboTax was free for them when it was not. (PFF ¶¶694). For context, the TY20 Test's survey population was divided into one control group and four test groups. (PFF ¶¶691). The control group was provided the TurboTax brand name but was not shown any TurboTax ads, while the test groups were shown one of four draft versions of TurboTax Free Edition ads. (PFF ¶¶691). After exposure to the brand name or one of the draft ads, the TY20 Test participants were asked questions about TurboTax, including whether TurboTax “[a]llows me to file my taxes for free.” (PFF ¶¶692-693). Responses to that question in both the control and test groups suggest that consumers were not misled or deceived by TurboTax advertising. (PFF ¶¶694).

In the control group, only 33% of respondents reported believing that TurboTax “[a]llows me to file my taxes for free.” (PFF ¶¶695). That percentage is substantially less than the roughly 50% of consumers in the online-tax preparation market who qualify to use Free Edition. (PFF ¶¶695; *see also* PFF ¶¶129). That 33% figure is also likely lower than the percentage of respondents who qualified to use Free Edition because the survey population skewed younger and thus were more likely to have simple tax returns. (PFF ¶¶695; *see also* PFF ¶¶689-690). The results from the control group indicate that, as of September 2020, TurboTax marketing either had not reached many consumers who qualify to file for free or had not successfully persuaded many of those consumers who do qualify that they qualify. (PFF ¶¶696). That is not what one would expect to see if Intuit's advertising was deceptive in the manner alleged. (PFF ¶¶696).

In the test groups, the percentage of respondents reported as believing that TurboTax “Allows me to file my taxes for free” was not substantially higher than in the control group and did not cause Intuit to believe that the respondents in the test groups had a misimpression about their ability to file for free. (PFF ¶697). After viewing a draft ad, an average of about 48.8% of participants in the four test groups indicated that TurboTax “Allows me to file my taxes for free.” (GX460 (Intuit) at 28). Again, that is less than the approximately 50% of consumers in the tax-preparation market who qualify to use Free Edition. (PFF ¶129; *see also* PFF ¶695).

Further, because participants in the test group responded to the survey immediately after viewing the ad, the results from the four test groups only depict the *short-term* effects of the draft ads. (PFF ¶700). These short-term effects typically decay over time. (PFF ¶700). The only evidence of *long-term* effects that the TY20 Test provides is the control group results, which clearly demonstrate that TurboTax’s Free Edition ads were not deceptive. (PFF ¶¶696, 700).

601. In copy testing four TurboTax “free” video ads (each of which was a version of Intuit’s “free, free, free” marketing campaign where nearly every word in a given commercial was “free”) for its “TY20 Campaign,” Intuit found that a single exposure to any one of these ads “result[ed] in significant lifts for all ads on perceptions around ... allows you to file your taxes for free.” (GX460 (Intuit) at CC-00009563).

Response to Finding No. 601:

The Proposed Finding is incorrect and misleading because the TY20 Test did not test any final ad from Tax Year 2020. The group of respondents who were shown Free Edition ads were shown *draft* versions of those ads. (PFF ¶691). The “Spelling Bee” ad that was tested included the Tax Year 2018 version of the eligibility disclosures, and the other three ads were drafts that included no written disclosures at all. (PFF ¶699). Accordingly, the results do not reflect how consumers would have reacted to ads with complete and up-to-date disclosure language.

The Proposed Finding is also inaccurate and misleading because the “lift” in respondents indicating that they could file for free from the control group to the test groups depicts only the

short-term effects of TurboTax advertising, which typically decay over time. (PFF ¶700).

Because consumers may only experience this “lift” immediately or shortly after viewing the ad, the TY20 Test results for the test groups do not provide evidence of consumers long-term belief of whether they can file for free using TurboTax. Instead, the only evidence of *long-term* effects of TurboTax ads that the TY20 Test provides is the control group results, which indicate that consumers actually underestimate their ability to file for free. (PFF ¶700). Only 33% of control group participants reported believing that TurboTax “[a]llows me to file my taxes for free.” (PFF ¶695). That percentage is less than the roughly 50% of consumers in the online-tax preparation market who qualify to use Free Edition. (PFF ¶695; *see also* PFF ¶129). That 33% figure is also likely lower than the percentage of respondents who qualified to use Free Edition because the survey population skewed younger and thus were more likely to have simple tax returns. (PFF ¶695; *see also* PFF ¶¶689-690). The results from the control group indicate that, as of September 2020, TurboTax marketing either had not reached many consumers who qualify to file for free or had not successfully persuaded many of those consumers who do qualify that they qualify. (PFF ¶696). That is not what one would expect to see if TurboTax’s advertising was deceptive in the manner alleged. (PFF ¶696).

Moreover, the Proposed Finding is incorrect insofar as it implies that the TY20 Test is evidence that reasonable consumers were likely misled by the challenged ads. (PFF ¶694). As noted, in the control group, only 33% of respondents reported believing that TurboTax “[a]llows me to file my taxes for free.” (PFF ¶695). And the percentage of respondents from the test groups who were reported as believing that TurboTax “[a]llows me to file my taxes for free” was not substantially higher than in the control group and did not cause Intuit to believe that the respondents in the test groups had a misimpression about their ability to file for free. (PFF

¶697). After viewing a draft ad, an average of about 48.8% of participants in the four test groups indicated that TurboTax “Allows me to file my taxes for free.” (GX460 (Intuit) at 28). That percentage is less than the roughly 50% of consumers in the online-tax preparation market who qualify to use Free Edition. (PFF ¶129; *see also* PFF ¶695). Moreover, that figure is not representative of how reasonable consumers would have reacted to actual TurboTax ads from Tax Year 2020 both because (1) the survey population skewed younger and thus were more likely to qualify for Free Edition (PFF ¶689), and (2) the ads used in the TY20 Test were not the final versions that ran during Tax Year 2020 (PFF ¶699). Due to the higher percentage participants who likely qualified for Free Edition, and who therefore responded accurately that they could file for free, the TY20 Test results do not suggest that the challenged ads were deceptive, even without any (or up-to-date) disclosures. (Ryan (Intuit) Tr. 740; *see also* PFF ¶¶690, 697, 699).

602. The purpose of the TY20 Campaign Copy Testing was to understand if the advertising concepts were resonating with Intuit’s target customers. (Ryan (Intuit) Tr. 735).

Response to Finding No. 602:

The Proposed Finding is incomplete because it fails to acknowledge that the “target customers” for ads for Free Edition were those who likely qualified. (*See* PFF ¶¶190-191). As such, the “target customers” that Ms. Ryan referenced in the cited testimony were customers who have simple tax returns and thus qualify for Free Edition. And as explained, Intuit uses various marketing strategies to target these customers. (*See* PFF ¶¶188-204; *see also* Response to CCF ¶617). For example, Intuit uses creative concepts that “resonate” with demographics who are likely to have simple tax returns, such as younger taxpayers. (PFF ¶¶193-194). In fact, all creative briefs that Intuit provided to its ad agencies discussing Free Edition advertising campaigns state that “[REDACTED].” (Ryan (Intuit) Tr. 783). And at least

one of the ads tested in the TY20 Test, the “Young Love” ad, was developed and aired because of its perceived appeal to younger audiences. (PFF ¶194).

603. They survey population for the TY20 Campaign Copy Testing were taxpayers who were responsible for tax filing decisions, paid taxes last year, and were between the ages of 18 and 49, regardless of whether they qualified for Free Edition or not. (GX460 (Intuit) at CC-00009537; *see also* Ryan (Intuit) Tr. 736).

Response to Finding No. 603:

The Proposed Finding is incomplete because it fails to acknowledge that the survey population, although limited to taxpayers between the ages of 18-49, skewed toward the younger end of that range and thus likely included a significant proportion of consumers who qualified for free TurboTax SKUs. (*See* PFF ¶689). The limits imposed on the survey population (age 18-49) already made that group younger than the average age of all taxpayers (which is 45-50). (PFF ¶85, 689). But the population ultimately skewed even younger, with 64% of test participants being between 18 and 39 years old. (PFF ¶689). Consumers with simple tax returns tend to be younger; in fact, customers who file using TurboTax Free Edition have an average age of 33 years, significantly lower than the average age of all taxpayers (which is 45-50 years). (PFF ¶¶85, 690). Thus, it is likely that a higher percentage of participants in the TY20 Test qualified for TurboTax Free Edition than the general population of taxpayers. (PFF ¶690).

604. After exposure to a single ad during the TY20 Campaign Copy Testing, 45% to 57% of consumers took away the free message. (GX460 (Intuit) at CC-00009563).

Response to Finding No. 604:

The Proposed Finding is incorrect because the results of the TY20 Test do not show the impact of final Tax Year 2020 TurboTax ads on “consumers.” The Respondents to the Copy Test were not intended to be a representative sample of consumers. Instead, the respondents to the survey skewed younger and thus were more likely to have simple tax returns and thus be able to file their taxes for free. (PFF ¶¶689-690; *see also* PFF ¶85).

Next, the Proposed finding is misleading because respondents were shown draft versions of these ads. (PFF ¶691). Three of these draft ads included no written disclosures at all. (PFF ¶699). The “Spelling Bee” ad that was tested included the Tax Year 2018 version of the eligibility disclosures. (PFF ¶699). Accordingly, the results do not reflect how consumers would have reacted to final Tax Year 2020 Free Edition ads with complete and up-to-date disclosure language.

The Proposed Finding is also misleading because the percentages referenced depict only the short-term effect of TurboTax advertising, which typically decay over time. (PFF ¶700). Those figures are therefore not an accurate depiction of consumers’ beliefs days or even hours after viewing the ad. (See PFF ¶700). Instead, the only evidence of *long-term* effects of TurboTax ads that the TY20 Test provides is the control group results, which indicate that consumers actually underestimate their ability to file for free. (PFF ¶700). Only 33% of control group participants reported believing that TurboTax “[a]llows me to file my taxes for free.” (PFF ¶695). That percentage matches the approximately 33% of taxpayers who qualify to use TurboTax Free Edition, and it is less than the roughly 50% of consumers in the online-tax preparation market who qualify to use Free Edition. (PFF ¶695). That 33% figure is also likely lower than the percentage of respondents who actually were eligible to use Free Edition because the survey population skewed younger and thus were more likely to have simple tax returns. (PFF ¶695; *see also* PFF ¶¶689-690). The results from the control group indicate that, as of September 2020, TurboTax marketing either had not reached many consumers who qualify to file for free or had not successfully persuaded many of those consumers who do qualify that they qualify. (PFF ¶696). That is not what one would expect to see if TurboTax’s advertising was deceptive in the manner alleged. (PFF ¶696).

605. Additionally, Intuit's TY20 Campaign Copy Testing shows that "[t]he promise of a free offer was enticing for many viewers – and differentiated from other brands within the category – which likely contributed to the intrigue to want to trial [sic]." (GX460 (Intuit) at CC-00009543).

Response to Finding No. 605:

Intuit agrees that its free SKUs are enticing to certain "viewers" of the video ads it runs—namely, those who qualify to use those SKUs. (See PFF ¶¶212, 660, 775). That is why between 11 and 14 million tax returns are filed completely for free each year using Free Edition. (PFF ¶113). The Proposed Finding, however, is irrelevant because it discusses responses to draft video ads that were not final versions of the ads that actually ran in Tax Year 2020. (PFF ¶¶691, 699). The tested versions of the ads did not include the disclosures included in the versions aired in Tax Year 2020. (PFF ¶¶691, 699).

606. Consumer ad testing presented to Intuit in December 2018 ("2018 Copy Testing") showed that 73% of 250 survey respondents took away from the "Spelling Bee" ad the message: "That i [sic] can file my taxes for free." (GX340 (Intuit) at CC-00006857).

Response to Finding No. 606:

The Proposed Finding is incorrect because the results of the referenced copy test (the "TY18 Test") do not show the impact on respondents of the "Spelling Bee" ad that actually aired in Tax Year 2018. (Ryan (Intuit) Tr. 723, 725). The draft ad shown to survey participants, unlike the aired version, did not include any disclosures. (Ryan (Intuit) Tr. 723, 725; *see also* GX340 (Intuit) at 43 (displaying images of the end cards in the draft ads shown during the test)). Accordingly, the TY18 Test says nothing about the challenged ads, including the claims conveyed by those ads or whether the ads were likely to mislead consumers.

The Proposed Finding is also incomplete and misleading because it omits that the survey population was not a representative sample of the target population for the ad, or even the general population. (Ryan (Intuit) Tr. 724-725; *see also* GX340 (Intuit) at 3). Instead,

respondents were much more likely to have simple tax returns and thus qualify for Free Edition. (Ryan (Intuit) Tr. 724-725; *see also* GX340 (Intuit) at 3). The population was comprised of 21- to 49-year-olds who made less than \$150,000 (at the time, there was an income limit to file a simple return), found their taxes to be simple to moderately complex, and would be interested in using online tax-preparation software. (Ryan (Intuit) Tr. 724; GX146 (Ryan (Intuit) Dep.) at 137; *see also* GX340 (Intuit) at 3). Given that makeup, and the fact that the ad tested was a draft without disclosures, the survey results do not reflect reasonable consumers' understanding of the qualifications in the final "Spelling Bee" ad. (Ryan (Intuit) Tr. 725; *see also* GX146 (Ryan (Intuit) Dep.) at 122).

In any event, the Proposed Finding does not support Complaint Counsel's claim that the challenged ads were misleading because the cited result—that 73% of respondents took away from the Spelling Bee ad the message, "i [sic] can file my taxes for free"—does not indicate that any respondents were misled by even the draft version of the ad. As noted, participants in the TY18 test were "much more likely" to qualify for Free Edition than the general population because they skewed younger, were lower income, and considered their taxes "simple to moderately complex." (Ryan (Intuit) Tr. 724-725; *see also* GX340 (Intuit) at 3; PFF ¶¶85, 193). It is thus possible that those participants correctly took away from the ad that they could file for free—and Complaint Counsel offered no evidence to the contrary. (CCFF ¶607).

607. The 2018 Copy Testing showed that "[a]bout half of viewers take away the 'free' offering in Spelling Bee" (GX340 (Intuit) at CC-00006883).

Response to Finding No. 607:

The Proposed Finding is an incomprehensible snippet of a much longer document summarizing consumer research. To the extent Complaint Counsel are suggesting something about the challenged ads from the half sentence followed by an ellipsis they are using here, the

Proposed Finding is incomplete and misleading because the results of the TY18 Test do not show the impact on respondents of the “Spelling Bee” ad that actually aired in Tax Year 2018. (Ryan (Intuit) Tr. 723, 725). The draft ad shown to survey participants, unlike the aired version, did not include any written disclosures. (Ryan (Intuit) Tr. 723, 725; *see also* GX340 (Intuit) at 43 (displaying images of the end cards in the draft ads shown during the test)). Accordingly, the TY18 Test says nothing about the challenged ads, including the claims conveyed by those ads or whether the ads were likely to mislead consumers. (Ryan (Intuit) Tr. 725; *see also* GX146 (Ryan (Intuit) Dep.) at 122).

Moreover, the Proposed Finding is incomplete and misleading because it ignores that the TY18 Test was not designed to test consumers’ understanding of Free Edition qualifications. (Ryan (Intuit) Tr. 723-724, 817, 820; GX146 (Ryan (Intuit) Dep.) at 96-97). Instead, it was designed to evaluate consumers’ “emotional connections” to ad concepts and characters, particularly for the ads in Intuit’s new TurboTax Live campaign. (Ryan (Intuit) Tr. 723-724; GX340 (Intuit) at 2; GX146 (Ryan (Intuit) Dep.) at 96-97).

In any event, the Proposed Finding does not support Complaint Counsel’s claim that the challenged ads were misleading because the cited language—that “[a]bout half of viewers take away the ‘free’ offering in Spelling Bee”—does not indicate that any viewers were misled by even the draft version of the ad. Participants in the TY18 test were “much more likely” to qualify for Free Edition than the general population because they skewed younger, were lower income, and considered their taxes “simple to moderately complex.” (Ryan (Intuit) Tr. 724-725; *see also* GX340 (Intuit) at 3; PFF ¶¶85, 193). It thus is possible that about half of the participants correctly took away from the ad that they could file for free—and Complaint Counsel offered no evidence to the contrary. (CCFF ¶607). Indeed, that figure is consistent with

the roughly 50% of consumers in the online tax-preparation market who qualify for free TurboTax SKUs. (See PFF ¶695).

608. The 2018 Copy Testing showed that consumers shared comments about the “Spelling Bee” ad that included:

- “Its [sic] free to file your taxes with them,”
- “Turbotax [sic] is free,”
- “Because the message was describing how turbo taxes [sic] service are [sic] free,”
- “Turbo tax [sic] is free and easy to use.”

(GX340 (Intuit) at CC-00006862).

Response to Finding No. 608:

The Proposed Finding is misleading because the results of the TY18 Test do not show the impact on respondents of the “Spelling Bee” ad that actually aired in Tax Year 2018. (Ryan (Intuit) Tr. 723, 725). The draft ad shown to survey participants, unlike the aired version, did not include any written disclosures. (Ryan (Intuit) Tr. 723, 725; *see also* GX340 (Intuit) at 43 (displaying images of the end cards in the draft ads shown during the test)). Accordingly, the TY18 Test says nothing about the challenged ads, including the claims conveyed by those ads or whether the ads were likely to mislead consumers.

The Proposed Finding also disregards that the survey population was not a representative sample of the target population for the ad, or even the general population. (Ryan (Intuit) Tr. 724-725; *see also* GX340 (Intuit) at 3). Instead, respondents were much more likely to have simple tax returns and thus qualify for Free Edition. (Ryan (Intuit) Tr. 724-725; *see also* GX340 (Intuit) at 3). The population was comprised of 21- to 49-year-olds who made less than \$150,000, found their taxes to be simple to moderately complex, and would be interested in using online tax-preparation software. (Ryan (Intuit) Tr. 724; *see also* GX340 (Intuit) at 3). Given that makeup,

and the fact that the ad tested was a draft without disclosures, the survey results do not reflect reasonable consumers' understanding of the qualifications in the final "Spelling Bee" ad. (Ryan (Intuit) Tr. 725; *see also* GX146 (Ryan (Intuit) Dep.) at 122).

Moreover, the Proposed Finding is incomplete because it offers only four comments out of the approximately 250 respondents who watched the draft "Spelling Bee" ad. (GX340 (Intuit) at 3).

609. The 2018 Copy Testing showed that the ads tested, including the "Spelling Bee" ad, "communicate **the parent brand**, TurboTax well, however, only about ~5% take away the sub brand (TurboTax Free, TurboTax Live)." (GX340 (Intuit) at CC-00006849 (emphasis in original); *see also* Ryan (Intuit) Tr. 817-818).

Response to Finding No. 609:

The Proposed Finding is misleading. The quoted statement merely reflected unaided responses to a specific, open-ended question: "Which brand do you think this ad was for?" (Ryan (Intuit) Tr. 817-818; *see also* GX340 (Intuit) at 14). Unsurprisingly, most respondents correctly responded: "TurboTax." The TY18 Test did not ask respondents for the specific product name being advertised and so it is unsurprising that respondents to this question did not provide the SKU name in response to the question. (Ryan (Intuit) Tr. 817-818; *see also* GX340 (Intuit) at 14).

The Proposed Finding is also misleading because the results of the TY18 Test do not show the impact on respondents of the "Spelling Bee" that actually aired in Tax Year 2018. (Ryan (Intuit) Tr. 723, 725). The draft ad shown to survey participants, unlike the aired version, did not include any written disclosures, including the "Free Edition product only" language included in the final version. (Ryan (Intuit) Tr. 723, 725; GX340 (Intuit) at 43 (displaying images of the end cards in the draft ads shown during the test); *see also* PFF ¶227; RX1110 (Intuit); RX1111 (Intuit); RX1118 (Intuit) (final versions of Tax Year 2018 Spelling Bee ad)).

Accordingly, the TY18 Test says nothing about the challenged ads, including the claims conveyed by those ads or whether the ads were likely to mislead consumers.

610. The 2018 Copy Testing showed that for the ads tested, including the “Spelling Bee” ad, “[m]ost viewers can recall TurboTax, but only a handful mention the specific product name” when asked “Which brand do you think this ad was for?” (GX340 (Intuit) at CC-00006856).

Response to Finding No. 610:

The Proposed Finding is misleading. The quoted statement merely reflected unaided responses to a specific, open-ended question: “Which brand do you think this ad was for?” (Ryan (Intuit) Tr. 817-818; GX340 (Intuit) at 14). Unsurprisingly, most respondents correctly responded: “TurboTax.” The TY18 Test did not ask respondents for the specific product name being advertised and so it is unsurprising that respondents to this question did not provide the SKU name in response to the question. (Ryan (Intuit) Tr. 817-818; GX340 (Intuit) at 14)).

The Proposed Finding is also misleading because the results of the TY18 Test do not show the impact on respondents of the “Spelling Bee” that actually aired in Tax Year 2018. (Ryan (Intuit) Tr. 723, 725). The draft ad shown to survey participants, unlike the aired version, did not include any written disclosures, including the “Free Edition product only” language included in the final version. (Ryan (Intuit) Tr. 723, 725; *see also* GX340 (Intuit) at 43 (displaying images of the end cards in the draft ads shown during the test); *see also* PFF ¶227; RX1110 (Intuit); RX1111 (Intuit); RX1118 (Intuit) (final versions of Tax Year 2018 Spelling Bee ad)). Accordingly, the TY18 Test says nothing about the challenged ads, including the claims conveyed by those ads or whether the ads were likely to mislead consumers.

Moreover, because the TY18 Test asked survey participants about an ad not challenged in this proceeding, the Proposed Finding is irrelevant. As noted, the ad shown to survey participants was a draft without disclosures. (Ryan (Intuit) Tr. 723, 725; *see also* GX340 (Intuit)

at 43). Survey participants' reaction to an ad that Complaint Counsel do not challenge, and that lacks an analogue in the record, says nothing about whether the ads actually at issue in this case were deceptive.

C. Intuit's Marketing Strategy Admits the Effect of its TurboTax Free Campaign on Consumers

611. Intuit's internal marketing strategy documents reflect a recognition of the impression its "free" TurboTax ads leave with consumers. Intuit's FY'19 GTM ("Go-To-Market") White Paper (GX428 (Intuit)) [REDACTED] As Intuit Director of Marketing Elizabeth Berger explained in her deposition, "every team cross-functionally provides some input" on the FY'19 GTM White Paper, and it is designed to provide a detailed view of Intuit's "go-to-market plans for fiscal year 2019." (GX145 (Berger (Intuit) Dep.) 125-127).

Response to Finding No. 611:

The Proposed Finding is incorrect and misleading. Tellingly, in a finding about Intuit's *documents*, Complaint Counsel can muster only a single *document* to support their thesis. A single document is not sufficient to establish the broader proposition that "internal marketing strategy documents" exist that reflect Intuit's recognition of the impression the challenged ads left with consumers. And even the single document cited—GX428—does not remotely stand for the proposition suggested.

In reality, the portion of the strategy document (GX428 (Intuit)) discussing some of the challenged advertisements illustrates Intuit's intention to advertise only specific SKUs as free—not to claim that all TurboTax products are free—to target eligible consumers with that advertising, and to clearly convey in that advertising that there are qualifications to use the free SKUs being advertised—not to claim that TurboTax is free for everyone. For example, the FY'19 Go-To-Market White Paper states:

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

(GX428 (Intuit) at 24 (emphasis added)).

Moreover, the Proposed Finding mischaracterizes Intuit's FY'19 Go-To-Market White Paper more broadly. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (Johnson (Intuit) Tr. 648). Accordingly, the 163-page strategy document reflects [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. (GX428 (Intuit) at 101-103, 105-110). The white paper details, for instance, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. And the white paper details [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (See GX428 (Intuit) at 101-110).

612. The FY'19 GTM White Paper admits that: [REDACTED] (GX428 (Intuit) at CC-00007711).

Response to Finding No. 612:

The Proposed Finding is incomplete and misleading because it recites a single sentence from the 163-page exhibit out of context. As noted, the portion of the exhibit discussing ads for free TurboTax SKUs illustrates Intuit's clear intention to advertise only specific SKUs as free—not to claim that all TurboTax products are free—to target eligible consumers with that advertising, and to clearly convey in that advertising that there are qualifications to use the free SKUs being advertised—not to claim that all TurboTax is free for everyone. (See Response to CCFE ¶611). Even the snippet quoted in the Proposed Finding is clear that Intuit wishes to make sure that consumers understand that a specific SKU—TurboTax Free Edition—is free, which it is. Other examples abound in the same document:

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

(GX428 (Intuit) at 23 (emphasis added)).

The Proposed Finding also ignores the sentence that immediately follows the quoted text, which confirms that the advertisement being referenced was intended to target consumers with simple tax returns who qualify for the free offer: [REDACTED]

[REDACTED] (GX428 (Intuit) at 24 (emphasis added)).

613. The FY'19 GTM White Paper admits [REDACTED] (GX428 (Intuit) at CC-00007740) (emphasis in the original).

Response to Finding No. 613:

The Proposed Finding is incorrect and misleading because its cited assertion is taken wholly out of context. The Proposed Finding ignores the sentence that comes immediately before the quoted text that specifies that the goal of the ads for free TurboTax SKUs being discussed was to [REDACTED] (GX428 (Intuit) at 53 (emphasis added)). The Proposed Finding also omits the paragraph that immediately follows the quoted text, which similarly specifies that the objective of TurboTax's free advertising is to [REDACTED] [REDACTED] (GX428 (Intuit) at 54 (emphasis added)). When read in the appropriate context, it is clear that Intuit intended to communicate to consumers with simple tax returns—i.e., those who qualified to file for free with free TurboTax SKUs—the fact that they could [REDACTED] [REDACTED] with TurboTax Free Edition. (See PFF ¶¶69, 191-204).

The Proposed Finding is further incomplete and misleading because it again recites a snippet of a single sentence from the 163-page exhibit out of context. As noted, the portion of the exhibit discussing ads for free TurboTax SKUs illustrates Intuit’s clear intention to advertise only specific SKUs as free—not to claim that all TurboTax products are free—to target eligible consumers with that advertising, and to clearly convey in that advertising that there are qualifications to use the free SKUs being advertised—not to claim that all TurboTax is free for everyone. (*See* Response to CCF ¶611). For example, the FY’19 Go-To-Market White Paper states:

[REDACTED]

(GX428 (Intuit) at 24 (emphasis added)).

This is yet another example of Complaint Counsel selectively quoting a tiny portion of a much larger document in an effort to provide an inaccurate and misleading portrayal of Intuit’s marketing strategy for free TurboTax SKUs. When considered with the proper context, the

exhibit (along with the rest of the record) confirms that Intuit intended to and in fact did communicate to consumers that the specific TurboTax SKU being advertised was free and that the free offer was qualified. (See GX428 (Intuit) at 23-24, 53-54).

614. The FY'19 GTM White Paper admits the [REDACTED] (GX428 (Intuit) at CC-00007716).

Response to Finding No. 614:

The Proposed Finding is correct. TurboTax's free offerings are "[REDACTED]" and the message in the advertisements for those products is "[REDACTED]" That is to say, Intuit is clear in its free advertisements that TurboTax Free Edition is free for taxpayers with simple tax returns only and consumers can see if they qualify for the free product on TurboTax.com. Thus, GX428 supports the *absence* of deception. GX428 is also accurate in its observation that Intuit's advertisements for its free products drive traffic and acquisition for *its free products*. That is why between 11 and 14 million returns are filed for free each year using those products. (PFF ¶113).

Though the Proposed Finding is correct for the reasons stated above, Complaint Counsel seek to use this snippet from the 163-page exhibit to suggest deception. Such an argument is demonstrably inaccurate. As noted, the portion of the exhibit discussing advertising for free TurboTax SKUs illustrates Intuit's clear intention to advertise only specific SKUs as free—not to claim that all TurboTax products are free—to target eligible consumers with that advertising, and to clearly convey in that advertising that there are qualifications to use the free SKUs being advertised—not to claim that all TurboTax is free for everyone. (See Response to CCFF ¶611). For example, the FY'19 Go-To-Market White Paper states:

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

(GX428 (Intuit) at 24 (emphasis added)).

Further, the Proposed Finding even omits a part of the sentence quoted in the Proposed Finding that undermines Complaint Counsel’s claim. The full text of the quoted sentence makes clear that the [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (GX428 (Intuit) at 29 (emphasis added)). And the bullet point immediately below the quoted text further explains that the free advertising being discussed is targeted toward eligible consumers by being “[REDACTED]” (GX428 (Intuit) at 29 (emphasis added)). When read in context, the quoted text reinforces that Intuit’s strategy was to market free TurboTax SKUs (which are truly free) to a targeted subset of consumers most likely to qualify for that free offer. (GX428 (Intuit) at 23-23, 29, 53-54; see also PFF ¶¶69, 191-204).

615. Intuit’s realization of the fact that “free” is compelling and attracts customers is not new. (See, e.g., GX57 (Intuit) at CC- 00000646 (2014 marketing strategy document finding that “Free/Free offer is compelling enough to drive considerable (1.2M) incremental customer growth”); GX403 (Intuit) at CC-00007485 [REDACTED] & GX144 (Soukas (Intuit) Dep.) at 125-127; GX410 (Intuit) at p. 1 & GX145 (Berger (Intuit) Dep.) at 97, 104–08 (discussing, in part, the “zero-dollar any way” campaign); GX457 (Intuit) at CC-00009340 (“ [REDACTED] ”) & GX148 (Somers (Intuit) Dep.) at 84-85).

Response to Finding No. 615:

The Proposed Finding is incorrect insofar as it suggests that Intuit’s marketing strategy with respect to the challenged ads is to attract customers who do not qualify for the free offer. The Court heard repeatedly in credible testimony from each Intuit witness that this was *not* true. (Johnson (Intuit) Tr. 574-575, 617-618; Ryan (Intuit) Tr. 704, 726, 747, 783, 785-786; Rubin (Intuit) Tr. 1524-1525; *see also* PFF ¶¶191-195). In reality, Intuit offers free TurboTax SKUs as part of a long-term, retention-based growth strategy geared towards attracting new customers who qualify to file for free and retaining those customers as their tax situations become more complex and might require paid TurboTax SKUs. (PFF ¶83). Intuit endeavors to retain such customers by delivering exceptional tax-preparation products that result in positive customer experiences. (PFF ¶90). Consistent with that strategy, Intuit targets advertising for free TurboTax SKUs toward consumers who are likely to qualify. (PFF ¶191). For example, Intuit targets younger taxpayers who are more likely to have simple tax returns both by (1) advertising through media channels that skew heavily toward that demographic, and (2) using creative concepts that “resonate” with that group. (PFF ¶¶193-194). Intuit also uses “exclusionary targeting” to avoid showing ads to consumers who are unlikely to qualify for a free TurboTax SKU. (PFF ¶197). For example, if Intuit has an indication that a consumer bought or sold cryptocurrency, Intuit will not show that consumer a Free Edition ad. (PFF ¶197). That strategy, and efforts to target advertising towards consumers who qualify to use free TurboTax SKUs,

refutes Complaint Counsel's insinuation that Intuit was attracting consumers who do not qualify to TurboTax with free ads.

Ignoring the detailed and undisputed testimony offered during trial about Intuit's actual strategy, the Proposed Finding relies on selective, out-of-context excerpts from a few documents and prior depositions. That evidence does not support finding that Intuit's strategy was to use the challenged ads to attract consumers who did not qualify for that free offer. To start, the excerpts of deposition testimony cited simply reflect that Complaint Counsel read selective portions of the cited exhibits aloud to the Intuit employee being deposed. (GX144 (Soukas (Intuit) Dep.) at 125-127; GX145 (Berger (Intuit) Dep.) at 97, 104-08; GX148 (Somers (Intuit) Dep.) at 84-85). None of Intuit's witnesses offered testimony that supports the Proposed Finding or the mischaracterization of the exhibits on which Complaint Counsel rely. (GX144 (Soukas (Intuit) Dep.) at 125-127; GX145 (Berger (Intuit) Dep.) at 97, 104-08; GX148 (Somers (Intuit) Dep.) at 84-85).

Likewise, none of the four cited exhibits themselves support the Proposed Finding. Instead, the documents reflect Intuit's strategy of communicating to eligible consumers that there is a truly free product available for them, and the long-term, retention-based growth strategy geared towards attracting new customers with simple tax returns and retaining those customers as their tax situations become more complex and might require paid TurboTax SKUs. (*See* GX57 (Intuit) at -0646; GX403 (Intuit) at -7485; GX410 (Intuit) at 1; GX457 (Intuit) at -9340; *see also* PFF ¶¶83-94, 191-204).

For example, GX57 details the business and marketing plans for Tax Year 2014. To start, that exhibit relates to advertising that predates the relevant period in the FTC's complaint and the statute of limitations. (*See* RX260 (FTC) ¶¶9-20, 21-22, 37-44, 47, 49, 53, 56, 61-62; COL

¶¶147-156). Accordingly, that exhibit does not and cannot support Complaint Counsel's case. Complaint Counsel are also wrong to suggest that the quoted text relates to advertising at all. The quote refers only to the free offer being discussed, which is the focus of the document. The exhibit does not discuss the impact of any advertising, and thus does not support Complaint Counsel's claim.

In any event, GX57 reflects Intuit's strategy of growing its customer-base by getting consumers to file their taxes for free with the hope that in future years those consumers will chose to use paid TurboTax products. (*See* GX57 (Intuit) at -0638). In context, it is thus unremarkable that a free TurboTax offer being made available during the first peak of tax season (when many consumers with simple tax returns file) would be "compelling" and "drive consumer growth from target value pools," because the consumers being discussed are those who qualify to file for free. (*See* GX57 (Intuit) at -0646). That GX57 recognizes that TurboTax's free strategy (apart from any advertising) generates consumer growth is not proof that consumers were likely deceived by the challenged ads.

Complaint Counsel's reliance on GX403 and GX410, different versions of the same document, is similarly misplaced. Complaint Counsel focus on the initiative to [REDACTED] [REDACTED] while ignoring that the target audience for that initiative was [REDACTED] (GX403 (Intuit) at -7485; GX410 (Intuit) at 1). It is a good thing for consumers that Intuit advertises its free product and does so in a way consumers find compelling. (Golder (Intuit) Tr. 1104-1106, 1113-1116, 1174, 1176). The exhibits further recognize that the strategy was focused on [REDACTED] [REDACTED] [REDACTED] (GX403 (Intuit) at -7485; GX410 (Intuit) at 1). Rather than

demonstrating that Intuit was aware of the allegedly deceitful nature of its free ad campaign, the exhibits instead reflect Intuit's targeted efforts to communicate its free product offerings to eligible consumers, who are most likely to file early in the season, and its efforts to get these consumers to return to TurboTax in future years after a positive tax-filing experience (GX403 (Intuit) at -7485; GX410 (Intuit) at 1; *see also* PFF ¶¶83, 188-204).

Turning to GX457, Complaint Counsel yet again find no support for their claim. The quote on which Complaint Counsel rely itself recognizes that the goal of [REDACTED] [REDACTED] GX457 (Intuit) at -9340). The slide with that quote also states that advertising for free TurboTax SKUs was intended to [REDACTED] [REDACTED] (GX457 (Intuit) at -9340 (emphasis added); *see also* GX457 (Intuit) at -9315 [REDACTED] [REDACTED] (emphasis added)). Indeed, GX457 recognizes that Intuit's strategy was (and is) [REDACTED] [REDACTED] [REDACTED] (GX457 (Intuit) at -9340). Elsewhere, GX457 reiterates that Intuit's strategy was to target advertising for free TurboTax SKUs towards consumers with simple returns. (GX457 (Intuit) at -9358). That Intuit advertised its TurboTax's industry-leading free offering to consumers who qualified and helped more of those consumers to file their taxes for free is not evidence of deception.

Finally, Complaint Counsel failed to present any of the cited exhibits (GX57 (Intuit); GX403 (Intuit); GX410 (Intuit); GX457 (Intuit)) to any witness at trial (Complaint Counsel's Exhibit Index at 2, 16, 18 (May 23, 2023)), and therefore Complaint Counsel's reliance on and

selective quoting from those exhibits should be accorded little weight and Complaint Counsel should not be permitted to rely on any inferences from the exhibits.

616. Similarly, creative briefs, presentations and other advertising strategy documents prepared for Intuit by advertising agency Wieden+Kennedy also show the impression the TurboTax “free” ads would leave with consumers. (GX869 (Wieden+Kennedy) at ¶ 7 (Certification of Records of Regularly Conducted Activity)). For example, a March 18, 2020 presentation developed by Wieden+Kennedy for Intuit titled [REDACTED] contains slides recognizing that:

- [REDACTED]

(GX688 (Wieden+Kennedy) at CC-00014872).

[REDACTED]
[REDACTED] (GX688 (Wieden+Kennedy) at CC-00014878-79 (see below for image of presentation slide found at CC-00014879)).

[REDACTED]
[REDACTED] (GX688

(Wieden+Kennedy) at CC-00014881).

[REDACTED]
[REDACTED] (GX688 (Wieden+Kennedy) at CC-00014882).

[REDACTED] (GX688

(Wieden+Kennedy) at CC-00014883).

Response to Finding No. 616:

The Proposed Finding is incorrect and misleading because it disregards context from the quoted presentation and ignores additional directives Intuit provided to its advertising agencies. To begin, the presentation does not reflect the impression that advertising for free TurboTax SKUs would leave with consumers. Instead, it discusses the free advertising strategy and some of the messaging that Wieden+Kennedy was considering using for that advertising. Indeed, trial testimony (which Complaint Counsel ignore) established that this exhibit and similar exhibits were drafts prepared by Wieden+Kennedy in the early to middle stages of an iterative process to develop Intuit's advertising. (Ryan (Intuit) Tr. 780, 785, 797). Documents prepared by Intuit's advertising agencies do not necessarily reflect Intuit's strategy or beliefs. Complaint Counsel have offered no evidence that Intuit agreed with or somehow adopted the specific quotes from GX688 on which they rely. Nor does GX869, the cited declaration produced by Wieden+Kennedy along with this exhibit, offer support for the Proposed Finding. The declaration merely certifies that GX869 and the other documents listed are true and correct copies of documents created by Wieden+Kennedy and not Intuit. (GX869 (WK)).

In any event, the Proposed Finding ignores the litany of slides in GX688 that make plain that the quotes all relate to communicating that a *specific TurboTax SKU* is free for consumers

who qualify in an effort to get those consumers to file their taxes for free with TurboTax. For instance, GX688 begins by explaining [REDACTED]

[REDACTED]. (GX688 (WK) at -4847). It then specifies [REDACTED].” (GX688 (WK) at -4848; *see also*

GX688 (WK) at -4851). The presentation also recognizes that [REDACTED]

[REDACTED] (GX609 (Intuit); GX629 (Intuit)), [REDACTED]

[REDACTED], (GX688 (WK) at -4848, -4874), [REDACTED]

[REDACTED] (GX688 (WK) at -4892). The

presentation also discusses [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]” (GX688 (WK)

at -4856).

The Proposed Finding also ignores the testimony that Complaint Counsel’s themselves elicited about GX688 from Ms. Ryan, presumably because Ms. Ryan’s answers did not fit the narrative they were trying to create. At trial, Ms. Ryan told Complaint Counsel that they were taking excerpts out of context, and that it was appropriate to consider the rest of the document when looking at the selected quotes. (Ryan (Intuit) Tr. 785-786). For example, when asked about the first excerpted quote stating [REDACTED] Ms. Ryan explained that she would [REDACTED]

[REDACTED]

[REDACTED] (Ryan (Intuit) Tr. 785-

786). It was in the context of that targeted audience of simple filers that Wieden+Kennedy recognized that [REDACTED] (Ryan (Intuit) Tr. 785-786).

Considering that context, the cited presentation does not reflect a strategy of luring consumers to TurboTax with a free offer even though those consumers likely do not qualify for that offer. Instead, GX688 reflects Intuit's strategy of communicating that there is a free TurboTax offer to consumers who likely qualify, that there are qualifications for the offer, and that consumers can learn more about that offer on the TurboTax website if they are interested. (See GX688 (WK) at -4847-4848, 4851; *see also* PFF ¶¶66, 188-192).

Beyond GX688, other marketing materials prepared by Wieden+Kennedy similarly reflect that Intuit's advertising of its free TurboTax SKUs was intended to get more consumers to file their taxes for free by targeting consumers who were likely to qualify for the advertised SKU. In a brief from 2020, for example, Wieden+Kennedy recognized that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (GX682 (WK) at -0147-0148). The brief continued: [REDACTED]

[REDACTED]

[REDACTED] (GX682 (WK) at -0149). In other

words, Wieden+Kennedy noted, [REDACTED]

[REDACTED] (GX682 (WK) at -0150). To execute on that strategy, [REDACTED]

[REDACTED] for Wieden+Kennedy was to [REDACTED]

[REDACTED] i.e., those consumers likely to qualify for the free product. (GX682 (WK) at

-0151; *see also* GX682 (WK) at -0157 ([REDACTED])

[REDACTED] (emphasis added)); GX686 (WK) at -

4810 (describing the Free Edition marketing strategy as “a big opportunity for TurboTax to start a relationship with the young, simple tax filers (18-35),” and “setting out to make sure they know about TurboTax Free Edition”). Those marketing materials, which reflect and implement TurboTax’s long-term customer growth and retention strategy, is inconsistent with Complaint Counsel’s deception claim.

Moreover, all of the creative briefs *Intuit* provided to Wieden+Kennedy and other ad agencies made clear that ads for its free SKUs should be targeted toward consumers who likely qualify to use the free offer, and that the advertisements should make clear that they are for a specific SKU and that there are qualifications to use that SKU. Creative briefs provided to Wieden+Kennedy, for example, articulated that [REDACTED] [REDACTED] (GX673 (WK) at -0033; *see also* Ryan (Intuit) Tr. 783). Intuit also gave advertising agencies such as Wieden+Kennedy “mandatory” instructions that the ads should “drive absolute clarity around who ... TurboTax Free Edition was meant for.” (Johnson (Intuit) Tr. 620-621). Those agencies were instructed to include the TurboTax Free Edition logo and specific qualifications in all television and video ads. (*See* Johnson (Intuit) Tr. 620-621; GX654 (Intuit) at 1; GX309 (Intuit); GX614 (Intuit); Ryan (Intuit) Tr. 797; *see also* GX682 (WK) at -0177 (identifying [REDACTED] [REDACTED] [REDACTED])).

617. While Intuit and several of its executives, including Cathleen Ryan, Senior Vice President Marketing, claim that they only intended to target simple filers, (*see e.g.*, GX428 (Intuit) at CC-00007710 (“[REDACTED] [REDACTED]”); GX146 (Ryan (Intuit) Dep.) at 124–25), much of Intuit’s TurboTax advertising was not at all targeted. Instead, Intuit engaged in mass marketing of TurboTax via television and other channels. (*See supra* FF-47—FF-466).

Response to Finding No. 617:

The Proposed Finding is incorrect because all ads for free TurboTax SKUs were targeted towards consumers with simple tax returns. (PFF ¶¶188-204). That Intuit advertised free TurboTax SKUs via television and other “mass marketing” channels does not by itself support a finding that the ads were not targeted to consumers with simple tax returns, as ad targeting encompasses strategies beyond just the advertising channel, such as timing, demographics, creative content, and the inclusion or exclusion of certain audiences. (PFF ¶¶188-204).

In terms of timing, Intuit runs ads for free TurboTax SKUs—including Super Bowl television ads—at the beginning of the tax season (the “First Peak”) because that is “when the majority of Simple Filers prepare and file their taxes.” (PFF ¶196; GX428 (Intuit) at 24, 29).

In terms of demographics, Intuit runs ads for free TurboTax SKUs on “media channels and platforms that skew heavily towards” consumers ages 18 to 35 because those individuals are more likely to have simple tax returns. (PFF ¶¶193-194). For example, Intuit runs display ads—such as social media ads—on platforms like Snapchat and TikTok because their users are more likely to have simple tax returns. (PFF ¶194).

In terms of content, Intuit uses young people “as the creative inspiration for [advertising for free TurboTax SKUs]” to appeal to younger audiences more likely to have simple tax returns. (PFF ¶195). And Intuit partners “with a broad range of YouTube and Instagram influencers” so that its advertising campaigns for free TurboTax SKUs resonate with younger audiences more likely to have simple tax returns. (PFF ¶195).

In terms of exclusionary targeting, Intuit takes steps to avoid showing advertising for free TurboTax SKUs to consumers who do not qualify for free offers. (PFF ¶197). For instance, Intuit will not show consumers that it knows have cryptocurrency or unemployment income ads for free TurboTax SKUs because those consumers will not qualify for the free offer. (PFF ¶197).

Conversely, in terms of inclusionary targeting, Intuit shows ads for free TurboTax SKUs to consumers it knows are likely to have simple tax returns. (PFF ¶198). For example, Intuit sends email ads to consumers who filed for free with TurboTax Free Edition the prior year. (PFF ¶198).

Finally, Intuit uses strategies to ensure that paid-search ads and organic search results are relevant to consumers. (PFF ¶¶184-185, 199-202). For paid-search advertising, Intuit bids on keywords in an auction, and if Intuit is the highest bidder, a targeted TurboTax advertisement will appear at the top of the search results page when a consumer searches for those keywords; for instance, if a consumer searches for “free” keywords, paid-search results for free TurboTax SKUs will appear. (*See* PFF ¶184). Intuit separately uses search engine optimization (“SEO”) to ensure that organic search results—i.e., search results generated by a search engine in response to a user’s query—are relevant to consumers. (PFF ¶¶185, 199-202; Ryan (Intuit) Tr. 697-698). Through SEO, Intuit optimizes content on the TurboTax website so that search engines list specific pages of the website “based on relevancy of that page to a user’s query.” (PFF ¶199). For example, if a consumer searches “TurboTax Free,” Intuit’s SEO strategy results in her being served more prominent organic search results related to TurboTax Free Edition, such as the Free Edition landing page and blog posts about Free Edition. (PFF ¶200). And conversely, if a consumer searches “TurboTax Form 1099,” she will be served high-ranking results for paid TurboTax SKUs that cover Form 1099 income, not TurboTax Free Edition. (PFF ¶¶200-202). t

618. Mary Ann Somers, then the SVP and Chief Growth Officer of Intuit’s consumer group, was interviewed on the September 20, 2019 episode of the podcast “Renegade Thinkers Unite.” (GX148 (Sommers (Intuit) Dep.) at 46–48; GX357 (Complaint Counsel) (transcript of podcast featuring Ms. Somers); GX358 (Complaint Counsel) (audio recording of podcast featuring Ms. Somers)). Ms. Somers made the following statements during the interview:

- a) “Here [at Intuit] we had an incredible marketing department and it’s a world-class marketing department. It’s a group that doesn’t toot their own

horn so I'm going to toot it for them. Just an incredible group of people. We spend hundreds of millions of dollars in a very short amount of time to generate billions of dollars in a matter of months." (GX357 (Complaint Counsel) at CC-00007048; GX358 (Complaint Counsel) at 16:11–16:30 (audio)).

- b) Regarding the TurboTax “free free free” campaign: “I’ll start with the part that really was the aha moment, and that was the insight. We know a lot about our free customer. We know what their journey is, a lot of things. But the key insight for us was, when you start talking about free, that’s what people hear. They hear free. You can say a lot of other things, but what they hear is free. We said, ‘Huh, well, if that’s the truth, then how do we create a campaign that builds upon that truth?’ And that’s the campaign that you saw.

It was the idea that it’s multiple different situations and you don’t know as you first start to see the execution, what’s going on. We have one that’s a lawyer. That’s a very dramatic environment. We have one that’s a game show that’s kind of fun. We have a spelling bee. We have all these different situations, and then the dialogue starts and everybody’s delivering, the actors and actresses are delivering the dialogue as if they’re delivering real words. But the real words are replaced all with free. And that was really important for us because we wanted it to reflect what the change was in our offering and we made a massive change this year.

What we did is, first there was tax reform, so we defined our free product based on the 1040 tax reform as the government had defined it. And then what we did is, we decided this year that we were going to provide what’s called year on year transfer for free. So in the past, people were paying for some of those kinds of things, so the ability to pay zero to file their taxes, we were really making a major change in order to do that.

We wanted to really let people know this was free, really free, free, free. That was a reflection of the innovation and the decision that we made on the product. We wanted that to show up in the campaign in a playful way, simple-minded, engaging. We measure advertising like many other people where we are tracking it during the season. We look at the overall ad track and we look at—Did the ad break through? Did people remember the ad then? Did you remember who the ad was from? So brand linkage. Did you get the key message, and then how did that impact your consideration? Just simple measures and metrics. We looked at it and it started to really do well and that’s when we started to realize we were onto something really big here.” (GX357 (Complaint Counsel) at CC-00007048; GX358 (Complaint Counsel) at 26:06-28:30 (audio)).

- c) “We have a history of being very effective with our ROI and really spending money smartly. Again, looking at the funnel altogether. Every

different thing that we do from a TV ad to spending a lot on digital marketing and our performance media to get people to visit the site, see if that's something as they're shopping around, is our product one that's right for them? And then going from visits to logins, from logins to starts, from starts to completions. That's really how we look at all our different vehicles playing a role in that full-funnel view.” (GX357 (Complaint Counsel) at CC-00007048; GX358 (Complaint Counsel) at 31:04–31:36 (audio)).

Response to Finding No. 618:

The Proposed Finding is misleading because it does not include critical context about those statements, including statements from Ms. Somers's deposition testimony.⁴ Ms. Somers is a former Intuit employee who has not worked at the company since 2020. (GX148 (Somers (Intuit) Dep.) at 89-90). During her deposition, Ms. Somers provided extensive testimony in response to Complaint Counsel's questions that demonstrate that her interview is not evidence of deception and that undermines their reliance on the isolated statements from the podcast. Ms. Somers repeatedly clarified that each of the statements quoted in the Proposed Finding was about TurboTax Free Edition and Free Edition advertising, as detailed further below. (*See* GX148 (Somers (Intuit) Dep) at 48, 49). Her statements therefore capture the unremarkable fact that is obvious from the challenged ads themselves: that Intuit advertised that TurboTax Free Edition was free for consumers who qualified, and that consumers who qualified reacted positively to learning about that free offer. Each quoted excerpt is addressed in turn.

⁴ Ms. Somers [REDACTED] (GX152 (Johnson (Intuit) IHT) at 148), and so her testimony in support of Intuit's position is particularly credible. And of course, Ms. Somers knows better than Complaint Counsel what her statements did and did not mean. It is also typical in FTC enforcement actions for Complaint Counsel to call former employees as witnesses live—that Complaint Counsel chose not to do so is their choice, but creates an inference that had Ms. Somers been asked to do so, the testimony would have been the same testimony she provided in her deposition.

First, when asked to explain her statement that the Intuit consumer group team “spent hundreds of millions of dollars in a very short amount of time to generate billions of dollars,” Ms. Somers testified that she was referring to the seasonal business of tax preparation and the amount of money spent “[g]enerally” on “all kinds of [Intuit] advertising.” (GX357 (FTC); GX148 (Somers (Intuit) Dep.) at 42-43). That Intuit’s general advertising spending is seasonal, to align with the tax season, is not evidence of deception and is largely irrelevant to the issues in the case.

Second, with regard to Ms. Somers’s statement that people “hear free,” which helped the advertising campaign “breakthrough” and deliver a “key message,” (GX357 (FTC)), it is clear from the podcast transcript itself that Ms. Somers was referring to consumers hearing “the truth” that a specific TurboTax “free product” (i.e., Free Edition) was free. (See CCF ¶618(b)). As she stated, Intuit wanted consumers to know that “*this* was free,” with *this* being TurboTax Free Edition. (See CCF ¶618(b)). Nowhere does Ms. Somers state, or even suggest, that any challenged ads told or implied to consumers that all TurboTax was free, or that that message was “what people hear.” Ms. Somers confirmed during her deposition that the specific product that she was referring to consumers hearing was free was TurboTax Free Edition, which is free. (GX148 (Somers (Intuit) Dep.) at 48-49). Thus, as Ms. Somers put it, her podcast statements evince only that “there were millions” of people “able to file for free” with TurboTax, that that was “something [Intuit took] pride in,” and that Intuit “want[ed] to be able to serve more and more of [its] customers with [its] free product.” (GX148 (Somers (Intuit) Dep.) at 48).

And finally, when discussing advertising ROI and “spending money smartly,” Ms. Somers prefaced this discussion by explaining how Intuit considers the needs of its customer base and targets its marketing accordingly. “[T]here are different customers and there's different

customer needs and we have a *range of products* to fit those different customer needs. When we look at *our free product, that's for the simple filer* and we want the simple filer to be able to file for free. And that's our goal.” (GX357 (FTC) (emphasis added); *see also* GX148 (Somers (Intuit) Dep. at 54). Ms. Somers also clarified that when discussing a simple filer eligible to file for free, “*we don't look at it from a monetization standpoint* for that filer.” (GX357 (FTC) (emphasis added); *see also* GX148 (Somers (Intuit) Dep. at 54).

Even setting that context aside, Ms. Somers's statements on their face do not suggest that the challenged advertising was deceptive. Her statements concerning ROI and spending money smartly were not limited to, or even focused on, the challenged ads. And Ms. Somers was clear that Intuit's marketing strategies were targeted towards consumers who could use the advertised product. A key consideration in that advertising strategy was whether the advertised product was “one that's right for them,” and using “all our different vehicles” in the advertising funnel to assist with targeting consumers with advertising for the right product. (*See* CCFF ¶618(c)).

D. Intuit's Awareness of Negative Customer Sentiment, Feedback and Complaints

619. Intuit's internal complaint tracking and tracking of consumer sentiment and consumer feedback identified price and price transparency as a trend in consumer complaints. For example, [REDACTED] (GX51 (Intuit) at CC-00000552), [REDACTED] (GX51 (Intuit) at CC-00000553). [REDACTED], Intuit found that “customers still want more price transparency (e.g. ‘Free isn't Free,’ ...),” (GX411 (Intuit) at CC-00007561), and that a number of consumers complained about Intuit's pricing, for example:

PLU Verbatims From PRS

Required Upgrades

it was very predatory. i came for a free file, but needed to upgrade to the delux edition, after refusing to upgrade 5 times before. My "particular" situation required the delux. so i have to shell out 35 for that. then, since i want to pay the 35 out of my tax return, you're charging 35 to take 35 out of my refund! 100% mark up. I signed in for free and ended up paying 70 bucks.

Because it wasn't until I was nearly finished with my filling that I was told I couldn't file without paying fees that amounted to 111. I find this absolutely ridiculous considering there wasn't anything special about my filling status. everything was nearly the same as last year and last year I was able to file for free. To make matters worse the explanation for why my tax situation required me to pay was cryptic at best basically saying there was an additional medicare form that magically caused me to have to pay all these fees. I would have tried another service if I hadn't been so far along with this service. I will only use turbo tax next year as an absolute last resort.

ever thing i needed to do required upgrading to the next level costing me 110 dollars

it gets more expensive every year. I should be required to pay just because i have a 1099-MISC form. Additionally, it's not mentioned up front that there is a \$34.99 charge if you want the fees deducted from refund, that's extremely misleading because most people would likely click right past that considering you have to scroll to clearly see the charge. Luckily, I caught it and wasn't gouged the extra charge. Just put it on the page where you select method of payment.

I was required to pay extra unexpected fees that totaled around \$100 after constantly reading and hearing that I would be able to file for free.

Because the site required me to upgrade my account, then it didn't make a difference in how I filed. Then charged me for an additional \$70 to file, and somehow $1380 - 106 = 1080$ in TurboTax land and I lost \$300 in your fees that don't actually add up.

The pricing seems sketchy and devious. I understand the need for marketing and upselling, but this year Turbo Tax seemed even worse with the required "upgrades" to the next higher service offering. I don't even think the price I paid is unreasonable, but the way I got to that price made me feel cheated and deceived. I will not be using TurboTax next year even though I have used it the last several years in a row.

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Intuit Proprietary & Confidential



(GX411 (Intuit) at CC-00007563).

Response to Finding No. 619:

The Proposed Finding is misleading because as a customer-focused company, (Johnson (Intuit) Tr. 550-551, 554-555; Ryan (Intuit) Tr. 836), Intuit always seeks out the negative feedback it receives and looks to do better (Rubin (Intuit) Tr. 1503-1504). The two cited exhibits are not reflective of the vast majority of consumer feedback at Intuit, nor are the cited issues at all tied to any of the challenged advertisements.

To begin, far from suggesting a negative trend, the cited exhibits (from 2016)—recognize that customer complaints about price were trending lower than the previous year. (GX51 (Intuit) at -0546 (stating that [REDACTED]

[REDACTED]; GX411 (Intuit) at 11 (“Overall monetization contact volume is lower than [prior year].”).

Next, the referenced consumer feedback concerning “price” and “price transparency” did not relate to the challenged ads. For instance, both documents plainly indicate that these customers were complaining about the price of specific add-on features that they valued—such as Refund Transfer and year-over-year data transfer. (See GX51 (Intuit) at -0552 (stating that

[REDACTED]; GX51 (Intuit) at -0553 [REDACTED]; GX411 (Intuit) at -7561 (“customers still unsure of how RT works or why they are being charged for it”). Complaints about the price of add-on products—which are not required to be purchased to file taxes—have no relation to ads for free TurboTax SKUs and are not at issue in this case.

Moreover, customer verbatims from the cited exhibits show that feedback about price was unrelated to customers feeling deceived by TurboTax ads. For instance, customers complained that they thought paid TurboTax SKUs cost too much relative to competitors. (*E.g.*, GX411 (Intuit) 5 (“The cost of filing is too high. You can get a better deal from H&R Block.”; “While TurboTax does make the process easier, the price has risen dramatically over the years.”); GX51 (Intuit) at -0559 [REDACTED])). Some customers also expressed frustration that their tax situations had changed that tax year and they had had to pay after filing for free the prior year. (*E.g.*, GX411 (Intuit) at 3 (customer complaining that “everything was nearly the same as last year and last year I was able to file for free” but acknowledging that he had “an additional medicare form that magically caused me to have to

pay’’)). This disappointment is unfortunate but it only illustrates that consumers *understood* the qualifications to use Free Edition. Still other customers also wished certain tax forms were covered under the IRS’s definition simple tax returns. (*E.g.*, GX411 (Intuit) at 3 (“I should [not] be required to pay just because I have a 1099-MISC form.”); GX411 (Intuit) at 4 (“I had to ‘upgrade’ in order to utilize a form for health insurance.”)). Again, these comments reflect consumer *comprehension* of the qualifications to use Free Edition. None of this feedback about price is relevant to whether consumers were misled by TurboTax advertising about their ability to file for free.

Even more importantly, these handful of negative reviews are in no way indicative of typical consumers’ experience using TurboTax or even a small minority of consumers’ experience. In fact, when TurboTax customer reviews are considered as a whole, “the overwhelming majority ... are positive.” (Rubin (Intuit) Tr. 1504-1505; PFF ¶¶625-626, 647). For example, the record does not reflect a meaningful volume of customer complaints—either in the FTC’s Sentinel database or with the BBB—and certainly not at a rate indicative of deception. (PFF ¶¶623-647). TurboTax’s high retention rates—both among free and paid customers—are similarly inconsistent with deception. (PFF ¶¶91-93, 648-651). Moreover, TurboTax customers provide consistently high ratings and positive reviews, which would not occur if Intuit were deceiving consumers about their ability to file for free. (PFF ¶¶652-654). TurboTax’s overall net promoter score (“NPS”)—a common metric in the tax-preparation industry—is either well above or comparable to competitors like H&R Block and TaxAct. (*See* RX583 (Intuit) at 3; RX593 (Intuit) at 2; RX38 (Intuit) at -5838; RX39 (Intuit) at -5023). TurboTax’s free and paid abandonment rates—which are the same—provide strong evidence that customers are not abandoning TurboTax because they felt deceived about their ability to file for free. (PFF ¶¶655-

658). All of this evidence strongly refutes Complaint Counsel's assertion that Intuit engaged in a multi-year, multi-ad, multi-channel, multi-modal, and integrated TurboTax marketing campaign that was deceptive. (PFF ¶¶98, 625, 639, 647). If such a campaign had occurred, we would see it in this data and we do not. So understood, it does not make sense to pull out the small handful of negative feedback Intuit received and extrapolate it more broadly. Instead, one has to keep in mind that "there will always be some reviews that include some negative things or complaints or things that people have questions about, but you have to look ... at what the themes are and what the trends are and what the prevailing data is." (Rubin (Intuit) Tr. 1504-1505).

Tellingly, Complaint Counsel failed to present either of the cited exhibits (GX51 (Intuit); GX411 (Intuit)) to any witness at trial (Complaint Counsel's Exhibit Index at 2, 16 (May 23, 2023)), and therefore Complaint Counsel's reliance on and selective quoting from those exhibits should be accorded little weight and Complaint Counsel should not be permitted to rely on any inferences from the exhibits.

620. In 2019, when TurboTax changed its Free Edition eligibility criteria, many consumers complained about being required to upgrade to a paid product when they were previously eligible to file for free. (See GX415 (Intuit) at CC-00007582-83 (showing that by January 21, there were around 500 posts about new upgrade requirements, 69% of which were negative)).

Response to Finding No. 620:

The Proposed Finding is irrelevant because consumer complaints in Tax Year 2018 about changes to Free Edition's qualifications—which were prompted by a change in tax laws outside of Intuit's control—have no relation to whether the challenged advertising was deceptive. If anything, the Proposed Finding illustrates only that consumers were aware of Free Edition's qualifications, some consumers who previously qualified knew that they could no longer qualify, and then expressed their displeasure at the change to Intuit.

As explained (*see* Responses to CCFE ¶¶13, 15-16), Intuit has always made free TurboTax SKUs available to those taxpayers with a “simple tax return”—i.e., the most basic tax form offered by the IRS. (*See also* PFF ¶71). As a result of tax-reform legislation before Tax Year 2018, the IRS eliminated Forms 1040EZ and 1040A—its most basic forms at the time—and replaced them with a new Form 1040 (PFF ¶121), after which Intuit aligned its use of simple tax return to the new Form 1040 with no attached schedules (PFF ¶124).

If Intuit had not aligned its definition of simple tax returns to the IRS’s definition after changes to the tax forms, *no consumers* would have qualified for TurboTax Free Edition. (PFF ¶125). Intuit also took efforts to communicate to customers who no longer qualified for free TurboTax SKUs because of tax reform at the outset of starting their return in Tax Year 2018 that they would have to use a paid TurboTax SKU in order “to be clear with [those] customers and not surprise them.” (GX150 (Goode (Intuit) IHT) at 202; *see also* Response to CCFE ¶16). Upon signing into TurboTax, these customers were shown a screen explaining the IRS tax form changes and informing them that, as a result of the changes, they would need to file tax forms not covered by free SKUs. (*See* Response to CCFE ¶16).

The Proposed Finding is also inaccurate because it mischaracterizes the cited exhibit, which does not show that any meaningful volume of Tax Year 2018 TurboTax customers who could previously file for free were complaining about being required to upgrade. For instance, contrary to Complaint Counsel’s assertion, GX415 does not show that there were around 500 consumer posts “about new upgrade requirements,” but rather that there were around 500 posts concerning free TurboTax SKUs in general—and many of those posts were positive. (GX415 (Intuit) at 2 (indicating that 31% of the posts were positive)). Further, the exhibit indicates that customer reviews mentioning upgrades were one of several themes observed in that year’s

reviews. (GX415 (Intuit) at 3). The exhibit also shows that consumers were frustrated by the IRS's decision to change tax forms, not with TurboTax, as it discusses consumers complaining that "IRS forms have changed" (GX415 (Intuit) at 9).

621. A 2019 Intuit study showed that [REDACTED] (RX765-A (Intuit) at p. 2, 7).

Response to Finding No. 621:

The Proposed Finding is irrelevant and omits critical context. To begin, Intuit's retention rate for its paying customers is 83%, far surpassing that of its competitors. (PFF ¶¶91-92, 650). Simply put, very few consumers "leav[e]" TurboTax for any reason. Among the small number who do leave, "price" is undoubtedly, as the finding suggests, "a reason." But there is nothing in the record to suggest that the "price" being referenced has to do with consumer expectations that TurboTax was going to be free for them and then it was not. Instead, as the exhibit itself suggests, those consumers simply might have been drawn to competing offers. (See RX765-A (Intuit) at 7 (noting that [REDACTED] [REDACTED] [REDACTED])). TurboTax software is the industry leader in quality, but it does tend to be more expensive than its rivals. (See RX92 (Intuit) at 1, 4; RX502 (Intuit)).

622. Intuit tracked that in 2019, [REDACTED] [REDACTED] [REDACTED]. (RX765-A (Intuit) at p. 17).

Response to Finding No. 622:

The Proposed Finding is irrelevant and omits critical context. To begin, Intuit's retention rate for its paying customers is 83%, far surpassing that of its competitors. Simply put, very few consumers "leav[e]" TurboTax for any reason. Among the small number who do leave, "price" is undoubtedly, as the finding suggests, "a reason." But there is nothing in the record to suggest

that the “price” being referenced has to do with consumer expectations that TurboTax was going to be free for them and then it was not. Instead, as the exhibit itself suggests, those consumers simply might have been drawn to competing offers. (See RX765-A (Intuit) at 7 (noting that [REDACTED] [REDACTED] [REDACTED])). TurboTax software is the industry leader in quality, but it does tend to be more expensive than its rivals. (See RX92 (Intuit) at 1, 4; RX502 (Intuit)).

623. In a different 2019 study, [REDACTED] [REDACTED] (GX665 (Intuit) at CC-00014561, CC-00014563).

Response to Finding No. 623:

The Proposed Finding is irrelevant and misleading. To begin, this “different 2019 study” is actually the Tax Year 2020 Net Promoter Score study (“TY20 NPS study”) that shows that overwhelmingly consumers have a positive experience using TurboTax, that TurboTax is the industry leader in providing a positive consumer experience, and that TurboTax users overwhelmingly recommend using TurboTax to their friends and family. (See PFF ¶¶714-721). It is true, however, that not *everyone* loves TurboTax and there are a small number of negative comments. These few negative comments about the cost of TurboTax’s paid products have nothing to do with the challenged advertisements. To illustrate, several comments about cost in the TY20 NPS study have nothing to do with advertisements at all; for instance, customers complained about having to pay to file certain forms (GX665 (Intuit) at 24 (“[REDACTED] [REDACTED] [REDACTED]”), and the cost of add-on features like expert tax assistance (GX665 (Intuit) at 24 [REDACTED] [REDACTED])). These comments are not related to the challenged advertisements.

Further, to properly evaluate customer feedback in any study, including this one, it is important to [REDACTED] [REDACTED] (Rubin (Intuit) Tr. 1624-1625; *see also* Rubin (Intuit) Tr. 1627 (testifying that [REDACTED] [REDACTED] Mr. Rubin also explained that [REDACTED] [REDACTED] [REDACTED] (Rubin (Intuit) Tr. 1624; *see also* Rubin (Intuit) Tr. 1624 (testifying that [REDACTED] [REDACTED] [REDACTED]). Mr. Rubin noted that [REDACTED] [REDACTED] [REDACTED]—a

trend that is inconsistent with deception. (Rubin (Intuit) Tr. 1628).

Finally, Intuit notes that the TY20 NPS study provides other strong evidence that consumers were not deceived. (*See* PFF ¶¶714-721). For example, the study showed that 48% of respondents were aware of free TurboTax SKUs, which is nearly the same as the proportion of respondents who actually filed their taxes for free with TurboTax. (PFF ¶¶717-718). The study also showed that only [REDACTED] of respondents who used paid TurboTax SKUs were even aware of TurboTax’s free offerings, illustrating Intuit’s success in targeting ads for free SKUs to consumers with simple tax returns. (PFF ¶¶719-720). And the study showed that consumers value free TurboTax SKUs such that they want to recommend them to others. (GX665 (Intuit) at 27).

624. Consumers can contact Intuit directly through its customer success team and customer care team by phone or chat. (GX158 (Intuit 3.33(c)—Berger (Intuit) Dep.) at 7-8).

Response to Finding No. 624:

Intuit has no specific response except to note that if, as alleged, Intuit had run ad campaigns that were deceptive, it would have been “overwhelmed with complaints,” including through “inbound phone calls to the customer success lines,” and “would go out of business trying to pay to handle all of the complaints,” none of which has occurred. (PFF ¶¶647; Rubin (Intuit) Tr. 1647-1648).

625. When customers are connected with an Intuit customer success agent, a record of the contact is created in Salesforce, Intuit’s customer relationship management database, by the customer success agent. (GX158 (Intuit 3.33(c)–Berger (Intuit) Dep.) at 8–9). The information entered into Salesforce includes, for example, “the name of the customer, what product they’re using, what they may be contacting [Intuit] about,” “notes captured about the interaction” by the customer success agent and any resolution. (GX158 (Intuit 3.33(c)–Berger (Intuit) Dep.) at 9).

Response to Finding No. 625:

Intuit has no specific response except to note that Complaint Counsel elicited no testimony concerning Intuit’s customer relationship management database (Salesforce) or its contents at trial.

626. These consumer calls to the care team can be escalated to “Tier two,” and those consumer interactions with more experienced or specialized customer care agents also would be recorded in Salesforce. (GX158 (Intuit 3.33(c)–Berger (Intuit) Dep.) at 10–12).

Response to Finding No. 626:

Intuit has no specific response except to note that Complaint Counsel elicited no testimony concerning Intuit’s customer relationship management database (Salesforce) or its contents at trial.

627. Intuit can track trends of consumer complaints in Salesforce, such as “what types on contacts [Intuit] is getting, whether there are more of some kind than another.” (GX158 (Intuit 3.33(c)–Berger (Intuit) Dep.) at 12).

Response to Finding No. 627:

Intuit has no specific response except to note that it tracks customer feedback through a variety of means—including CRM data in Salesforce, customer ratings and reviews, product recommendation scores, and net promoter scores—and takes all of that feedback into account when making business decisions. (PFF ¶¶652-654, 714-721; Johnson (Intuit) Tr. 559-560 (testifying that Intuit tracks TurboTax product recommendation scores and “continued to innovate and increase” the scores over time); Rubin (Intuit) Tr. 1503-1504 (testifying that Intuit reviews customer feedback “to learn ... what consumers like and what other things we can do to continue to [be] enhancing and improving our offerings”). However, Intuit does not make decisions based on isolated comments, positive or negative, because “that wouldn’t make sense” given that not everything that consumers write in a review is accurate and the volume of feedback that Intuit receives. (Rubin (Intuit) Tr. 1504-1505). Intuit also notes that Complaint Counsel elicited no testimony concerning Intuit’s customer relationship management database (Salesforce) or its contents at trial.

628. This information, along with significant amount of other information about consumers, is stored in Intuit’s customer relationship management database, or CRM. (*See* (GX158 (Berger (Intuit) Dep.) at 77 (“CRM is sort of the totality, our total customer base, for example, all the data we have about everybody.”). A subset of that data was produced pursuant to this Court’s December 30, 2022 Order Granting Complaint Counsel’s Motion to Compel Production of Documents at GX857 to GX868, which are admitted into evidence on the JX-2.

Response to Finding No. 628:

The Proposed Finding is unintelligible. It is not clear what “information” Complaint Counsel are referring to in the first sentence, and it is unclear what “data” is being referenced in the second sentence. Further, the Proposed Finding is not supported by the cited source because there is no page 77 in GX158 and the quoted language does not appear elsewhere in the exhibit. Intuit otherwise has no specific response except to note that Complaint Counsel elicited no

testimony concerning Intuit's customer relationship management database (Salesforce) or its contents at trial.

629. On a weekly basis, Intuit "is mining the information that comes into Salesforce for trends in consumer complaints." (GX158 (Intuit 3.33(c)–Berger (Intuit) Dep.) at 15).

Response to Finding No. 629:

Intuit has no specific response except to note that Intuit's mining of the information that came into Salesforce for trends in consumer complaints never revealed the existence of a deceptive advertising campaign, which it surely would have if Complaint Counsel's theory of deception were accurate. (PFF ¶¶642-645). Pivotal to the accuracy of this Proposed Finding compared to the surrounding findings is that it focuses on *trends*, not isolated and cherry-picked reviews. Intuit does not make decisions based on isolated comments, positive or negative, because "that wouldn't make sense" given that not everything that consumers write in a review is accurate and in light of the volume of feedback that Intuit receives. (Rubin (Intuit) Tr. 1504-1505). Intuit also notes that Complaint Counsel elicited no testimony concerning Intuit's customer relationship management database (Salesforce) or its contents at trial.

630. In addition to Salesforce, Intuit also uses a third-party vendor Bazaarvoice to capture and store consumer reviews. (GX149 (Crosby (Intuit) Dep.) at 42-43).

Response to Finding No. 630:

Intuit has no specific response except to note that the customer reviews captured by Bazaarvoice are publicly available on the TurboTax website and reflect consistently positive customer feedback for TurboTax products. (PFF ¶¶652-654; GX146 (Ryan (Intuit) Dep.) at 67; GX149 (Crosby (Intuit) Dep.) at 42-43, 45-46). During Tax Year 2021, for example, TurboTax products had average ratings between 4.4 and 4.9 out of 5 stars based on hundreds of thousands of customer reviews. (PFF ¶653). This is unlikely to be true if Intuit had engaged in a

widespread and long-running deceptive advertising campaign in the manner Complaint Counsel contend. (RX1018 (Golder Expert Report) ¶¶31-32, 36-37, 50, 228).

631. The data stored in Bazaarvoice includes, for example, the product name, the relevant tax year, the method by which the consumer filed their taxes the prior year, and life changes that would impact the consumer's tax situation. (GX149 (Crosby (Intuit) Dep.) at 92–95).

Response to Finding No. 631:

Intuit has no specific response.

632. In order for the review and accompanying data to be captured in Bazaarvoice, the consumer must actually complete filing their taxes using a TurboTax product. (GX149 (Crosby (Intuit) Dep.) at 42–43, 47).

Response to Finding No. 632:

Intuit has no specific response.

633. The excel file “TY21 Bazaarvoice Customer Reviews Data,” (the “TY21 customer review data”) captures these consumer reviews, including an overall rating, a review ID, a review title, and review text, for consumers who filed their TY21 taxes using a TurboTax product and completed the Bazaarvoice survey. (*See generally* RX816⁵ (Intuit) INTUIT-FTC-PART3-000490341; *see also* RX1027 (Deal Expert Report) at D-36).

Response to Finding No. 633:

Intuit has no specific response except to note that the consumer reviews captured in RX816 are overwhelmingly positive and result in an average rating for all TurboTax SKUs of 4.578 out of 5 stars. (RX816 (Intuit)).

634. Throughout his report, Intuit expert Bruce Deal uses quotations from RX816, the TY21 Bazaarvoice Customer Review Data “by way of exemplars and examples,” or “illustrations of the types of narrative that’s in the review data.” (Deal (Intuit) Tr. 1428–1431).

Response to Finding No. 634:

The Proposed Finding is misleading because it is intended to suggest that every quote taken from Bazaarvoice customer review data is exemplary of consumer sentiment towards

⁵ This document is identified in deposition testimony as GX475 (Intuit).

TurboTax and thus Complaint Counsel are justified in cherry-picking the very small number of negative reviews that exist and extrapolating them into serving as support for their theory of deception. As Mr. Deal explained in his report and at trial, his report uses quotations specifically chosen from RX816 because they are exemplary of *overall trends* in the Bazaarvoice data. (Deal (Intuit) Tr. 1430; RX1027 (Deal Expert Report) ¶¶59, 79, 81, 88, 90-91, 109, 117, 120, 157).

The trends showed that TurboTax customers were satisfied and returned for many years, rated TurboTax products highly, appreciated TurboTax's ease and efficiency, valued TurboTax's add-on services, cross-shopped between TurboTax and its competitors, and switched tax-preparation products easily. (See RX1027 (Deal Expert Report) ¶¶59, 81, 88, 117, 120, 157). Mr. Deal also explained that he was "not relying on [customer quotes] directly for any of [his] data analysis," but rather on the actual "numerical scores" from customer reviews. (Deal (Intuit) Tr. 1430-1431). In contrast, Complaint Counsel seek to use individual reviews to support propositions that are inconsistent with the overall thrust of the reviews. For example, as the Court saw at trial, Complaint Counsel pointed to a single negative review on a page of a spreadsheet, when the surrounding 20-or-so reviews were all positive, and many of those reviews were inconsistent with Complaint Counsel's theory of deception. (Rubin (Intuit) Tr. 1504-1505).

635. In Intuit's CRM, case number [REDACTED] includes in the field "[REDACTED]" the text "[REDACTED]" (GX859 (Intuit) at CC-00015471, row 39720, column V).

Response to Finding No. 635:

The Proposed Finding is correct as far as it goes, which is not very far. In Tax Year 2020, [REDACTED] consumers used TurboTax to prepare and file their taxes. (RX820 (Intuit)). In such a large population, "there will always be some reviews that include some negative things or complaints or things that people have questions about, but you have to look ... at what the

themes are and what the trends are and what the prevailing data is.” (Rubin (Intuit) Tr. 1504-1505). Complaint Counsel identify only *seven* negative comments in total from the Tax Year 2020 CRM data (*see* CCF ¶¶635-641). Those seven comments represent just [REDACTED] of the [REDACTED] returns filed using TurboTax in Tax Year 2020. (RX820 (Intuit)). That tiny percentage is not indicative of deception—in fact the opposite is true—and when the data are properly considered as a whole, “the overwhelming majority ... are positive.” (Rubin (Intuit) Tr. 1504-1505; *see also* PFF ¶¶652-654; Deal (Intuit) Tr. 1368, 1372-1373; RX1018 (Golder Expert Report) ¶44, fig. 3).

Further, this isolated comment from an unknown consumer lacks sufficient information or context to even reliably conclude whether it is supportive of Complaint Counsel’s theory. Intuit acknowledges that case number [REDACTED]’s comment could suggest that the consumer had an expectation from the challenged advertisement that their taxes would be free. But a more plausible reading is that the consumer is just unhappy that *their taxes* were not free. (*See* CCF ¶635). The Proposed Finding includes no context about the referenced customer’s tax situation, price expectation, prior experience with TurboTax or other tax-preparation services, or the basis for needing to upgrade, if the customer was in fact required to upgrade at all.

Finally, the extraordinarily low rate of negative feedback identified by Complaint Counsel in the Tax Year 2020 CRM data ([REDACTED] of all Tax Year 2020 customer returns) is entirely consistent with other customer-based evidence showing a lack of widespread deception. For example, the record does not reflect a meaningful volume of customer complaints—either in the FTC’s Sentinel database or with the BBB—and certainly not at a rate indicative of deception. (PFF ¶¶623-647). TurboTax’s high retention rates for its paid customers are similarly inconsistent with deception. (PFF ¶¶91-93, 648-651). Moreover, TurboTax customers provide

consistently high ratings and positive reviews, which would not occur if Intuit were deceiving consumers about their ability to file for free. (PFF ¶¶652-654). TurboTax’s free and paid abandonment rates—which are the same—likewise provide strong evidence that customers are not abandoning TurboTax because they felt deceived about their ability to file for free. (PFF ¶¶655-658). And Mr. Deal’s analysis revealed that the customer-level data for only 510 TurboTax customers—out of over 55 million Tax Year 2021 customers—were even only potentially consistent with the deception alleged by Complaint Counsel. (PFF ¶¶663-682).

636. In Intuit’s CRM, case number [REDACTED] includes in the field “ [REDACTED] ” the text [REDACTED] .” (GX859 (Intuit) at CC-00015471, row 40777, column C).

Response to Finding No. 636:

The Proposed Finding is correct as far as it goes, which is not very far. In Tax Year 2020, [REDACTED] consumers used TurboTax to prepare and file their taxes. (RX820 (Intuit)). In such a large population, “there will always be some reviews that include some negative things or complaints or things that people have questions about, but you have to look ... at what the themes are and what the trends are and what the prevailing data is.” (Rubin (Intuit) Tr. 1504-1505). Complaint Counsel identify only *seven* negative comments in total from the Tax Year 2020 CRM data (*see* CCF ¶¶635-641). Those seven comments represent just [REDACTED] of the [REDACTED] returns filed using TurboTax in Tax Year 2020. (RX820 (Intuit)). That tiny percentage is not indicative of deception—in fact the opposite is true—and when the data are properly considered as a whole, “the overwhelming majority ... are positive.” (Rubin (Intuit) Tr. 1504-1505; *see also* PFF ¶¶652-654; Deal (Intuit) Tr. 1368, 1372-1373; RX1018 (Golder Expert Report) ¶44, fig. 3).

Further, this isolated comment from an unknown consumer illustrates the hazards in trying to use an isolated comment as evidence of deception. Fairly read, the comment reveals that the consumer *understood* from the challenged advertisements that TurboTax Free Edition is for simple tax returns, and that a simple tax return is typically one where the main source of the taxpayer's income is from a W-2. (See CCF ¶636; see also PFF ¶¶70, 71, 124). The consumer is expressing their frustration that even though they believe their return meets these criteria, they are unable to use the free product. (See CCF ¶636). Because there is no context provided and we do not know the taxpayer's individual tax situation, it is difficult to assess why it is this consumer was not able to file for free, be it human error or something else.

Finally, the extraordinarily low rate of negative feedback identified by Complaint Counsel in the Tax Year 2020 CRM data (██████████ of all Tax Year 2020 customer returns) is entirely consistent with other customer-based evidence showing a lack of widespread deception. For example, the record does not reflect a meaningful volume of customer complaints—either in the FTC's Sentinel database or with the BBB—and certainly not at a rate indicative of deception. (PFF ¶¶623-647). TurboTax's high retention rates for its paid customers are similarly inconsistent with deception. (PFF ¶¶91-93, 648-651). Moreover, TurboTax customers provide consistently high ratings and positive reviews, which would not occur if Intuit were deceiving consumers about their ability to file for free. (PFF ¶¶652-654). TurboTax's free and paid abandonment rates—which are the same—likewise provide strong evidence that customers are not abandoning TurboTax because they felt deceived about their ability to file for free. (PFF ¶¶655-658). And Mr. Deal's analysis revealed that the customer-level data for only 510 TurboTax customers—out of over 55 million Tax Year 2021 customers—were even only potentially consistent with the deception alleged by Complaint Counsel. (PFF ¶¶663-682).

637. In Intuit’s CRM, case number [REDACTED] includes in the field “[REDACTED]” the text “[REDACTED]” (GX860 (Intuit) at CC-00015472, row 8417, column V).

Response to Finding No. 637:

The Proposed Finding is correct as far as it goes, which is not very far. In Tax Year 2020, [REDACTED] consumers used TurboTax to prepare and file their taxes. (RX820 (Intuit)). In such a large population, “there will always be some reviews that include some negative things or complaints or things that people have questions about, but you have to look ... at what the themes are and what the trends are and what the prevailing data is.” (Rubin (Intuit) Tr. 1504-1505). Complaint Counsel identify only *seven* negative comments in total from the Tax Year 2020 CRM data (*see* CCF ¶¶635-641). Those seven comments represent just [REDACTED] of the [REDACTED] returns filed using TurboTax in Tax Year 2020. (RX820 (Intuit)). That tiny percentage is not indicative of deception—in fact the opposite is true—and when the data are properly considered as a whole, “the overwhelming majority ... are positive.” (Rubin (Intuit) Tr. 1504-1505; *see also* PFF ¶¶652-654; Deal (Intuit) Tr. 1368, 1372-1373; RX1018 (Golder Expert Report) ¶44, fig. 3).

Further, this isolated comment from an unknown consumer illustrates the hazards in trying to use an isolated comment as evidence of deception. Fairly read, this comment reflects an intemperate customer’s unhappiness with being *offered* paid products and misrepresents the nature of those offers. (*See* CCF ¶637). The Proposed Finding includes no context about the referenced customer’s tax situation, prior experience with TurboTax or other tax-preparation services, or if the customer was in fact required to upgrade. It is not reliable evidence of anything *other than* the perils to Intuit if its ads were actually deceptive, since consumers would

not passively accept the costs of using TurboTax but instead would loudly complain and take their business elsewhere. (RX1018 (Golder Expert Report) ¶¶31-32, 36-37, 50, 228).

Finally, the extraordinarily low rate of negative feedback identified by Complaint Counsel in the Tax Year 2020 CRM data ([REDACTED] of all Tax Year 2020 customer returns) is entirely consistent with other customer-based evidence showing a lack of widespread deception. For example, the record does not reflect a meaningful volume of customer complaints—either in the FTC’s Sentinel database or with the BBB—and certainly not at a rate indicative of deception. (PFF ¶¶623-647). TurboTax’s high retention rates for its paid customers are similarly inconsistent with deception. (PFF ¶¶91-93, 648-651). Moreover, TurboTax customers provide consistently high ratings and positive reviews, which would not occur if Intuit were deceiving consumers about their ability to file for free. (PFF ¶¶652-654). TurboTax’s free and paid abandonment rates—which are the same—likewise provide strong evidence that customers are not abandoning TurboTax because they felt deceived about their ability to file for free. (PFF ¶¶655-658). And Mr. Deal’s analysis revealed that the customer-level data for only 510 TurboTax customers—out of over 55 million Tax Year 2021 customers—were even only potentially consistent with the deception alleged by Complaint Counsel. (PFF ¶¶663-682).

638. In Intuit’s CRM, case number [REDACTED] includes in the field “[REDACTED]” the text “[REDACTED]” (GX858 (Intuit) at CC-00015470, row 24574, column D).

Response to Finding No. 638:

The Proposed Finding is correct as far as it goes, which is not very far. In Tax Year 2020, [REDACTED] consumers used TurboTax to prepare and file their taxes. (RX820 (Intuit)). In such a large population, “there will always be some reviews that include some negative things or complaints or things that people have questions about, but you have to look ... at what the themes are and what the trends are and what the prevailing data is.” (Rubin (Intuit) Tr. 1504-

1505). Complaint Counsel identify only *seven* negative comments in total from the Tax Year 2020 CRM data (*see* CCF ¶¶635-641). Those seven comments represent just [REDACTED] of the [REDACTED] returns filed using TurboTax in Tax Year 2020. (RX820 (Intuit)). That tiny percentage is not indicative of deception—in fact the opposite is true—and when the data are properly considered as a whole, “the overwhelming majority ... are positive.” (Rubin (Intuit) Tr. 1504-1505; *see also* PFF ¶¶652-654; Deal (Intuit) Tr. 1368, 1372-1373; RX1018 (Golder Expert Report) ¶44, fig. 3).

Further, this isolated text really tells us nothing at all about the consumer’s expectations or experience. There is no reason provided for why customer 470950444 believed [REDACTED] [REDACTED] let alone any indication that the challenged advertisements were *the* reason for that belief. (*See* CCF ¶638).

Finally, the extraordinarily low rate of negative feedback identified by Complaint Counsel in the Tax Year 2020 CRM data ([REDACTED] of all Tax Year 2020 customer returns) is entirely consistent with other customer-based evidence showing a lack of widespread deception. For example, the record does not reflect a meaningful volume of customer complaints—either in the FTC’s Sentinel database or with the BBB—and certainly not at a rate indicative of deception. (PFF ¶¶623-647). TurboTax’s high retention rates for its paid customers are similarly inconsistent with deception. (PFF ¶¶91-93, 648-651). Moreover, TurboTax customers provide consistently high ratings and positive reviews, which would not occur if Intuit were deceiving consumers about their ability to file for free. (PFF ¶¶652-654). TurboTax’s free and paid abandonment rates—which are the same—likewise provide strong evidence that customers are not abandoning TurboTax because they felt deceived about their ability to file for free. (PFF ¶¶655-658). And Mr. Deal’s analysis revealed that the customer-level data for only 510

TurboTax customers—out of over 55 million Tax Year 2021 customers—were even only potentially consistent with the deception alleged by Complaint Counsel. (PFF ¶¶663-682).

639. In Intuit’s CRM, case number [REDACTED] includes in the field “[REDACTED]” the text “[REDACTED].” (GX857 (Intuit) at CC-00015469, row 1423, column D).

Response to Finding No. 639:

The Proposed Finding is correct as far as it goes, which is not very far. In Tax Year 2020, [REDACTED] consumers used TurboTax to prepare and file their taxes. (RX820 (Intuit)). In such a large population, “there will always be some reviews that include some negative things or complaints or things that people have questions about, but you have to look ... at what the themes are and what the trends are and what the prevailing data is.” (Rubin (Intuit) Tr. 1504-1505). Complaint Counsel identify only *seven* negative comments in total from the Tax Year 2020 CRM data (*see* CCFF ¶¶635-641). Those seven comments represent just [REDACTED] of the [REDACTED] returns filed using TurboTax in Tax Year 2020. (RX820 (Intuit)). That tiny percentage is not indicative of deception—in fact the opposite is true—and when the data are properly considered as a whole, “the overwhelming majority ... are positive.” (Rubin (Intuit) Tr. 1504-1505; *see also* PFF ¶¶652-654; Deal (Intuit) Tr. 1368, 1372-1373; RX1018 (Golder Expert Report) ¶44, fig. 3).

Further, this isolated comment from an unknown consumer illustrates the hazards in trying to use an isolated comment as evidence of deception. Fairly read, the comment reveals that the consumer *understood* from the challenged advertisements that TurboTax Free Edition is for simple tax returns and inquired to assess whether their tax return is simple. (*See* CCFF ¶639; *see also* PFF ¶¶70, 71, 124). Because there is no context provided and we do not know the taxpayer’s individual tax situation, it is difficult to assess why it is this consumer was not able to file for free, be it human error or something else. Indeed, there are numerous examples in the

record where consumers made mistakes, thought they could not file for free, and then after receiving guidance from Intuit customer service agents, did in fact file for free. (GX123 (Lee (Consumer) Dep.) at 36; GX135 (Phyfer (Consumer) Dep.) at 55-56; GX857 (Intuit)).

Finally, the extraordinarily low rate of negative feedback identified by Complaint Counsel in the Tax Year 2020 CRM data (██████████ of all Tax Year 2020 customer returns) is entirely consistent with other customer-based evidence showing a lack of widespread deception. For example, the record does not reflect a meaningful volume of customer complaints—either in the FTC’s Sentinel database or with the BBB—and certainly not at a rate indicative of deception. (PFF ¶¶623-647). TurboTax’s high retention rates for its paid customers are similarly inconsistent with deception. (PFF ¶¶91-93, 648-651). Moreover, TurboTax customers provide consistently high ratings and positive reviews, which would not occur if Intuit were deceiving consumers about their ability to file for free. (PFF ¶¶652-654). TurboTax’s free and paid abandonment rates—which are the same—likewise provide strong evidence that customers are not abandoning TurboTax because they felt deceived about their ability to file for free. (PFF ¶¶655-658). And Mr. Deal’s analysis revealed that the customer-level data for only 510 TurboTax customers—out of over 55 million Tax Year 2021 customers—were even only potentially consistent with the deception alleged by Complaint Counsel. (PFF ¶¶663-682).

640. In Intuit’s CRM, case number ██████████ includes in the field “██████████” the text “██████████.” (GX857 (Intuit) at CC-00015469, row 3176, column V).

Response to Finding No. 640:

The Proposed Finding is misleading. This isolated comment does not come close to suggesting that the consumer was deceived. Instead, it reflects that the customer must have

accidentally started their return in a paid SKU, and then had to start over to prepare their taxes for free. (See GX636 (Intuit) at -3578 ([REDACTED]); GX398 (Intuit) at -7368). Not only was this customer *not* deceived, but from the case description, it sounds like they successfully filed their taxes *for free*.

641. In Intuit's CRM, case number [REDACTED] includes in the field "[REDACTED]" the text "[REDACTED]." (GX862 (Intuit) at CC-00015474, row 60802, column D).

Response to Finding No. 641:

The Proposed Finding is correct as far as it goes, which is not very far. In Tax Year 2020, [REDACTED] consumers used TurboTax to prepare and file their taxes. (RX820 (Intuit)). In such a large population, "there will always be some reviews that include some negative things or complaints or things that people have questions about, but you have to look ... at what the themes are and what the trends are and what the prevailing data is." (Rubin (Intuit) Tr. 1504-1505). Complaint Counsel identify only *seven* negative comments in total from the Tax Year 2020 CRM data (see CCF ¶¶635-641). Those seven comments represent just [REDACTED] of the [REDACTED] returns filed using TurboTax in Tax Year 2020. (RX820 (Intuit)). That tiny percentage is not indicative of deception—in fact the opposite is true—and when the data are properly considered as a whole, "the overwhelming majority ... are positive." (Rubin (Intuit) Tr. 1504-1505; see also PFF ¶¶652-654; Deal (Intuit) Tr. 1368, 1372-1373; RX1018 (Golder Expert Report) ¶44, fig. 3).

Further, this isolated text really tells us nothing at all about the consumer's expectations or experience. There is no reason provided for why customer 479139939 believed [REDACTED] [REDACTED], " [REDACTED] . (CCFF ¶641). There is plainly no basis to believe (a) that customer 479139939 was speaking about their taxes, or (b) that the challenged ads were the source of the belief.

Finally, the extraordinarily low rate of negative feedback identified by Complaint Counsel in the Tax Year 2020 CRM data ([REDACTED] of all Tax Year 2020 customer returns) is entirely consistent with other customer-based evidence showing a lack of widespread deception. For example, the record does not reflect a meaningful volume of customer complaints—either in the FTC’s Sentinel database or with the BBB—and certainly not at a rate indicative of deception. (PFF ¶¶623-647). TurboTax’s high retention rates for its paid customers are similarly inconsistent with deception. (PFF ¶¶91-93, 648-651). Moreover, TurboTax customers provide consistently high ratings and positive reviews, which would not occur if Intuit were deceiving consumers about their ability to file for free. (PFF ¶¶652-654). TurboTax’s free and paid abandonment rates—which are the same—likewise provide strong evidence that customers are not abandoning TurboTax because they felt deceived about their ability to file for free. (PFF ¶¶655-658). And Mr. Deal’s analysis revealed that the customer-level data for only 510 TurboTax customers—out of over 55 million Tax Year 2021 customers—were even only potentially consistent with the deception alleged by Complaint Counsel. (PFF ¶¶663-682).

642. In Intuit’s TY21 customer review data, the row with the value 205760959 in the “*review_id*” field also has a “*review_title*” field containing the text “TurboTax is a deceiving company” and a “*review_text*” field containing the text “Your TV commercials are a big lie, this company should be put out of business for deceptive practices. Free, free, free, yes right \$154.00 to file this return, Free, Free, free.” (RX816 (Intuit) at row 272983, columns A, E, P).

Response to Finding No. 642:

The Proposed Finding is correct as far as it goes, which is not very far. In Tax Year 2021, more than [REDACTED] consumers used TurboTax to prepare and file their taxes. (RX821 (Intuit)). In such a large population, “there will always be some reviews that include some negative things or complaints or things that people have questions about, but you have to look ... at what the themes are and what the trends are and what the prevailing data is.” (Rubin (Intuit))

Tr. 1504-1505). Complaint Counsel identify just 3,831 reviews purportedly indicative of deception from the Tax Year 2021 customer review data (*see* CCF ¶¶662; *see also* CCF ¶¶642-661). Several of those 3,831 reviews are irrelevant or unreliable. (*See* Response to CCF ¶¶662). Even when considered in total, those 3,831 reviews represent just [REDACTED] of the more than [REDACTED] [REDACTED] returns filed using TurboTax in Tax Year 2021. (RX821 (Intuit)). That tiny percentage is not indicative of deception, and when customer review data are properly considered as a whole, “the overwhelming majority [of TurboTax customer reviews] ... are positive.” (Rubin (Intuit) Tr. 1504-1505; *see also* PFF ¶¶652-654; Deal (Intuit) Tr. 1368, 1372-1373; RX1018 (Golder Expert Report) ¶44, fig. 3).

643. In Intuit’s TY21 customer review data, the row with the value 199062998 in the “*review_id*” field also has a “*review_title*” field containing the text “TURBO TAX ISNT FREE, EVER!” and a “*review_text*” field containing the text “ADVERTISES FREE, FREE, FREE, BUT ITS ACTUALLY FEE, FEE, FEE!” (RX816 (Intuit) at row 15850, columns A, E, P).

Response to Finding No. 643:

The Proposed Finding is correct as far as it goes, which is not very far. In Tax Year 2021, more than [REDACTED] consumers used TurboTax to prepare and file their taxes. (RX821 (Intuit)). In such a large population, “there will always be some reviews that include some negative things or complaints or things that people have questions about, but you have to look ... at what the themes are and what the trends are and what the prevailing data is.” (Rubin (Intuit) Tr. 1504-1505). Complaint Counsel identify just 3,831 reviews purportedly indicative of deception from the Tax Year 2021 customer review data (*see* CCF ¶¶662; *see also* CCF ¶¶642-661). Several of those 3,831 reviews are irrelevant or unreliable. (*See* Response to CCF ¶¶662). Even when considered in total, those 3,831 reviews represent just [REDACTED] of the more than [REDACTED] [REDACTED] returns filed using TurboTax in Tax Year 2021. (RX821 (Intuit)). That tiny percentage is not indicative of deception, and when customer review data are properly considered as a whole,

“the overwhelming majority [of TurboTax customer reviews] ... are positive.” (Rubin (Intuit) Tr. 1504-1505; *see also* PFF ¶¶652-654; Deal (Intuit) Tr. 1368, 1372-1373; RX1018 (Golder Expert Report) ¶44, fig. 3).

644. In Intuit’s TY21 customer review data, the row with the value 200507088 in the “*review_id*” field also has a “*review_title*” field containing the text “Horrible” and a “*review_text*” field containing the text “They advertise \$0 to file a basic W2 and end up charging you!” (RX816 (Intuit) at row 150070, columns A, E, P).

Response to Finding No. 644:

The Proposed Finding is correct as far as it goes, which is not very far. In Tax Year 2021, more than ██████████ consumers used TurboTax to prepare and file their taxes. (RX821 (Intuit)). In such a large population, “there will always be some reviews that include some negative things or complaints or things that people have questions about, but you have to look ... at what the themes are and what the trends are and what the prevailing data is.” (Rubin (Intuit) Tr. 1504-1505). Complaint Counsel identify just 3,831 reviews purportedly indicative of deception from the Tax Year 2021 customer review data (*see* CCFE ¶662; *see also* CCFE ¶¶642-661). Several of those 3,831 reviews are irrelevant or unreliable. (*See* Response to CCFE ¶662). Even when considered in total, those 3,831 reviews represent just ██████████ of the more than ██████████ returns filed using TurboTax in Tax Year 2021. (RX821 (Intuit)). That tiny percentage is not indicative of deception, and when customer review data are properly considered as a whole, “the overwhelming majority [of TurboTax customer reviews] ... are positive.” (Rubin (Intuit) Tr. 1504-1505; *see also* PFF ¶¶652-654; Deal (Intuit) Tr. 1368, 1372-1373; RX1018 (Golder Expert Report) ¶44, fig. 3).

Further, this isolated comment from an unknown consumer illustrates the hazards in trying to use an isolated comment as evidence of deception. Fairly read, the comment actually reveals that the consumer *understood* from the challenged advertisements that TurboTax Free

Edition is for simple tax returns, and that a simple tax return is typically one where the main source of the taxpayer's income is reported on a W-2. (See PFF ¶¶70, 71, 124). Because there is no context provided and we do not know the taxpayer's individual tax situation, it is difficult to assess why it is this consumer was not able to file for free, be it human error or something else.

645. In Intuit's TY21 customer review data, the row with the value 199500386 in the "review_id" field also has a "review_title" field containing the text "Disappointed" and a "review_text" field containing the text "I would give a higher review, however they keep promoting that it is free free free and yet it is NOT NOT NOT" (RX816 (Intuit) at row 44033, columns A, E, P).

Response to Finding No. 645:

The Proposed Finding is correct as far as it goes, which is not very far. In Tax Year 2021, more than [REDACTED] consumers used TurboTax to prepare and file their taxes. (RX821 (Intuit)). In such a large population, "there will always be some reviews that include some negative things or complaints or things that people have questions about, but you have to look ... at what the themes are and what the trends are and what the prevailing data is." (Rubin (Intuit) Tr. 1504-1505). Complaint Counsel identify just 3,831 reviews purportedly indicative of deception from the Tax Year 2021 customer review data (see CCFE ¶662; see also CCFE ¶¶642-661). Several of those 3,831 reviews are irrelevant or unreliable. (See Response to CCFE ¶662). Even when considered in total, those 3,831 reviews represent just [REDACTED] of the more than [REDACTED] [REDACTED] returns filed using TurboTax in Tax Year 2021. (RX821 (Intuit)). That tiny percentage is not indicative of deception, and when customer review data are properly considered as a whole, "the overwhelming majority [of TurboTax customer reviews] ... are positive." (Rubin (Intuit) Tr. 1504-1505; see also PFF ¶¶652-654; Deal (Intuit) Tr. 1368, 1372-1373; RX1018 (Golder Expert Report) ¶44, fig. 3).

646. In Intuit's TY21 customer review data, the row with the value 200178820 in the "review_id" field also has a "review_title" field containing the text "NOT TRULEY FREE AS ADVERTISED" and a "review_text" field containing the text "NOT FREE

ASADVERTISED,, THE LAST TIME I USED TURBO TAX FEDERAL WAS FREE THIS TIME IT WAS NOT WHICH I AM NOT HAPPY ABOUT .. THE COMMERCIALS ADVERTISE FREE FREE FREE FREE THIS IS B****S****.” (RX816 (Intuit) at row 120171, columns A, E, P).

Response to Finding No. 646:

The Proposed Finding is correct as far as it goes, which is not very far. In Tax Year 2021, more than [REDACTED] consumers used TurboTax to prepare and file their taxes. (RX821 (Intuit)). In such a large population, “there will always be some reviews that include some negative things or complaints or things that people have questions about, but you have to look ... at what the themes are and what the trends are and what the prevailing data is.” (Rubin (Intuit) Tr. 1504-1505). Complaint Counsel identify just 3,831 reviews purportedly indicative of deception from the Tax Year 2021 customer review data (*see* CCF ¶¶662; *see also* CCF ¶¶642-661). Several of those 3,831 reviews are irrelevant or unreliable. (*See* Response to CCF ¶662). Even when considered in total, those 3,831 reviews represent just [REDACTED] of the more than [REDACTED] [REDACTED] returns filed using TurboTax in Tax Year 2021. (RX821 (Intuit)). That tiny percentage is not indicative of deception, and when customer review data are properly considered as a whole, “the overwhelming majority [of TurboTax customer reviews] ... are positive.” (Rubin (Intuit) Tr. 1504-1505; *see also* PFF ¶¶652-654; Deal (Intuit) Tr. 1368, 1372-1373; RX1018 (Golder Expert Report) ¶44, fig. 3).

Further, this isolated comment from an unknown consumer illustrates the hazards in trying to use an isolated comment as evidence of deception. The language suggests that this consumer did not form an expectation about their ability to file for free based on the challenged advertisements but on their own experience using the product. It is likely that the consumer’s tax situation changed such that they no longer qualified to file for free, and they were unhappy about that. This is not evidence of deception.

647. In Intuit's TY21 customer review data, the row with the value 199758529 in the "review_id" field also has a "review_title" field containing the text "more bullsh*T" and a "review_text" field containing the text "commercial after commercial telling you its free its free , go to hell with that." (RX816 (Intuit) at row 75870, columns A, E, P).

Response to Finding No. 647:

The Proposed Finding is correct as far as it goes, which is not very far. In Tax Year 2021, more than [REDACTED] consumers used TurboTax to prepare and file their taxes. (RX821 (Intuit)). In such a large population, "there will always be some reviews that include some negative things or complaints or things that people have questions about, but you have to look ... at what the themes are and what the trends are and what the prevailing data is." (Rubin (Intuit) Tr. 1504-1505). Complaint Counsel identify just 3,831 reviews purportedly indicative of deception from the Tax Year 2021 customer review data (*see* CCF ¶662; *see also* CCF ¶¶642-661). Several of those 3,831 reviews are irrelevant or unreliable. (*See* Response to CCF ¶662). Even when considered in total, those 3,831 reviews represent just [REDACTED] of the more than [REDACTED] [REDACTED] returns filed using TurboTax in Tax Year 2021. (RX821 (Intuit)). That tiny percentage is not indicative of deception, and when customer review data are properly considered as a whole, "the overwhelming majority [of TurboTax customer reviews] ... are positive." (Rubin (Intuit) Tr. 1504-1505; *see also* PFF ¶¶652-654; Deal (Intuit) Tr. 1368, 1372-1373; RX1018 (Golder Expert Report) ¶44, fig. 3).

648. In Intuit's TY21 customer review data, the row with the value 212819587 in the "review_id" field also has a "review_title" field containing the text "Turbotax scammed \$29 dollars from me," and a "review_text" field containing the text "I used turbotax free version provided by my USAA bank membership. This is a service provided to veterans. I am a veteran of a foreign war, hence ability to use the free filing service through my bank. Turbotax would not allow me to file until I paid for the plus upgrade even though my filing was 100% accurate and correct. This is a scam technique I do not appreciate after service to my country leaving me disabled. I am accusing you of fraud in other words. I want \$29 dollars back." (RX816 (Intuit) at row 301178, columns A, E, P).

Response to Finding No. 648:

The Proposed Finding is irrelevant. The customer at issue is referring to something they saw through their USAA bank membership, and not one of the challenged advertisements. Further, while Intuit does offer active-duty military the ability to file their taxes for free, it does not offer all USAA members free tax filing. (See PFF ¶¶151-154). Although the record is closed, Intuit notes that it is public that it offers a *discount* to USAA members. (See USAA, *Tax Center: Forms, FAQ and TurboTax Discounts* (last visited June 18, 2023), <https://www.usaa.com/inet/wc/advice-tax-center?showtab=turbotax>).⁶

649. In Intuit's TY21 customer review data, the row with the value 200256102 in the "review_id" field also has a "review_title" field containing the text "I would of given ZERO stars!!!!!!!!!!," and a "review_text" field containing the text "Your COMMERCIALS in the STATE of MINNESOTA says FREE FREE FREE FREE FREE. YOU CHARGE FOR FILING!!! FALSE ADVERTISEMENT!!!!!! YOU NEED TO REFUND ME FOR FILING!!!!!!!!!!!!!!!!!!!!!! STOP LYING about being FREE!!!!!!!!!!!!!!!!!!!!!!!!!!!!!!" (RX816 (Intuit) at row 124340, columns A, E, P).

Response to Finding No. 649:

The Proposed Finding is correct as far as it goes, which is not very far. In Tax Year 2021, more than ████████ consumers used TurboTax to prepare and file their taxes. (RX821 (Intuit)). In such a large population, "there will always be some reviews that include some negative things or complaints or things that people have questions about, but you have to look ... at what the themes are and what the trends are and what the prevailing data is." (Rubin (Intuit) Tr. 1504-1505). Complaint Counsel identify just 3,831 reviews purportedly indicative of

⁶ Intuit requests that the Court take judicial notice of the cited USAA webpage pursuant to Commission Rule 3.43(f). (See 16 C.F.R. § 3.43(f)). It is appropriate to take judicial notice of content on websites. (See *In re California Naturel, Inc.*, 2016 WL 7228668, at *5 n.2 (F.T.C. Dec. 5, 2016) ("[W]e take official notice of the content of [respondent's] website."); *O'Toole v. Northrop Grumman Corp.*, 499 F.3d 1218, 1225 (10th Cir. 2007) ("It is not uncommon for courts to take judicial notice of factual information found on the world wide web.")).

deception from the Tax Year 2021 customer review data (*see* CCFE ¶¶662; *see also* CCFE ¶¶642-661). Several of those 3,831 reviews are irrelevant or unreliable. (*See* Response to CCFE ¶¶662). Even when considered in total, those 3,831 reviews represent just [REDACTED] of the more than [REDACTED] [REDACTED] returns filed using TurboTax in Tax Year 2021. (RX821 (Intuit)). That tiny percentage is not indicative of deception, and when customer review data are properly considered as a whole, “the overwhelming majority [of TurboTax customer reviews] ... are positive.” (Rubin (Intuit) Tr. 1504-1505; *see also* PFF ¶¶652-654; Deal (Intuit) Tr. 1368, 1372-1373; RX1018 (Golder Expert Report) ¶44, fig. 3).

650. In Intuit’s TY21 customer review data, the row with the value 199286801 in the “*review_id*” field also has a “*review_title*” field containing the text “FEES!” and a “*review_text*” field containing the text “Turbo Tax claims I can file for free but that is not true as I try every year and it does not allow any option to file for free! Very disappointed with Turbo Tax bait and switch tactics and their abuse of taking advantage of the hard-working poor.” (RX816 (Intuit) at row 30132, columns A, E, P).

Response to Finding No. 650:

The Proposed Finding is correct as far as it goes, which is not very far. In Tax Year 2021, more than [REDACTED] consumers used TurboTax to prepare and file their taxes. (RX821 (Intuit)). In such a large population, “there will always be some reviews that include some negative things or complaints or things that people have questions about, but you have to look ... at what the themes are and what the trends are and what the prevailing data is.” (Rubin (Intuit) Tr. 1504-1505). Complaint Counsel identify just 3,831 reviews purportedly indicative of deception from the Tax Year 2021 customer review data (*see* CCFE ¶¶662; *see also* CCFE ¶¶642-661). Several of those 3,831 reviews are irrelevant or unreliable. (*See* Response to CCFE ¶¶662). Even when considered in total, those 3,831 reviews represent just [REDACTED] of the more than [REDACTED] [REDACTED] returns filed using TurboTax in Tax Year 2021. (RX821 (Intuit)). That tiny percentage is not indicative of deception, and when customer review data are properly considered as a whole,

“the overwhelming majority [of TurboTax customer reviews] ... are positive.” (Rubin (Intuit) Tr. 1504-1505; *see also* PFF ¶¶652-654; Deal (Intuit) Tr. 1368, 1372-1373; RX1018 (Golder Expert Report) ¶44, fig. 3).

Further, the Proposed Finding is a complaint from a consumer who is exceedingly unlikely to have formed a *reasonable* expectation from the challenged ads that they could have filed for free. Instead, as the review makes clear, this consumer is a repeated TurboTax customer who attempted to use the free SKU. (*See* CCF ¶650). This consumer is no doubt frustrated that there is a free product that they do not qualify to use, but it is not credible to say that this consumer was deceived. (Deal (Intuit) Tr. 1345-1350; *see also* PFF ¶670).

651. In Intuit’s TY21 customer review data, the row with the value 204871446 in the “*review_id*” field also has a “*review_title*” field containing the text “Misleading” and a “*review_text*” field containing the text “This process is very misleading. It promotes free,free,free until its tme to checkout and then all of a sudden there is a fee that was more than the return itself.” (RX816 (Intuit) at row 263327, columns A, E, P).

Response to Finding No. 651:

The Proposed Finding is correct as far as it goes, which is not very far. In Tax Year 2021, more than [REDACTED] consumers used TurboTax to prepare and file their taxes. (RX821 (Intuit)). In such a large population, “there will always be some reviews that include some negative things or complaints or things that people have questions about, but you have to look ... at what the themes are and what the trends are and what the prevailing data is.” (Rubin (Intuit) Tr. 1504-1505). Complaint Counsel identify just 3,831 reviews purportedly indicative of deception from the Tax Year 2021 customer review data (*see* CCF ¶662; *see also* CCF ¶¶642-661). Several of those 3,831 reviews are irrelevant or unreliable. (*See* Response to CCF ¶662). Even when considered in total, those 3,831 reviews represent just [REDACTED] of the more than [REDACTED] [REDACTED] returns filed using TurboTax in Tax Year 2021. (RX821 (Intuit)). That tiny percentage is not indicative of deception, and when customer review data are properly considered as a whole,

“the overwhelming majority [of TurboTax customer reviews] ... are positive.” (Rubin (Intuit) Tr. 1504-1505; *see also* PFF ¶¶652-654; Deal (Intuit) Tr. 1368, 1372-1373; RX1018 (Golder Expert Report) ¶44, fig. 3).

652. In Intuit’s TY21 customer review data, the row with the value 204113036 in the “*review_id*” field also has a “*review_title*” field containing the text “Y’all are thieves,” and a “*review_text*” field containing the text “Turbo Tax will help you get the biggest return! and then they will take half of it because they charge you for so much. You can file for free! LOL JK you stupid fools should be Turbo Taxes actual slogan.” (RX816 (Intuit) at row 255488, columns A, E, P).

Response to Finding No. 652:

The Proposed Finding is correct as far as it goes, which is not very far. In Tax Year 2021, more than [REDACTED] consumers used TurboTax to prepare and file their taxes. (RX821 (Intuit)). In such a large population, “there will always be some reviews that include some negative things or complaints or things that people have questions about, but you have to look ... at what the themes are and what the trends are and what the prevailing data is.” (Rubin (Intuit) Tr. 1504-1505). Complaint Counsel identify just 3,831 reviews purportedly indicative of deception from the Tax Year 2021 customer review data (*see* CCFE ¶662; *see also* CCFE ¶¶642-661). Several of those 3,831 reviews are irrelevant or unreliable. (*See* Response to CCFE ¶662). Even when considered in total, those 3,831 reviews represent just [REDACTED] of the more than [REDACTED] [REDACTED] returns filed using TurboTax in Tax Year 2021. (RX821 (Intuit)). That tiny percentage is not indicative of deception, and when customer review data are properly considered as a whole, “the overwhelming majority [of TurboTax customer reviews] ... are positive.” (Rubin (Intuit) Tr. 1504-1505; *see also* PFF ¶¶652-654; Deal (Intuit) Tr. 1368, 1372-1373; RX1018 (Golder Expert Report) ¶44, fig. 3).

The Proposed Finding is also irrelevant since it neither refers to any challenged advertisements nor suggests that the consumer expected, based on those advertisements, to be able to file for free.

653. In Intuit's TY21 customer review data, the row with the value 201601307 in the "review_id" field also has a "review_title" and a "review_text" field containing the text "Turbo Tax's thing is that it is FREE. This is the second year I've filed my own taxes and they charged me almost 200\$ for filing my federal taxes! Complete scam!!!" (RX816 (Intuit) at row 182906, columns A, E, P).

Response to Finding No. 653:

The Proposed Finding is correct as far as it goes, which is not very far. In Tax Year 2021, more than [REDACTED] consumers used TurboTax to prepare and file their taxes. (RX821 (Intuit)). In such a large population, "there will always be some reviews that include some negative things or complaints or things that people have questions about, but you have to look ... at what the themes are and what the trends are and what the prevailing data is." (Rubin (Intuit) Tr. 1504-1505). Complaint Counsel identify just 3,831 reviews purportedly indicative of deception from the Tax Year 2021 customer review data (*see* CCF ¶¶662; *see also* CCF ¶¶642-661). Several of those 3,831 reviews are irrelevant or unreliable. (*See* Response to CCF ¶662). Even when considered in total, those 3,831 reviews represent just [REDACTED] of the more than [REDACTED] [REDACTED] returns filed using TurboTax in Tax Year 2021. (RX821 (Intuit)). That tiny percentage is not indicative of deception, and when customer review data are properly considered as a whole, "the overwhelming majority [of TurboTax customer reviews] ... are positive." (Rubin (Intuit) Tr. 1504-1505; *see also* PFF ¶¶652-654; Deal (Intuit) Tr. 1368, 1372-1373; RX1018 (Golder Expert Report) ¶44, fig. 3).

654. In Intuit's TY21 customer review data, the row with the value 204976905 in the "review_id" field also has a "review_title" field containing the text "Probably won't use Turbotax again" and a "review_text" field containing the text "I got told it was a free upgrade to Turbotax Live on the website itself (it prompted that it was free) and from an

ad on T.V. I still had to lose half of my refund because it was a complete lie.” (RX816 (Intuit) at row 265027, columns A, E, P).

Response to Finding No. 654:

The Proposed Finding is correct as far as it goes, which is not very far. In Tax Year 2021, more than [REDACTED] consumers used TurboTax to prepare and file their taxes. (RX821 (Intuit)). In such a large population, “there will always be some reviews that include some negative things or complaints or things that people have questions about, but you have to look ... at what the themes are and what the trends are and what the prevailing data is.” (Rubin (Intuit) Tr. 1504-1505). Complaint Counsel identify just 3,831 reviews purportedly indicative of deception from the Tax Year 2021 customer review data (*see* CCF ¶¶662; *see also* CCF ¶¶642-661). Several of those 3,831 reviews are irrelevant or unreliable. (*See* Response to CCF ¶¶662). Even when considered in total, those 3,831 reviews represent just [REDACTED] of the more than [REDACTED] [REDACTED] returns filed using TurboTax in Tax Year 2021. (RX821 (Intuit)). That tiny percentage is not indicative of deception, and when customer review data are properly considered as a whole, “the overwhelming majority [of TurboTax customer reviews] ... are positive.” (Rubin (Intuit) Tr. 1504-1505; *see also* PFF ¶¶652-654; Deal (Intuit) Tr. 1368, 1372-1373; RX1018 (Golder Expert Report) ¶44, fig. 3).

Further, the Proposed Finding illustrates the hazards of relying on individual reviews to prove widespread deception. This consumer discusses a “free upgrade” to TurboTax Live. (*See* CCF ¶¶654). But no challenged ad includes such language and the TurboTax website never promised consumers a “free upgrade” to TurboTax Live. (PFF ¶¶215, 248, 267, 281).

655. In Intuit’s TY21 customer review data, the row with the value 199833762 in the “*review_id*” field also has a “*review_title*” field containing the text “Free to file my a55” and a “*review_text*” field containing the text “Such false advertising. You state free for simple returns, but over \$100 later, that is not the case at all. Every year it is the same crap. False advertising. I will not use you again moving forward.” (RX816 (Intuit) at row 83380, columns A, E, P).

Response to Finding No. 655:

The Proposed Finding is correct as far as it goes, which is not very far. In Tax Year 2021, more than [REDACTED] consumers used TurboTax to prepare and file their taxes. (RX821 (Intuit)). In such a large population, “there will always be some reviews that include some negative things or complaints or things that people have questions about, but you have to look ... at what the themes are and what the trends are and what the prevailing data is.” (Rubin (Intuit) Tr. 1504-1505). Complaint Counsel identify just 3,831 reviews purportedly indicative of deception from the Tax Year 2021 customer review data (*see* CCFE ¶¶662; *see also* CCFE ¶¶642-661). Several of those 3,831 reviews are irrelevant or unreliable. (*See* Response to CCFE ¶¶662). Even when considered in total, those 3,831 reviews represent just [REDACTED] of the more than [REDACTED] [REDACTED] returns filed using TurboTax in Tax Year 2021. (RX821 (Intuit)). That tiny percentage is not indicative of deception, and when customer review data are properly considered as a whole, “the overwhelming majority [of TurboTax customer reviews] ... are positive.” (Rubin (Intuit) Tr. 1504-1505; *see also* PFE ¶¶652-654; Deal (Intuit) Tr. 1368, 1372-1373; RX1018 (Golder Expert Report) ¶44, fig. 3).

Moreover, the consumer review includes specific reference to “simple return[s].” (*See* CCFE ¶¶655). The review therefore reveals that the consumer *understood* from the challenged advertisements that TurboTax Free Edition is for simple tax returns. (*See* CCFE ¶¶655). The consumer’s awareness that the product is only free for simple tax returns demonstrates the effectiveness of the disclosures about qualifications in ads for free TurboTax SKUs.

656. In Intuit’s TY21 customer review data, the row with the value 201654935 in the “*review_id*” field also has a “*review_title*” field containing the text “Your commercials say that your’e free” and a “*review_text*” field containing the text “Every year I see the commercials that say you are a free tax filing service yet you charge me over \$100 to file every year. If it is not free for a broke college student who is in the lowest tax bracket, then who exactly is it free for?” (RX816 (Intuit) at row 187204, columns A, E, P).

Response to Finding No. 656:

The Proposed Finding is correct as far as it goes, which is not very far. In Tax Year 2021, more than [REDACTED] consumers used TurboTax to prepare and file their taxes. (RX821 (Intuit)). In such a large population, “there will always be some reviews that include some negative things or complaints or things that people have questions about, but you have to look ... at what the themes are and what the trends are and what the prevailing data is.” (Rubin (Intuit) Tr. 1504-1505). Complaint Counsel identify just 3,831 reviews purportedly indicative of deception from the Tax Year 2021 customer review data (*see* CCFE ¶¶662; *see also* CCFE ¶¶642-661). Several of those 3,831 reviews are irrelevant or unreliable. (*See* Response to CCFE ¶¶662). Even when considered in total, those 3,831 reviews represent just [REDACTED] of the more than [REDACTED] [REDACTED] returns filed using TurboTax in Tax Year 2021. (RX821 (Intuit)). That tiny percentage is not indicative of deception, and when customer review data are properly considered as a whole, “the overwhelming majority [of TurboTax customer reviews] ... are positive.” (Rubin (Intuit) Tr. 1504-1505; *see also* PFE ¶¶652-654; Deal (Intuit) Tr. 1368, 1372-1373; RX1018 (Golder Expert Report) ¶44, fig. 3).

657. In Intuit’s TY21 customer review data, the row with the value 200195867, in the “*review_id*” field also has a “*review_title*” field containing the text “TurboTax” and a “*review_text*” field containing the text “Overall, TurboTax is great and easy to use. However, my only complaint was that you originally advertise the tax program to be free. Once you reach the end of the tax form however, you come to find out that it is indeed not free, but is going to cost at least a minimum of \$39 or more. So that’s not cool. False advertising if you ask me.” (RX816 (Intuit) at row 116550, columns A, E, P).

Response to Finding No. 657:

The Proposed Finding is correct as far as it goes, which is not very far. In Tax Year 2021, more than [REDACTED] consumers used TurboTax to prepare and file their taxes. (RX821 (Intuit)). In such a large population, “there will always be some reviews that include some negative things or complaints or things that people have questions about, but you have to look ...

at what the themes are and what the trends are and what the prevailing data is.” (Rubin (Intuit) Tr. 1504-1505). Complaint Counsel identify just 3,831 reviews purportedly indicative of deception from the Tax Year 2021 customer review data (*see* CCF ¶¶662; *see also* CCF ¶¶642-661). Several of those 3,831 reviews are irrelevant or unreliable. (*See* Response to CCF ¶662). Even when considered in total, those 3,831 reviews represent just [REDACTED] of the more than [REDACTED] [REDACTED] returns filed using TurboTax in Tax Year 2021. (RX821 (Intuit)). That tiny percentage is not indicative of deception, and when customer review data are properly considered as a whole, “the overwhelming majority [of TurboTax customer reviews] ... are positive.” (Rubin (Intuit) Tr. 1504-1505; *see also* PFF ¶¶652-654; Deal (Intuit) Tr. 1368, 1372-1373; RX1018 (Golder Expert Report) ¶44, fig. 3).

658. In Intuit’s TY21 customer review data, the row with the value 201746447 in the “*review_id*” field also has a “*review_title*” field containing the text “It’s good enough” and a “*review_text*” field containing the text “Ah it’s not that bad, not free thou like they said in the commercial.” (RX816 (Intuit) at row 197881, columns A, E, P).

Response to Finding No. 658:

The Proposed Finding is correct as far as it goes, which is not very far. In Tax Year 2021, more than [REDACTED] consumers used TurboTax to prepare and file their taxes. (RX821 (Intuit)). In such a large population, “there will always be some reviews that include some negative things or complaints or things that people have questions about, but you have to look ... at what the themes are and what the trends are and what the prevailing data is.” (Rubin (Intuit) Tr. 1504-1505). Complaint Counsel identify just 3,831 reviews purportedly indicative of deception from the Tax Year 2021 customer review data (*see* CCF ¶¶662; *see also* CCF ¶¶642-661). Several of those 3,831 reviews are irrelevant or unreliable. (*See* Response to CCF ¶662). Even when considered in total, those 3,831 reviews represent just [REDACTED] of the more than [REDACTED] [REDACTED] returns filed using TurboTax in Tax Year 2021. (RX821 (Intuit)). That tiny percentage is

not indicative of deception, and when customer review data are properly considered as a whole, “the overwhelming majority [of TurboTax customer reviews] ... are positive.” (Rubin (Intuit) Tr. 1504-1505; *see also* PFF ¶¶652-654; Deal (Intuit) Tr. 1368, 1372-1373; RX1018 (Golder Expert Report) ¶44, fig. 3).

659. In Intuit’s TY21 customer review data, the row with the value 199431392 in the “*review_id*” field also has a “*review_title*” field containing the text “FREE?” and a “*review_text*” field containing the text “It advertises as FREE. Why am I paying for it???” (RX816 (Intuit) at row 40791, columns A, E, P).

Response to Finding No. 659:

The Proposed Finding is correct as far as it goes, which is not very far. In Tax Year 2021, more than [REDACTED] consumers used TurboTax to prepare and file their taxes. (RX821 (Intuit)). In such a large population, “there will always be some reviews that include some negative things or complaints or things that people have questions about, but you have to look ... at what the themes are and what the trends are and what the prevailing data is.” (Rubin (Intuit) Tr. 1504-1505). Complaint Counsel identify just 3,831 reviews purportedly indicative of deception from the Tax Year 2021 customer review data (*see* CCF ¶662; *see also* CCF ¶¶642-661). Several of those 3,831 reviews are irrelevant or unreliable. (*See* Response to CCF ¶662). Even when considered in total, those 3,831 reviews represent just [REDACTED] of the more than [REDACTED] [REDACTED] returns filed using TurboTax in Tax Year 2021. (RX821 (Intuit)). That tiny percentage is not indicative of deception, and when customer review data are properly considered as a whole, “the overwhelming majority [of TurboTax customer reviews] ... are positive.” (Rubin (Intuit) Tr. 1504-1505; *see also* PFF ¶¶652-654; Deal (Intuit) Tr. 1368, 1372-1373; RX1018 (Golder Expert Report) ¶44, fig. 3).

660. In Intuit’s TY21 customer review data, the row with the value 199410292 in the “*review_id*” field also has a “*review_title*” field containing the text “Unexpected fees” and a “*review_text*” field containing the text “Its an easy site to use but they have

unexpected fees when the commercial clearly say free, ITS NOT FREE!!” (RX816 (Intuit) at row 35974, columns A, E, P).

Response to Finding No. 660:

The Proposed Finding is correct as far as it goes, which is not very far. In Tax Year 2021, more than [REDACTED] consumers used TurboTax to prepare and file their taxes. (RX821 (Intuit)). In such a large population, “there will always be some reviews that include some negative things or complaints or things that people have questions about, but you have to look ... at what the themes are and what the trends are and what the prevailing data is.” (Rubin (Intuit) Tr. 1504-1505). Complaint Counsel identify just 3,831 reviews purportedly indicative of deception from the Tax Year 2021 customer review data (*see* CCF ¶¶662; *see also* CCF ¶¶642-661). Several of those 3,831 reviews are irrelevant or unreliable. (*See* Response to CCF ¶¶662). Even when considered in total, those 3,831 reviews represent just [REDACTED] of the more than [REDACTED] [REDACTED] returns filed using TurboTax in Tax Year 2021. (RX821 (Intuit)). That tiny percentage is not indicative of deception, and when customer review data are properly considered as a whole, “the overwhelming majority [of TurboTax customer reviews] ... are positive.” (Rubin (Intuit) Tr. 1504-1505; *see also* PFF ¶¶652-654; Deal (Intuit) Tr. 1368, 1372-1373; RX1018 (Golder Expert Report) ¶44, fig. 3).

661. In Intuit’s TY21 customer review data, the row with the value 200252495 in the “*review_id*” field also has a “*review_title*” field containing the text “lies” and a “*review_text*” field containing the text “It's not free, has never been free, stop lying about how it's free.” (RX816 (Intuit) at row 123687, columns A, E, P).

Response to Finding No. 661:

The Proposed Finding is correct as far as it goes, which is not very far. In Tax Year 2021, more than [REDACTED] consumers used TurboTax to prepare and file their taxes. (RX821 (Intuit)). In such a large population, “there will always be some reviews that include some negative things or complaints or things that people have questions about, but you have to look ...

at what the themes are and what the trends are and what the prevailing data is.” (Rubin (Intuit) Tr. 1504-1505). Complaint Counsel identify just 3,831 reviews purportedly indicative of deception from the Tax Year 2021 customer review data (*see* CCF ¶¶662; *see also* CCF ¶¶642-661). Several of those 3,831 reviews are irrelevant or unreliable. (*See* Response to CCF ¶¶662). Even when considered in total, those 3,831 reviews represent just [REDACTED] of the more than [REDACTED] [REDACTED] returns filed using TurboTax in Tax Year 2021. (RX821 (Intuit)). That tiny percentage is not indicative of deception, and when customer review data are properly considered as a whole, “the overwhelming majority [of TurboTax customer reviews] ... are positive.” (Rubin (Intuit) Tr. 1504-1505; *see also* PFF ¶¶652-654; Deal (Intuit) Tr. 1368, 1372-1373; RX1018 (Golder Expert Report) ¶44, fig. 3).

662. In fact, Intuit’s TY21 customer review data includes thousands of examples of customer feedback that indicates consumers may have been, and in many cases were, deceived by Intuit’s practices. (*See e.g.*, RX816 (Intuit) at “*review_id*” numbers: 196258729, 196271390, 196754465, 196891783, 196921634, 196830836, 197314551, 197598593, 198200510, 198273546, 198116384, 198334864, 198464016, 198470439, 198349619, 198406400, 198495534, 198545592, 198566122, 198566345, 198527975, 198568568, 198570052, 198538956, 198576442, 198582239, 198583041, 198585647, 198597976, 198599779, 198621335, 198633617, 198637341, 198655415, 198636870, 198672528, 198678815, 198693741, 198694677, 198688149, 198688250, 198712916, 198713633, 198692788, 198719545, 198720847, 198723526, 198746851, 198754807, 198767587, 198759658, 198763318, 198764316, 198764391, 198777207, 198777237, 198768211, 198755710, 198787310, 198794790, 198796905, 198806044, 198806448, 198812103, 198816700, 198831610, 198819447, 198819797, 198832591, 198833567, 198834170, 198836095, 198870467, 198877691, 198860438, 198866486, 198868680, 198868811, 198841411, 198886230, 198875322, 198852809, 198884318, 198888584, 198864640, 198892608, 198894544, 198897748, 198903232, 198904283, 198911705, 198926909, 198928402, 198946276, 198931636, 198932144, 198909031, 198910200, 198910412, 198940631, 198912783, 198942390, 198944515, 198950291, 198955695, 198959118, 198963836, 198967349, 198967811, 198969403, 198970386, 198971895, 198973559, 198973727, 198977019, 198977324, 198979982, 198992353, 198981004, 198981641, 198982241, 198984456, 198985562, 199003657, 198964032, 198989865, 198992773, 198994813, 198995300, 198999285, 199013245, 199004606, 199005423, 199005964, 199007350, 199010609, 199012926, 199013035, 199022008, 199022965, 199034161, 199034344, 199047356, 199036344, 199036505, 199037127, 199048922, 199038646, 199049520, 199039505, 199041590, 199041845, 199053214, 199043832, 199044213, 199061113, 199049156, 199050256, 199050313, 199050952, 199063000, 199051318,

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Response to Finding No. 662:

The Proposed Finding is inaccurate. Many of the listed reviews are not at all suggestive of deception. Though Intuit has not fliespecked each and every review, even if they were all as Complaint Counsel say, it would not help their case because for the reasons discussed in the previous findings and below, many of the reviews simply are not as Complaint Counsel describe.

For instance:

- 1,911 of the reviews identified in the Proposed Finding were left by customers who paid to file their taxes with TurboTax in prior years and therefore were unlikely to have been deceived by the ads that ran that year.
- 1,009 were left by customers who could have filed for free but chose not to do so.
- 56 of the reviews identified in the Proposed Finding were left by customers who *did* file their taxes for free in Tax Year 2021 using TurboTax Free Edition and therefore could not have been deceived. (RX816 (Intuit)). Take for example Review ID #201494792: Although the customer stated that it “felt like I was force[d] to pay,” the customer did not actually pay to file their taxes, and therefore

could not have had a misimpression about being able to file for free. (RX816 (Intuit)).

- Review ID #201709861: This customer stated that “TurboTax is so easy and reliable” and “the premier way to file [in my humble opinion].” (RX816 (Intuit)). The customer also noted that “I will always use TurboTax even if it’s not free.” (RX816 (Intuit)). Further, the customer rated TurboTax 5 stars, which is the highest possible rating. (RX816 (Intuit)). Nothing in this customer’s review indicated that he felt deceived by ads for free TurboTax SKUs or had a misimpression about his ability to file for free.
- Review ID #199748719: This customer stated that “TurboTax got me the maximum refund” and rated TurboTax 5 stars, the highest possible rating. (RX816 (Intuit)). The customer also noted that he “started to file with a different online tax preparer, but it [the other software] wasn’t free this year,” and therefore switched to TurboTax to file his taxes. (RX816 (Intuit)). Nothing in this customer’s review indicated that he felt deceived by ads for free TurboTax SKUs or had a misimpression about his ability to file for free.
- Review ID #19975200: This customer stated that TurboTax was “easy to use” and that he “appreciate[d] the ease of use.” (RX816 (Intuit)). The customer also rated TurboTax 4 stars, and explained that he “took off one star because in order to use [the] child care credit you have to pay and can’t use the free version.” (RX816 (Intuit)). Nothing in this customer’s review indicated that he felt deceived by ads for free TurboTax SKUs or had a misimpression about his ability to file for free. To the contrary, the review shows that the customer understood that free TurboTax SKUs had qualifications on eligibility based on the complexity of tax returns.
- Review ID #201355659: This customer stated that though they *hoped* for free, “the fee was very reasonable.” (RX816 (Intuit)). The customer also rated TurboTax 5 stars, the highest possible rating, and noted that “[a]t every step there was help and information in easy to understand language.” (RX816 (Intuit)). Nothing in this review indicated that the customer felt deceived by any challenged ad or had a misimpression about the ability to file for free. To the contrary, the review shows that the customer understood that free TurboTax SKUs had qualifications, and that the customer only hoped it might be free.
- Review ID #201598341: This customer noted that fees had gone up and the product was not free, but that the customer was “sure it’s an inflation thing.” (RX816 (Intuit)). The customer also rated TurboTax 5 stars, the highest possible rating. (RX816 (Intuit)). Nothing in this review indicated that the customer felt deceived by the ads for free TurboTax SKUs or had a misimpression about the ability to file for free. To the contrary, the review shows that the customer understood that not all TurboTax products are free for a variety of reasons.

Indeed, beyond *Complaint Counsel's* bald assertion about what these reviews do and do not say, there is no evidentiary support whatsoever for the theory advanced.

The Proposed Finding also omits critical context. In Tax Year 2021, more than [REDACTED] [REDACTED] consumers used TurboTax to prepare and file their taxes. (RX821 (Intuit)). In such a large population, “there will always be some reviews that include some negative things or complaints or things that people have questions about, but you have to look ... at what the themes are and what the trends are and what the prevailing data is.” (Rubin (Intuit) Tr. 1504-1505). In the Proposed Finding, Complaint Counsel identify just 3,831 reviews purportedly indicative of deception from the Tax Year 2021 customer review data. As discussed, several of those 3,831 reviews are irrelevant or unreliable. Even when considered in total, those 3,831 reviews represent just [REDACTED] of the more than [REDACTED] returns filed using TurboTax in Tax Year 2021. (RX821 (Intuit)). That tiny percentage is not indicative of deception, and when customer review data are properly considered as a whole, “the overwhelming majority [of TurboTax customer reviews] ... are positive.” (Rubin (Intuit) Tr. 1504-1505; *see also* PFF ¶¶652-654; Deal (Intuit) Tr. 1368, 1372-1373; RX1018 (Golder Expert Report) ¶44, fig. 3).

E. Consumer Depositions

663. Counsel for Intuit deposed 16 consumers that complained about TurboTax.⁷

Response to Finding No. 663:

The Proposed Finding is irrelevant. The number of consumers Intuit deposed has no bearing on whether the challenged ads were deceptive or any other issue in this proceeding.

⁷ Though Intuit only took 16 consumer depositions, Intuit issued deposition testimony subpoenas to 66 consumers. Six consumers did not appear for their depositions, and Intuit withdrew 42 subpoenas. Two depositions were canceled and never rescheduled.

The Proposed Finding is also incomplete. Intuit issued deposition subpoenas to 66 consumers who were originally identified by Complaint Counsel as “likely to have discoverable information relevant to the allegations of the Complaint.” (Complaint Counsel’s Initial Disclosures at 1 (Apr. 21, 2022)). Those consumers had either filed a Better Business Bureau complaint against Intuit or signed a declaration at Complaint Counsel’s request articulating their dissatisfaction with TurboTax. (Complaint Counsel’s Initial Disclosures at 2, 4 (Apr. 21, 2022)). Since Complaint Counsel acknowledged that they had done *nothing* to verify the accuracy or authenticity of any of the complaints relied on from the Consumer Sentinel database (PCL ¶¶95; PFF ¶¶633), Intuit performed its own investigation, deposing 16 consumers and withdrawing deposition subpoenas for other consumers after determining that deposition testimony was not needed to establish that the complaints were unreliable or irrelevant. (Intuit Mot. *In Limine* to Exclude Consumer Complaints (Feb. 10, 2023)). By contrast, Complaint Counsel did not depose any consumers in this proceeding or call any consumers to testify at the trial, despite bearing the burden of proof.

664. Of those deposed, 11 consumers began using TurboTax because they thought or hoped that they could use it for free. (GX138 (Adamson (Consumer) Dep.) at 42, 56, 57; GX125 (Beck (Consumer) Dep.) at 55; GX128 (Benbrook (Consumer) Dep.) at 55; GX124 (Bodi (Consumer) Dep.) at 31-33; GX139 (Derscha (Consumer) Dep.) at 76; GX122 (DeRyke (Consumer) Dep.) at 15-16; GX137 (DuKatz (Consumer) Dep.) at 27-28, 82-83); GX142 (Keahiolalo (Consumer) Dep.) at 76-77; GX123 (Lee (Consumer) Dep.) at 53-54; GX135 (Phyfer (Consumer) Dep.) at 79-81, 88-90, 104-105; GX130 (Tew (Consumer) Dep.) at 52-54).

Response to Finding No. 664:

The Proposed Finding is not supported by the cited evidence. Many of these consumers provided testimony that directly contradicts the portion of the transcript Complaint Counsel rely on in support of the Proposed Finding. That testimony confirms that the consumers began using TurboTax *not* because they thought or hoped that they could use it for free—and certainly not

because of any supposedly deceptive advertising—but for other reasons. Three of these eleven consumers began using TurboTax because it was recommended to them by friends and family. (GX128 (Benbrook (Consumer) Dep.) at 20-21, 32-33; GX139 (Derscha (Consumer) Dep.) at 39-42; GX135 (Phyfer (Consumer) Dep.) at 28). Another of the consumers identified began using TurboTax because they considered TurboTax to be “fast and easy to use.” (GX137 (DuKatz (Consumer) Dep.) at 28-29). And other consumers began using TurboTax because of its reputation as a popular, well-known online tax preparation service (GX125 (Beck (Consumer) Dep.) at 15); because they heard about TurboTax’s offering through the IRS Free File Program (GX125 (Beck (Consumer) Dep.) at 21); or because they were familiar with other products offered by Intuit (GX130 (Tew (Consumer) Dep.) at 21-22). It is simply not the case that eleven of the sixteen consumers deposed began using TurboTax because they thought or hoped that they could use it for free.

The Proposed Finding is also irrelevant in part because consumers who merely “hoped” that they could file for free using TurboTax were not deceived, even under Complaint Counsel’s misguided theory of the case. Likewise, simply because a consumer may have “thought” that they could file for free does not speak to deception because neither the Proposed Finding nor the evidentiary record links these consumers’ “thoughts” to *any* of the challenged advertisements.

Moreover, the Proposed Finding does not support an inference that reasonable consumers were likely deceived by the challenged ads. To start, Complaint Counsel have not established that the eleven consumers discussed in the Proposed Finding are representative of reasonable consumers in the tax-preparation market. Instead, the evidence shows that these are not reasonable consumers—these are consumers that were identified by Complaint Counsel as likely supporting their case because they had filed a complaint related to TurboTax or signed a

declaration at Complaint Counsel's request. The fact that they filed a complaint against TurboTax is itself evidence that these consumers are outliers—only 0.0005% of the 86.4 million TurboTax customers who filed at least one return from Tax Year 2015 to Tax Year 2021 filed a complaint that Complaint Counsel identified at one point as being relevant to this proceeding. (See PFF ¶631). Such a microscopic subset of consumers is not representative of the larger population of TurboTax customers or consumers who viewed a TurboTax advertisement. And their skewed and often incorrect or inconsistent statements about their experiences with TurboTax should not be attributed to the vast majority of consumers who have not complained.

Rather than providing evidence that reasonable consumers were likely deceived by the challenged ads, the consumer deposition testimony relied on by Complaint Counsel (or lack thereof) reflects that reasonable consumers were not deceived. If, as Complaint Counsel claim, Intuit's ads were deceiving, one would expect Complaint Counsel to come forward with testimony from a substantial number of consumers that uniformly and strongly suggests that those consumers felt deceived. (PFF ¶¶624-626, 647, 653-654). That has not happened here. As noted, the 16 deposed consumers are all consumers that Complaint Counsel identified as supporting their case. (Complaint Counsel's Pretrial Br. at 23 (Feb. 17, 2023)). Yet only a subset of those consumers offered testimony even potentially helpful to their case. And even with respect to the limited consumer testimony on which Complaint Counsel rely, Complaint Counsel are often forced to misstate or misrepresent that testimony in an effort to cobble together support for their case that is otherwise missing from the record. That only some of the consumers that Complaint Counsel identified offered testimony supportive of Complaint Counsel's case underscores that reasonable consumers were not misled by the challenged ads.

665. Ten consumers testified that the cost of the tax filing services was important to them. (GX138 (Adamson (Consumer) Dep.) at 56; GX125 (Beck (Consumer) Dep.) at 15, 27,

30; GX128 (Benbrook (Consumer) Dep.) at 22; GX139 (Derscha (Consumer) Dep.) at 41, 88; GX132 (Dougher (Consumer) Dep.) at 17, 41-42; GX137 (DuKatz (Consumer) Dep.) at 74-75, 80-82; GX134 (Hobson (Consumer) Dep.) at 20; GX142 (Keahiolalo (Consumer) Dep.) at 42, 61, 77; GX135 (Phyfer (Consumer) Dep.) at 54, 103, 109; GX130 (Tew (Consumer) Dep.) at 53-54).

Response to Finding No. 665:

The Proposed Finding is not fully supported by the cited evidence. At least one of the ten consumers listed provided testimony that directly contradicts a finding that he thought cost was important. Complaint Counsel ignore that testimony. Mr. Adamson noted that the possibility of paying for TurboTax “would [not] have been [an] issue” that would have prevented him from using TurboTax in the future. (GX138 (Adamson (Consumer) Dep.) at 57). Mr. Adamson in fact clarified that the cost of his tax-filing software was *not* important to him, and he was “more than willing to pay for” any additional forms or features he might need. (GX138 (Adamson (Consumer) Dep.) at 59).

Moreover, the Proposed Finding is incomplete and misleading because Complaint Counsel have omitted testimony from these consumers regarding the many *additional* factors they cited as important to them when selecting a tax-preparation provider. Consumers testified that the factors that were important to them when selecting a tax-preparation product included clarity and ease of use (GX125 (Beck (Consumer) Dep.) at 15; GX128 (Benbrook (Consumer) Dep.) at 22; GX137 (DuKatz (Consumer) Dep.) at 22-23; GX134 (Hobson (Consumer) Dep.) at 20; GX135 (Phyfer (Consumer) Dep.) at 24-25; GX130 (Tew (Consumer) Dep.) at 16); accuracy (GX125 (Beck (Consumer) Dep.) at 16; GX128 (Benbrook (Consumer) Dep.) at 22; GX132 (Dougher (Consumer) Dep.) at 24-25; GX137 (DuKatz (Consumer) Dep.) at 23; GX135 (Phyfer (Consumer) Dep.) at 24-25; GX130 (Tew (Consumer) Dep.) at 16-17); the ability to import prior year tax data (GX125 (Beck (Consumer) Dep.) at 17; GX132 (Dougher (Consumer) Dep.) at 24; GX137 (DuKatz (Consumer) Dep.) at 23); the ability to receive personalized help (GX128

(Benbrook (Consumer) Dep.) at 22; GX132 (Dougher (Consumer) Dep.) at 24); and maximizing their tax refund amount (GX132 (Dougher (Consumer) Dep.) at 23-24; GX137 (DuKatz (Consumer) Dep.) at 23; GX135 (Phyfer (Consumer) Dep.) at 25). The testimony cited by Complaint Counsel does not establish that cost was the primary or even a significant factor for consumers when deciding which tax-preparation product to use. (GX130 (Tew (Consumer) Dep.) at 15-16 (citing familiarity as the “key driver”); GX132 (Dougher (Consumer) Dep.) at 24 (citing accuracy as the “most important”); GX137 (DuKatz (Consumer) Dep.) at 22-23 (citing the user interface and clear instructions as “really important”).

Moreover, Intuit does not dispute that “price” is a factor that some taxpayers consider in choosing their method of tax preparation. But the Proposed Finding does not support an inference that reasonable consumers were likely deceived by the challenged ads and is also unhelpful for purposes of establishing materiality. To start, Complaint Counsel have not established that the eleven consumers discussed in the Proposed Finding are representative of reasonable consumers in the tax-preparation market. Instead, the evidence shows that these are not reasonable consumers—these are consumers that were identified by Complaint Counsel as likely supporting their case because they had filed a complaint related to TurboTax or signed a declaration at Complaint Counsel’s request. The fact that they filed a complaint against TurboTax is itself evidence that these consumers are outliers—only 0.0005% of the 86.4 million TurboTax customers who filed at least one return from Tax Year 2015 to Tax Year 2021 filed a complaint that Complaint Counsel identified at one point as being relevant to this proceeding. (See PFF ¶631). Such a microscopic subset of consumers is not representative of the larger population of TurboTax customers or consumers who viewed a TurboTax advertisement. And

their skewed and often incorrect or inconsistent statements about their experiences with TurboTax should not be attributed to the vast majority of consumers who have not complained.

Rather than providing evidence that reasonable consumers were likely deceived by the challenged ads, the consumer deposition testimony relied on by Complaint Counsel (or lack thereof) reflects that reasonable consumers were not deceived. If Intuit had engaged in a “multi-year, multi-channel, multi-modal, multi-ad integrated marketing campaign” to deceive consumers, one would expect Complaint Counsel to come forward with testimony from a substantial number of consumers that uniformly and strongly suggests that those consumers felt deceived by the challenged ads. (PFF ¶¶624-626, 647, 653-654). That has not happened here. As noted, the sixteen deposed consumers were all identified by Complaint Counsel as supporting their case. (Complaint Counsel’s Pretrial Br. at 23 (Feb. 17, 2023)). But Complaint Counsel point to only ten consumers out of those sixteen who considered cost to be important when selecting a tax-filing service. That only some of the consumers that Complaint Counsel identified offered testimony supportive of Complaint Counsel’s case underscores that reasonable consumers did not view the price of tax-filing products as determinative or the sole driver of consumers’ choice of a product.

The Proposed Finding does not speak to materiality because TurboTax’s free SKUs are free, thus the challenged advertisements are not misleading regarding the *price* of TurboTax.

666. Nine consumers remembered Intuit’s free advertising. (GX125 (Beck (Consumer) Dep.) at 22-23, 30, 55; GX128 (Benbrook (Consumer) Dep.) at 53-55; GX139 (Derscha (Consumer) Dep.) at 58-59; 88; GX137 (DuKatz (Consumer) Dep.) at 29-31, 93-94; GX142 (Keahiolalo (Consumer) Dep.) at 25, 26, 32-33, 42; GX123 (Lee (Consumer) Dep.) at 53-54; GX135 (Phyfer (Consumer) Dep.) at 79-81; GX141 (Robinson (Consumer) Dep.) at 40-41; GX136 (Schulte (Consumer) Dep.) at 14-15).

Response to Finding No. 666:

The Proposed Finding is not supported by the cited evidence. Many of the deposed consumers whose testimony Complaint Counsel rely on could not remember any specifics about Intuit's advertising for free TurboTax products (GX125 (Beck (Consumer) Dep.) at 50-51, 53-54; GX128 (Benbrook (Consumer) Dep.) at 53-55), instead often merely remarking that Intuit "generally" ran TV commercials for TurboTax (GX137 (DuKatz (Consumer) Dep.) at 29), or noting they "[didn't] really pay attention" to TurboTax's email marketing campaigns. (GX136 (Schulte (Consumer) Dep.) at 15).

The Proposed Finding is also irrelevant. The simple fact that a small number of consumers supposedly remember Intuit's free advertising does not support an inference that any of the challenged TurboTax advertisements were deceptive. Indeed, Intuit hopes that many consumers *do* remember advertising for free TurboTax products—in order to increase awareness among consumers with simple tax returns that Intuit offers a free tax-preparation product for consumers who qualify, to inform those consumers with simple returns that it is "completely free to file" using free TurboTax SKUs, and to ultimately increase the number of returns filed using free TurboTax SKUs. (PFF ¶¶191, 203-204, 860).

Moreover, the Proposed Finding does not support an inference that reasonable consumers were likely deceived by the challenged ads. To start, Complaint Counsel have not established that the nine consumers discussed in the Proposed Finding are representative of reasonable consumers in the tax-preparation market. Instead, the evidence shows that these are not reasonable consumers—these are consumers that were identified by Complaint Counsel as likely supporting their case because they had filed a complaint related to TurboTax or signed a declaration at Complaint Counsel's request. The fact that they filed a complaint against TurboTax is itself evidence that these consumers are outliers—only 0.0005% of the 86.4 million

TurboTax customers who filed at least one return from Tax Year 2015 to Tax Year 2021 filed a complaint that Complaint Counsel identified at one point as being relevant to this proceeding. (See PFF ¶631). Such a microscopic subset of consumers is not representative of the larger population of TurboTax customers or consumers who viewed a TurboTax advertisement. And their skewed and often incorrect or inconsistent statements about their experiences with TurboTax should not be attributed to the vast majority of consumers who have not complained.

Moreover, the Proposed Finding does not support an inference that the challenged ads were likely to deceive reasonable consumers. As an initial matter, several of the consumers cited by Complaint Counsel testified not merely that they remembered Intuit's free advertising, but that they remembered Intuit advertising its free TurboTax product specifically as being for simple tax returns only. (GX135 (Phyfer (Consumer) Dep.) at 79-80; GX136 (Schulte (Consumer) Dep.) at 27-28). That is consistent with the deposition testimony of other consumers who recognized that TurboTax Free Edition was limited to taxpayers with simple returns (GX124 (Bodi (Consumer) Dep.) at 15-16, 38; GX130 (Tew (Consumer) Dep.) at 21; GX138 (Adamson (Consumer) Dep.) at 44).

Rather than providing evidence that reasonable consumers were likely deceived by the challenged ads, the consumer deposition testimony relied on by Complaint Counsel (or lack thereof) reflects that reasonable consumers were not deceived. If Intuit had engaged in a "multi-year, multi-channel, multi-modal, multi-ad integrated marketing campaign" to deceive consumers, one would expect Complaint Counsel to come forward with testimony from a substantial number of consumers that uniformly and strongly suggests that those consumers felt deceived by the challenged ads. (PFF ¶¶624-626, 647, 653-654). That has not happened here. As noted, the sixteen deposed consumers were all identified by Complaint Counsel as supporting

their case. (Complaint Counsel’s Pretrial Br. at 23 (Feb. 17, 2023)). But Complaint Counsel point to only nine consumers out of those sixteen who even purport to remember any TurboTax advertising for free offers. That only some of the consumers that Complaint Counsel identified offered testimony even potentially supportive of Complaint Counsel’s case underscores that reasonable consumers were not misled by the challenged ads.

667. One consumer testified about how “ubiquitous” the TurboTax free advertising was. (GX138 (Adamson (Consumer) Dep.) at 55-56).

Response to Finding No. 667:

The Proposed Finding is irrelevant. The fact that a single consumer identified by Complaint Counsel considered TurboTax advertising mentioning a free offer to be “ubiquitous” does not support that fact, let alone an inference that any of the challenged TurboTax advertisements were deceptive. Intuit advertises free TurboTax SKUs to increase awareness among consumers with simple tax returns that Intuit offers a free tax-preparation product, to inform those consumers with simple returns that it is “completely free to file” using free TurboTax SKUs, and to increase the number of returns filed using free TurboTax SKUs. (PFF ¶¶191, 203-204, 860). Whether that advertising was ubiquitous has no bearing on whether that advertising was likely to deceive reasonable consumers. Further, this same consumer confirmed that he did not even decide to use TurboTax because of any advertising, further undermining any relevance that this Proposed Finding might have. (GX138 (Adamson (Consumer) Dep.) at 40).

Moreover, the fact that the challenged ads were widely run (which is not disputed) only serves to highlight the absence of relevant consumer complaints, which is strong evidence that the challenged ads are not deceptive. Indeed, the fact that the consumer filed a complaint related to TurboTax is itself evidence that he is an outlier—only 0.0005% of the 86.4 million TurboTax customers who filed at least one return from Tax Year 2015 to Tax Year 2021 filed a complaint

that Complaint Counsel identified at one point as being relevant to this proceeding. (See PFF ¶631). That microscopic subset of consumers is not representative of the larger population of TurboTax customers or consumers who viewed a TurboTax advertisement.

668. One consumer testified that the free advertising was “the key message that brought me to TurboTax in the first place.” (GX125 (Beck (Consumer) Dep.) at 55).

Response to Finding No. 668:

The Proposed Finding is not supported by the cited evidence. The consumer at issue testified that she could not remember “any one particular thing” about TurboTax’s ads, and she could not say whether any particular ads impacted her choice to use TurboTax to file her taxes (GX125 (Beck (Consumer) Dep.) at 50-51, 53-54). Ms. Beck also testified—directly contradicting this Proposed Finding—that she ultimately decided to use TurboTax because of the IRS Free File Program. (GX125 (Beck (Consumer) Dep.) at 21, 23-24).

The Proposed Finding is also irrelevant. The fact that a single consumer identified by Complaint Counsel was purportedly brought to TurboTax via advertising does not say anything about whether other consumers had a similar experience or whether the challenged ads were likely to mislead reasonable consumers.

Moreover, the Proposed Finding does not support an inference that the challenged ads were likely to deceive reasonable consumers. Complaint Counsel have not established that the experience of this individual consumer is somehow representative of reasonable consumers in the tax-preparation market as a whole. Instead, the evidence shows that this consumer is not representative of reasonable consumers. This consumer was identified by Complaint Counsel as likely supporting their case because she had filed a complaint related to TurboTax or signed a declaration at Complaint Counsel’s request. (Complaint Counsel’s Initial Disclosures at 2, 4 (Apr. 21, 2022)). The fact that she filed a complaint related to TurboTax is itself evidence that

she is an outlier—only 0.0005% of the 86.4 million TurboTax customers who filed at least one return from Tax Year 2015 to Tax Year 2021 filed a complaint that Complaint Counsel identified at one point as being relevant to this proceeding. (*See* PFF ¶631). That microscopic subset of consumers is not representative of the larger population of TurboTax customers or consumers who viewed a TurboTax advertisement.

That only a single consumer that Complaint Counsel identified offered testimony suggesting that ads brought them to TurboTax underscores that reasonable consumers were not misled by the challenged ads into using TurboTax. As noted, the sixteen deposed consumers were all identified by Complaint Counsel as supporting their case. (Complaint Counsel’s Pretrial Br. at 23 (Feb. 17, 2023)). But Complaint Counsel point to the testimony of only one consumer to support this Proposed Finding.

The Proposed Finding is also incomplete and misleading because it ignores the deposition testimony of many other consumers who stated that TurboTax advertising for free offers was not what led them to use TurboTax. Rather, those consumers testified that they were brought to TurboTax because TurboTax was recommended to them by friends and family (GX128 (Benbrook (Consumer) Dep.) at 20-21, 32-33; GX139 (Derscha (Consumer) Dep.) at 39-42; GX135 (Phyfer (Consumer) Dep.) at 28); because they considered TurboTax to be “fast and easy to use” (GX137 (DuKatz (Consumer) Dep.) at 28-29); because of TurboTax’s reputation as a popular, well-known online tax preparation service (GX125 (Beck (Consumer) Dep.) at 15); or because consumers were familiar with other products offered by Intuit (GX130 (Tew (Consumer) Dep.) at 21-22). That testimony significantly outweighs the testimony from a single consumer put forward by Complaint Counsel and reflects that reasonable consumers did not choose to use TurboTax solely because they saw TurboTax advertising for a free offer.

669. At least ten consumer deponents did not understand Intuit's eligibility criteria for Free Edition. (GX138 (Adamson (Consumer) Dep.) at 44, 58-59; GX131 (Bansal (Consumer) Dep.) at 15; GX128 (Benbrook (Consumer) Dep.) at 27-28, 31; GX139 (Derscha (Consumer) Dep.) at 47-48; GX132 (Dougher (Consumer) Dep.) at 35-36; GX137 (DuKatz (Consumer) Dep.) at 18-19, 56, 63-64; GX142 (Keahiolalo (Consumer) Dep.) at 37-38; GX135 (Phyfer (Consumer) Dep.) at 66-67, 75-76, 92-93; GX141 (Robinson (Consumer) Dep.) at 41-42, 58-59); GX136 (Schulte (Consumer) Dep.) at 70).

Response to Finding No. 669:

The Proposed Finding is not supported by the cited evidence because many of these ten consumers provided testimony that directly contradicts the portion of their deposition transcript Complaint Counsel cite in support of the Proposed Finding. That contradictory testimony shows that the consumers understood that the qualifications for TurboTax Free Edition are based on tax complexity, and are limited to taxpayers with simple returns. (See GX124 (Bodi (Consumer) Dep.) at 15-16, 38; GX130 (Tew (Consumer) Dep.) at 21; GX137 (DuKatz (Consumer) Dep.) at 67-68; GX135 (Phyfer (Consumer) Dep.) at 89-90). Mr. Tew, for example, testified that he *did* understand that he did not qualify for TurboTax Free Edition because his taxes were “too complex.” (GX130 (Tew (Consumer) Dep.) at 21). And Ms. Bodi testified that the TurboTax website “clearly identified” that Free Edition was for simple tax returns. (GX124 (Bodi (Consumer) Dep.) at 15-16); *see also* GX137 (DuKatz (Consumer) Dep.) at 67-68 (testifying that he understood that the phrase “simple tax returns only” indicated that TurboTax Free Edition was only for taxpayers with simple returns); GX135 (Phyfer (Consumer) Dep.) at 89-90 (describing how taxpayers who took the student loan deduction in 2019 were not eligible for TurboTax's Free Edition product); GX136 (Schulte (Consumer) Dep.) at 26-27 (noting TurboTax advertising contained references to “1040A, or 1040EZ only, or simple returns only”)).

Many of the deposed consumers whose testimony Complaint Counsel cite also understood more generally that there were qualifications for free TurboTax SKUs, and acknowledged that not all TurboTax SKUs were free and that the free SKUs were not available

for every taxpayer. (See GX131 (Bansal (Consumer) Dep.) at 15-16; GX128 (Benbrook (Consumer) Dep.) at 47-48, 58; GX139 (Derscha (Consumer) Dep.) at 48-49; GX137 (DuKatz (Consumer) Dep.) at 67-68; GX135 (Phyfer (Consumer) Dep.) at 80, 89-90, 94; GX136 (Schulte (Consumer) Dep.) at 70). These consumers' testimony further shows that they understood that they could visit the TurboTax website to learn more about the qualifications for free TurboTax SKUs, and that they could find information on the TurboTax website to determine whether they qualified for free TurboTax SKUs or find details about what qualified as a simple tax return. (See GX137 (DuKatz (Consumer) Dep.) at 64 (recognizing the "simple tax returns" text on the TurboTax website as "100 percent a hyperlink," which he could click on in order to find out what qualifies as a simple tax return), 66-67; GX142 (Keahiolalo (Consumer) Dep.) at 38 (acknowledging that anyone could click on the multiple hyperlinks on the TurboTax website to determine whether they were eligible to use TurboTax Free Edition); GX136 (Schulte (Consumer) Dep.) at 68-70 (explaining that the asterisk next to "simple tax returns" indicates there is "additional information explained somewhere," and noting that a hyperlink would likely bring consumers to the TurboTax website if they wanted to learn more about what constitutes a simple tax return)).

Moreover, the Proposed Finding does not support an inference that reasonable consumers were likely deceived by the challenged ads. To start, Complaint Counsel have not established that the eleven consumers discussed in the Proposed Finding are representative of reasonable consumers in the tax-preparation market. Instead, the evidence shows that these are not reasonable consumers—these are consumers that were identified by Complaint Counsel as likely supporting their case because they had filed a complaint related to TurboTax or signed a declaration at Complaint Counsel's request. The fact that they filed a complaint against

TurboTax is itself evidence that these consumers are outliers—only 0.0005% of the 86.4 million TurboTax customers who filed at least one return from Tax Year 2015 to Tax Year 2021 filed a complaint that Complaint Counsel identified at one point as being relevant to this proceeding. (See PFF ¶631). Such a microscopic subset of consumers is not representative of the larger population of TurboTax customers or consumers who viewed a TurboTax advertisement. And their skewed and often incorrect or inconsistent statements about their experiences with TurboTax should not be attributed to the vast majority of consumers who have not complained.

670. One consumer testified that they “ha[d] no idea unless it told me — Unless TurboTax explicitly told me ‘You qualify for free,’ I would have no idea ... So I am putting my trust in them to do that” and that the phrase simple tax returns “has no connotation to me because I don’t understand what is and is not a simple tax return.” (GX137 (DuKatz (Consumer) Dep.) at 56).

Response to Finding No. 670:

The Proposed Finding relies on a misleading snippet of Mr. DuKatz’s testimony. In fact, Mr. DuKatz admitted that he understood from the TurboTax website that TurboTax Free Edition was free only for taxpayers with simple returns, and that not every taxpayer would be able to file their taxes for free using TurboTax Free Edition. (GX137 (DuKatz (Consumer) Dep.) at 67-68). He testified that the “for simple tax returns only” language informed him “that TurboTax Free Edition is only for simple returns” and that “not everyone will be able to file for free using TurboTax.” (GX137 (DuKatz (Consumer) Dep.) at 68). He also stated that “linking to the simple tax return” language, referring to the pop-up on the TurboTax website that provided detailed information about Free Edition’s qualification, made him understand that not everyone could use Free Edition. (GX137 (DuKatz (Consumer) Dep.) at 67-68).

Moreover, the Proposed Finding is incomplete and misleading because it ignores other relevant testimony from the same consumer. Mr. DuKatz testified that he understood that he could easily determine the definition of “simple tax return” by visiting the TurboTax website and

clicking on the available hyperlinks to learn more. (GX137 (DuKatz (Consumer) Dep.) at 66-67). His recognition that he could easily find more information about the qualifications for free TurboTax SKUs rebuts any inference that Mr. DuKatz was misled by the challenged ads.

The Proposed Finding is also irrelevant. The fact that a single consumer identified by Complaint Counsel testified that he would have no idea whether he qualified for a free TurboTax SKU unless TurboTax told him, or that the phrase simple tax returns has “no connotation” to him, does not say anything about whether the challenged ads were likely to mislead reasonable consumers.

The Proposed Finding is also incomplete and misleading because it ignores that many of the consumers identified by Complaint Counsel in their initial disclosures that Intuit ultimately deposed confirmed that they *did* understand the phrase “simple tax returns” and further understood that TurboTax Free Edition’s qualifications were based on the complexity of certain tax forms and situations. (GX130 (Tew (Consumer) Dep.) at 21 (explaining how he understood he did not qualify for Free Edition because his taxes were “too complex”); GX135 (Phyfer (Consumer) Dep.) at 89-90 (describing her understanding that taxpayers who took the student loan deduction in 2019 were not eligible for TurboTax’s Free Edition product); GX136 (Schulte (Consumer) Dep.) at 70 (explaining his understanding of simple tax returns as referring to tax situations that are “not overtly complicated” and do not require many different forms); GX138 (Adamson (Consumer) Dep. at 59 (demonstrating an accurate understanding of simple tax returns as those filed with an “income tax [form]” and “nothing else”), 71-73 (indicating he understood the phrase “simple returns” more clearly than references to IRS tax forms such as “Form 1040” or “1040EZ/A”)). That testimony shows that even the consumers identified by Complaint Counsel were not misled by the challenged ads.

Further, the Proposed Finding does not support an inference that the challenged ads were likely to deceive reasonable consumers. Complaint Counsel have not established that the experience of this individual consumer is somehow representative of reasonable consumers in the tax-preparation market as a whole. Instead, the evidence shows that this consumer is not representative of reasonable consumers. This consumer was identified by Complaint Counsel as likely supporting their case because he had filed a complaint related to TurboTax or signed a declaration at Complaint Counsel's request. (Complaint Counsel's Initial Disclosures at 2, 4 (Apr. 21, 2022)). The fact that he filed a complaint related to TurboTax is itself evidence that he is an outlier—only 0.0005% of the 86.4 million TurboTax customers who filed at least one return from Tax Year 2015 to Tax Year 2021 filed a complaint that Complaint Counsel identified at one point as being relevant to this proceeding. (See PFF ¶¶631). That microscopic subset of consumers is not representative of the larger population of TurboTax customers or consumers who viewed a TurboTax advertisement.

671. One consumer testified that they spent between 30 and 45 minutes entering their tax information on TurboTax before learning they could not file for free. (GX138 (Adamson (Consumer) Dep.) at 58).

Response to Finding No. 671:

The Proposed Finding is irrelevant. One consumer's experience is not revealing for a product that between 40 and 50 million people use each year. (See RX820 (Intuit); RX821 (Intuit); RX1018 (Golder Expert Report) ¶126 & fig. 37; PFF ¶¶113-116). The evidence conclusively establishes that consumers do not spend significant time and effort preparing their taxes with TurboTax. (PFF ¶¶449-450). To start, consumers can see the qualifications for free TurboTax SKUs on the TurboTax website before starting their return. (See PFF ¶¶364-441, 789-791). Complaint Counsel's expert, for example, 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). Intuit has also invested substantial time, effort, and other resources in tools that help consumers identify the TurboTax SKU best for their tax situation. (PFF ¶77; *see also* PFF ¶423). And the average time, from start to finish, to use TurboTax Free Edition is under 30 minutes. (PFF ¶¶449, 793).

Upgrade screens necessarily appear far sooner. (PFF ¶¶449, 793).

672. Other consumers testified that by the time they realized they would have to pay to file their taxes they did not want to switch providers. (GX124 (Bodi (Consumer) Dep.) at 33; GX139 (Derscha (Consumer) Dep.) at 57; GX137 (DuKatz (Consumer) Dep.) at 80-82).

Response to Finding No. 672:

The Proposed Finding accurately reflects the testimony of three consumers handpicked by Complaint Counsel but is incorrect to the extent it seeks to use the testimony to support a broader point. The witnesses' testimony is overwhelmed by the weight of the record that consumers could easily switch between providers. For example, though the depositions of the small number of complaining consumers that Intuit took is not a representative sample of TurboTax customers, the weight of even that testimony contradicts the Proposed Finding. Most of the consumer deposition testimony confirmed that they did *not* find it difficult to switch between tax-preparation providers, that they understood they were not forced to continue using TurboTax, and that they in fact had "probably not" spent much time inputting information into TurboTax before making their purchase decision. (GX125 (Beck (Consumer) Dep.) at 42; GX135 (Phyfer (Consumer) Dep.) at 82-83).

The online software segment of the tax-preparation industry has several features that allow customers to switch firms and products with particular ease, such as allowing consumers to electronically import and export their tax documents to and from competitors' products, thereby reducing the burden on consumers of switching. (PFF ¶55; Ryan (Intuit) Tr. 694-695, 799-800; Deal (Intuit) Tr. 1310-1311, 1346; RX1027 (Deal Expert Report) ¶¶12, 51, 53; RX90 (Intuit);

RX498 (Intuit)). And the evidence reflects that many consumers do in fact switch between tax-preparation providers, both from year to year and even mid-return within a single tax season, trying out multiple options before making an ultimate selection. (PFF ¶¶51-55). TurboTax data, for example, indicates that customers are willing to switch tax-preparation providers in a given year, even after beginning their tax return in a particular product. (RX1018 (Golder Expert Report), fig. 4). In Tax Year 2021, [REDACTED] (RX52 (Intuit) at -2250). And of those customers, [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]. (RX52 (Intuit) at -2250). These statistics indicate that many customers do not act as if they are locked in to using TurboTax, even after they have filled in all of their information.

An expert survey confirmed that consumers do not feel locked in to using TurboTax. (RX1555 (Kirk Fair (Intuit) Trial Dep.) at 46-59; RX1016-A (Kirk Fair Expert Report) ¶¶33-37). Intuit's competitors also advertise the ease of switching from TurboTax to their products (RX638 (Intuit); RX1048 (Intuit)), and product review websites discuss the ease of switching among providers (RX90 (Intuit); RX498 (Intuit)). Complaint Counsel have not presented any evidence that reasonable consumers are unable or unwilling to seek alternative tax preparation providers when told they cannot file for free with TurboTax.

673. One consumer described it the following ways:

I'd already spent the time. It's like if you were – Let's say you ordered something from IKEA and you were building, like, a wardrobe, and you spent four hours on the wardrobe, and then you realize that you have to go buy another piece to do it -- to complete it. You're going to go buy that piece. You're not just going to, like, throw it in the dumpster. Like, it has to be done now. (GX 137 (DuKatz (Consumer) Dep.) at 80).

...

It would be like if you bought a plane ticket, you got on an airplane, they flew you across the country, and then to leave the airplane, they were like, “Actually, it’s \$100 to leave the airplane. Otherwise we’re just going to fly you back.” And you’re like, “But I already paid for my vacation, like for my hotel and stuff,” and they’re like, “You’re going to have to pay the \$100 to get out of the airplane.” So that’s the way that I would phrase that.

(GX137 (DuKatz (Consumer) Dep.) at 81).

Response to Finding No. 673:

The Proposed Finding is vague and irrelevant. It is entirely unclear what the “it” being described is or what the Proposed Finding is truly addressing. Further, the fact that a single consumer offered two analogies purportedly about his experiences does not say anything about reasonable consumers’ experiences using TurboTax. Those analogies are also self-evidently poor ones and are directly contradicted by the record. Neither building a wardrobe nor flying across the country are comparable to preparing your taxes using a TurboTax product. The ease and immediacy with which consumers can reach the TurboTax website and find detailed, accessible information about the qualifications for free TurboTax offers differs substantially from spending “four hours” constructing an IKEA wardrobe or fully booking a “vacation,” buying “a plane ticket,” and flying all the way “across the country.” (GX137 (DuKatz (Consumer) Dep.) at 81). Indeed, the average time—start to finish—to use TurboTax Free Edition this year was only 28 minutes. (PFF ¶¶449, 793). One cannot fly across this country (or even from D.C. to Milwaukee) in 28 minutes.

Complaint Counsel’s own expert, for example, 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). Intuit has also invested substantial time, effort, and other resources in tools that help consumers

identify the TurboTax SKU best for their tax situation. (PFF ¶¶77; *see also* PFF ¶¶423). And Intuit has been successful in getting consumers to start in the right SKU and avoid upgrades—the vast majority of consumers start and finish their return in the same TurboTax SKU. (PFF ¶¶81, 661).

The Proposed Finding is also incorrect to the extent it implies that there are high switching costs associated with using a tax-preparation provider other than TurboTax, which locks consumers in to using TurboTax. An expert survey confirmed that consumers do not feel locked in to using TurboTax. (*See* RX1555 (Kirk Fair (Intuit) Trial Dep.) at 46-59; RX1016-A (Kirk Fair Expert Report) ¶¶33-37). Intuit’s competitors also advertise the ease of switching from TurboTax to their products (RX638 (Intuit); RX1048 (Intuit), and product review websites discuss the ease of switching among providers (RX90 (Intuit); RX498 (Intuit)). Complaint Counsel have not presented any evidence that reasonable consumers are unable or unwilling to seek alternative tax preparation providers when told they cannot file for free with TurboTax.

674. One consumer testified that disclaimers on the TurboTax website were not “obvious.” (GX125 (Beck (Consumer) Dep.) at 35-36).

Response to Finding No. 674:

The Proposed Finding is not supported by the cited evidence. In fact, Ms. Beck expressly acknowledged that the simple returns disclosure was visible on the TurboTax website. (GX125 (Beck (Consumer) Dep.) at 66).

The Proposed Finding is also irrelevant. The fact that a single consumer did not consider disclosures on the TurboTax website to be “obvious” (even if that were true, which in this case it is not) does not establish that fact, nor does it say anything about whether the challenged ads were likely to mislead reasonable consumers.

The Proposed Finding is also incomplete and misleading because it ignores the weight of the evidence, which shows the disclosures on the TurboTax website were obvious to consumers.

Professor Golder reliably concluded—based on a review of the TurboTax website from Tax Years 2015 to 2022—that consumers were able to see and interact with the disclosures on the TurboTax website before entering any information. (Golder (Intuit) Tr. 1125, 1127-1129; RX1018 (Golder Expert Report) ¶¶178-179). Moreover, consumers whose complaints make up the 218 identified by Complaint Counsel testified that the TurboTax website included disclosures that were clear and noticeable. (GX123 (Lee (Consumer) Dep.) at 31-32; GX124 (Bodi (Consumer) Dep.) at 15-16, 39; GX137 (DuKatz (Consumer) Dep. at 64, 67).

Further, Intuit’s internal research showed that reasonable consumers understood the disclosures on the website about qualifications for free SKUs. One Intuit survey tested consumer comprehension of the phrase “simple tax return,” and all respondents found the phrase “easy to understand.” (Rubin (Intuit) Tr. 1544-1546; RX304 (Intuit); see also PFF ¶134). None of the participants indicated that they were confused by the phrase or did not understand it. (PFF ¶134). In addition, in some years, Intuit also included the phrase “see why it’s free” on the TurboTax website as part of the disclosure for Free Edition. (PFF ¶376). Intuit’s consumer research on the phrase “see why it’s free” found that it came across as “authentic and simple,” with consumers understanding its purpose was “[to] see why they can have absolute zero. Why they can give this away ... [and] maybe tell me who they charge instead.” (RX44-A (Intuit) at 6).

675. One consumer, in discussing Intuit’s disclosures that were behind a hyperlink, testified that “it is highly unlikely that people will click through to an external link.” (GX135 (Phyfer (Consumer) Dep.) at 67-68).

Response to Finding No. 675:

The Proposed Finding is not supported by the cited evidence. In fact, Ms. Phyfer admitted not only that she understood she could have clicked hyperlinks in TurboTax advertisements that would have explained what qualified as a “simple tax return,” but also that

she “probably” did click on hyperlinks seen on the TurboTax website that would have explained the qualifications for TurboTax Free Edition. (GX135 (Phyfer (Consumer) Dep.) at 93-94).

The Proposed Finding is also irrelevant. The fact that a single consumer identified by Complaint Counsel testified that it is unlikely people will click a hyperlink does not establish that fact, nor does it say anything about how reasonable consumers would have acted. Indeed, this opinion testimony from an individual consumer about what other consumers think and do is inadmissible as it fails all three prongs of admissibility under Federal Rule of Evidence 701. Instead, the Court heard reliable expert testimony (not anecdote from one individual) that reasonable consumers are familiar with disclosures that are available by clicking a hyperlink—such as on the TurboTax website and display ads—and know in particular that hyperlinks are typically displayed in blue text and that clicking that text will lead to a webpage with additional information. (PFF ¶¶521-522; Golder (Intuit) Tr. 1116-1117; RX1018 (Golder Expert Report) ¶182; Shiller (FTC) Tr. 209-210). Likely for that reason, the FTC’s own .com Disclosures Guidelines recognize that hyperlinks can be an effective method for providing information to consumers. (See RX96 (FTC) at 11-13, A-8). Reasonable consumers visiting the TurboTax website thus understood that additional information about the qualifications for free TurboTax offers was available by clicking on the hyperlinked disclosure text on the TurboTax website. (PFF ¶521).

The Proposed Finding is also contradicted by the deposition testimony of many other consumers who stated that they understood that they could click on hyperlinks on the TurboTax website to learn more about the qualifications for free TurboTax offers. Those consumers explained that they understood that the blue text on the TurboTax website indicated that there was a hyperlink and that they could access more information about the qualifications for

TurboTax's free offers by clicking on that link. (GX124 (Bodi (Consumer) Dep.) at 17; GX128 (Benbrook (Consumer) Dep.) at 28-29; GX137 (DuKatz (Consumer) Dep.) at 64, 67; GX142 (Keahiolalo (Consumer) Dep.) at 38; GX136 (Schulte (Consumer) Dep.) at 68-70).

F. Consumer Sentinel Network Complaints

676. Consumer Sentinel Network ("Sentinel"), the FTC's consumer complaint database, had received no fewer than 218 complaints between January 1, 2016, and March 28, 2022, that pertain to Count One of the Complaint. (See Complaint Counsel's Reply to Respondent Intuit Inc.'s Supplemental Response to the Statement of Material Facts As to Which There Is No Genuine Issue for Trial (filed Sep. 30, 2022) at p. 3 & Attachment A (summarizing GX502 & GX503 (Complaint Counsel) (Sentinel Complaints received Jan. 1, 2016 to Mar. 28, 2022)); see also GX504 (Complaint Counsel) at CC-00012478 to -00013150 (Sentinel Complaints received Mar. 29, 2022 to Aug. 31, 2022)).

Response to Finding No. 676:

The Proposed Finding is incorrect. There are not 218 complaints between January 1, 2016, and March 28, 2022, that "pertain" to the sole count of the Complaint. To the contrary, the evidence reflects that those complaints are not relevant or reliable and cannot be used as evidence that reasonable consumers were likely deceived by the challenged ads.

For example, many of these complaints are not related to the challenged advertisements or are not based on the consumer's personal knowledge. (PFF ¶634). Consumers whose complaints make up part of the 218 identified by Complaint Counsel testified that they were not misled by any TurboTax advertising (GX123 (Lee (Consumer) Dep.) at 41-43), or that their beliefs about their ability to file for free using TurboTax were wholly unrelated to TurboTax's advertising (GX136 (Schulte (Consumer) Dep.) at 71-72). Several other complaints focused on the IRS Free File Program, a government Program entirely separate from TurboTax's Free Edition product. (GX136 (Schulte (Consumer) Dep.) at 19, 21-22; GX125 (Beck (Consumer) Dep.) at 60). And other consumers admitted to being inspired to complain by ProPublica's mistaken reporting, merely parroting those allegations without describing any personal

experiences using TurboTax that would suggest they were misled by TurboTax free advertising. (GX128 (Benbrook (Consumer) Dep.) at 51-52; GX138 (Adamson (Consumer) Dep.) at 46-47; *see also* Intuit's Motion *in Limine* to Exclude Complaints at App'x G (Feb. 10, 2023) (identifying complaints referencing reporting about Intuit's marketing practices, the FTC's investigation, or litigation against Intuit); RX1018 (Golder Expert Report) ¶77 & fig. 7). Many more consumers further offered testimony indicating that they understood both that free TurboTax SKUs had qualifications and the phrase "simple tax returns." (PFF ¶635; GX136 (Schulte (Consumer) Dep.) at 70; GX124 (Bodi (Consumer) Dep.) at 15-16, 39; GX128 (Benbrook (Consumer) Dep.) at 28-29, 56; GX130 (Tew (Consumer) Dep.) at 21, 37-39, 46, 54; GX137 (Dukatz (Consumer) Dep.) at 64, 67-68; GX123 (Lee (Consumer) Dep.) at 28-29; GX135 (Phyfer (Consumer) Dep.) at 66, 80; GX138 (Adamson (Consumer) Dep.) at 44, 69-70; *see also* RX71 (Rozar (Consumer) Dep.) at 43, 60; RX70 (Beckett (Consumer) Dep.) at 74-77; RX72 (Harford (Consumer) Dep.) at 161).

Professor Golder's independent coding analysis confirms that the majority of the complaints identified by Complaint Counsel are not pertinent. Unlike Complaint Counsel, Professor Golder used independent coders who were blind to the hypotheses in this case to conduct a careful and nuanced review of these complaints. (PFF ¶636). That analysis found that only 120 complaints out of the full set of 396 complaints originally identified by Complaint Counsel were even potentially relevant to Complaint Counsel's allegations in this case. (PFF ¶636). These 120 complaints represent only 0.0001% of the TurboTax customers who filed their taxes during the six-year period from which the complaints are collected. (Golder (Intuit) Tr. 1207-1208; RX1018 (Golder Expert Report) ¶¶68, 82).

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). Yet Complaint Counsel expended “minimal to nonexistent” effort to verify any of the complaints they rely on, such as by confirming the consumers’ identities, tax-filing history, or use of TurboTax. (PFF ¶¶633; Golder (Intuit) Tr. 1198-1200; RX1018 (Golder Expert Report) ¶¶78; RX1390 (Shiller (FTC) Dep.) at 20, 56-57, 115-116, 189-192). As Professor Golder explained, such verification would have revealed whether the complaints were in fact written by real TurboTax customers, whether the consumers could have conceivably been misled about their ability to file for free using TurboTax, and in fact whether those consumers’ experiences reflected any deception as a result of TurboTax advertising at all. (Golder (Intuit) Tr. 1205-1207). In fact, Ms. Shiller attempted to contact just twelve consumers who had complained, and ultimately spoke to only *two*. (PFF ¶¶918). Ms. Shiller did not even *read* most of the complaints she compiled that now make up the 218 identified by Complaint Counsel. (PFF ¶¶917). Accordingly, Complaint Counsel have not carried their burden of establishing that the 218 complaints they identified are relevant to their claim.

The Proposed Finding is also incorrect insofar as it suggests that the 218 complaints provide evidence that a significant minority of reasonable consumers were likely deceived by the challenged ads. To the contrary, the miniscule number of complaints from a six-year period establishes that reasonable consumers were not likely to be deceived by the challenged advertisements. (PFF ¶¶623, 631). Even if every one of the 218 complaints identified by Complaint Counsel were found to be both relevant and reliable, these complaints represent less than 0.0003% of the 86.4 million TurboTax customers who completed at least one return during the Tax Year 2015 to 2021 period. (*Cf.* PFF ¶¶631-632). The 218 complaints are even more

insignificant when compared to the number of views, impressions, and clicks that the challenged ads received during the relevant time period. (PFF ¶¶637). For example, in Tax Years 2020 and 2021, TurboTax Free Edition ads generated over 15 billion impressions and were clicked on over 130 million times. (Baburek (FTC) Tr. 338). Even considering only the advertisement clicks from those two years, and ignoring consumers who would have seen ads through other mediums in other years, the full set of 218 complaints amounts to just 0.000167% of those who clicked on a TurboTax ad. (Cf. PFF ¶¶637). 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 a survey of nine other FTC consumer-protection cases relied upon by Complaint Counsel rebuttal witness Mr. Yoeli. (Cf. PFF ¶¶641-642; *see also* PFF ¶¶643-644, 646). And when calculated based on Mr. 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 likely to be deceived. (PFF ¶¶623, 631-632).

Professor Golder’s benchmarking analysis of Better Business Bureau (BBB) complaints confirms that the number of complaints filed related to Intuit are 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). For example, Chime Financial—which has faced public allegations of defrauding customers—has a rate of 589.8 BBB complaints per million customers, compared to Intuit’s rate of 31.3. (PFF ¶640).

If, as Complaint Counsel contend, Intuit engaged in a multi-year, multi-channel, multi-modal scheme to deceive customers, the number of consumer complaints should be many, many orders of magnitude greater. (PFF ¶639; Golder (Intuit) Tr. 1211; RX1018 (Golder Expert Report) ¶89, fig. 10). If consumers expected to file for free when they began using a TurboTax SKU but could not do so, they would express anger over that fact in reporting their experiences using the product, including in complaints, product reviews, and ratings. (PFF ¶625; Johnson (Intuit) Tr. 559-562, 678-679; Golder (Intuit) Tr. 1057-1058, 1193-1194, 1212-1213; RX1018 (Golder Expert Report) ¶¶25, 36-37, 50). As an article cited by Complaint Counsel’s rebuttal witness Erez Yoeli and written by Nobel Prize-winning economist George Akerlof explains, “Brand names” (like the TurboTax brand) “give the consumer a means of retaliation if the quality does not meet expectations,” including by “curtail[ing] future purchases.” (RX1370 (FTC) at 499-500; Yoeli (FTC) Tr. 1739-1740). Likewise, academic marketing literature confirms that complaints are a “major source of information on the quality of products and companies.” (RX1552 (FTC) at 168). Consumer complaints represents “critical turning points in [a] company’s relationship with its customers” and “are associated with a substantial increase in the probability that the customer stops buying.” (RX562 (Intuit) at 42). In other words, a meaningful volume of consumer complaints would be a “clear signal” of deception—but the record does not reflect anything of the sort. (RX1018 (Golder Expert Report) ¶¶68, 83-84;

Golder (Intuit) Tr. 1057-1058, 1189-1191, 1193-1194, 1213-1214). The miniscule number of complaints identified by Complaint Counsel, therefore, confirm that consumers were not misled or deceived by the challenged ads. (PFF ¶¶625-626, 630-632).

In short, this Proposed Finding reflects only that Complaint Counsel continue to rely on a tiny set of irrelevant, unverified complaints that do not support their case and instead show that reasonable consumers were not likely to be deceived by the challenged advertisements.

677. Of the 218 complaints, 43 were recorded between January 1, 2021, and March 28, 2022, and 26 were recorded between November 1, 2021, and March 28, 2022. (Complaint Counsel's Reply to Respondent Intuit Inc.'s Supplemental Response to the Statement of Material Facts As to Which There Is No Genuine Issue for Trial (filed Sep. 30, 2022) at p. 3 & Attachment A (summarizing GX502 & GX503 (Complaint Counsel) (Sentinel Complaints received Jan. 1, 2016 to Mar. 28, 2022)); *see also* GX504 (Complaint Counsel) at CC-00012478 to -00013150 (Sentinel Complaints received Mar. 29, 2022 to Aug. 31, 2022)).

Response to Finding No. 677:

The Proposed Finding is incorrect. There are not 218 complaints between January 1, 2016 and March 28, 2022 that "pertain" to the sole count of the Complaint. Nor are there 43 complaints between January 1, 2021, and March 28, 2022, or 26 complaints from November 1, 2021, and March 28, 2022, that pertain to the Complaint Counsel's claim. To the contrary, the evidence reflects that those complaints are not relevant or reliable and cannot be used as evidence that reasonable consumers were likely deceived by the challenged ads. (*See* Response to CCFF ¶676).

Even if Complaint Counsel had established that the 218 complaints were all relevant and reliable, the miniscule number establishes that reasonable consumers were not likely to be deceived by the challenged ads. (*See* Response to CCFF ¶676). The even smaller subset of complaints Complaint Counsel identified from Tax Years 2020 and 2021 further demonstrates that reasonable consumers were not likely to be deceived by the challenged ads. Complaint

Counsel identified only 43 potentially relevant complaints in the FTC's database from Tax Years 2020 and 2021. In those years, ads for free TurboTax SKUs generated over 15 *billion* impressions and were clicked on over 130 million times. (PFF ¶¶637; Baburek (FTC) Tr. 338). Even considering only the advertisement clicks from those two years, and ignoring consumers who would have seen ads through other mediums, the set of 43 purportedly relevant complaints from Tax Years 2020 and 2021 amounts to just 0.000033% of those who clicked on a TurboTax ad during those two years. (*Cf.* PFF ¶¶637). The tiny number of complaints identified by Complaint Counsel, therefore, confirms that consumers were not misled or deceived by the challenged ads. (PFF ¶¶625-626, 630-632).

678. Of the 26 complaints referenced above:

- a) 26 of 26 consumers indicated that they believed or TurboTax communicated that filing taxes with TurboTax would be free;
- b) 22 of 26 consumers mentioned advertising about a free TurboTax option; and
- c) 20 of 26 consumers indicated they were charged for or paid for TurboTax.

(Complaint Counsel's Reply to Respondent Intuit Inc.'s Supplemental Response to the Statement of Material Facts As to Which There Is No Genuine Issue for Trial (filed Sep. 30, 2022) at p. 3 & Attachment A (summarizing GX502 & GX503 (Complaint Counsel) (Sentinel Complaints received Jan. 1, 2016 to Mar. 28, 2022)); *see also* GX504 (Complaint Counsel) at CC-00012478 to -00013150 (Sentinel Complaints received Mar. 29, 2022 to Aug. 31, 2022)).

Response to Finding No. 678:

The Proposed Finding is incorrect. There are not 26 complaints from consumers who "indicated that they believed or TurboTax communicated that filing taxes with TurboTax would be free" between November 1, 2021 and March 28, 2022. To the contrary, the evidence reflects that those complaints are not relevant or reliable and cannot be used as evidence that reasonable consumers were likely deceived by the challenged ads. Indeed, Complaint Counsel did nothing

to investigate the veracity of any of the complaints, including the 26 identified in this Proposed Finding. (*See* PFF ¶¶633, 917; Golder (Intuit) Tr. 1198-1200; RX1018 (Golder Expert Report) ¶78; RX1390 (Shiller (FTC) Dep.) at 20, 56-57, 115-116, 189-192). That Complaint Counsel have not verified or even closely reviewed these complaints is clear from their face. One complaint, for example, incorrectly states that “TurboTax continues to advertise for free when they no longer offer a free filing process.” (Complaint Counsel’s Reply to Respondent Intuit Inc.’s Supplemental Response to the Statement of Material Facts as to Which There Is No Genuine Issue for Trial (Sept. 30, 2022), Attachment A at 5). Of course, it is not correct that Intuit does not offer a free tax-filing product—TurboTax’s free SKUs are indisputably free. (*See* GX161 (Maxson (FTC) Dep.) at 279; PFF ¶¶69, 109-110, 112). That erroneous and unreliable complaint, along with the other unverified complaints, do not support the Proposed Finding or Complaint Counsel’s claim.

The Proposed Finding is also incorrect insofar as it suggests that the 26 consumer complaints are evidence that reasonable consumers were likely deceived by the challenged ads. To the contrary, as explained, the miniscule number of complaints identified by Complaint Counsel proves that no significant minority of reasonable consumers was likely to be deceived. (*See* Response to CCF ¶676). As the Proposed Finding makes clear, Complaint Counsel identified only 26 potentially relevant complaints in the FTC’s database from Tax Year 2021. In that same tax year, ads for free TurboTax SKUs generated over 9 *billion* impressions and were clicked on almost 40 million times. (*Cf.* PFF ¶637; Baburek (FTC) Tr. 338; GX434 (Intuit); GXD002 (FTC)). Even considering only the advertisement clicks from that year, and ignoring consumers who would have seen ads through other mediums, that set of 26 complaints amounts to just 0.000066% of those who clicked on a TurboTax ad during Tax Year 2021. (*Cf.* PFF ¶637).

If, as Complaint Counsel contended, Intuit engaged in a multi-year, multichannel, multi-modal scheme to deceive customers, the number of consumer complaints should be many, many orders of magnitude greater. (PFF ¶¶639; Golder (Intuit) Tr. 1211; RX1018 (Golder Expert Report) ¶¶89, fig. 10).

IV. Intuit's Experts

679. Intuit engaged four experts: Professor John Hauser, Professor Peter Golder, Ms. Rebecca Kirk Fair, and Mr. Bruce Deal. (RX1017 (Hauser Expert Report); RX1018 (Golder Expert Report); RX1016-A (Kirk Fair Expert Report); RX1027 (Deal Expert Report)).

Response to Finding No. 679:

Intuit agrees with the Proposed Finding that Professor Hauser, Professor Golder, Ms. Kirk Fair, and Mr. Deal are experts in their respective fields. Intuit has no other specific response except to note that those four experts offered reliable expert opinions and testimony demonstrating that the challenged ads were not deceptive. (See PFF ¶¶878-911).

680. Intuit's experts provide no direct evidence that consumers were not deceived by its advertising, relying instead on a collection of unreliable and irrelevant evidence, speculation, and logical fallacies. (See GX749 (Novemsky Rebuttal Expert Report) §§ IV–VIII; GX743 (Yoeli Rebuttal Expert Report) §§ IV–VI).

Response to Finding No. 680:

The Proposed Finding—which is devoid of any factual content—is irrelevant because it is Complaint Counsel who bear the burden of proving that the challenged ads were deceptive. See 16 C.F.R. §3.43(a). Thus, contrary to Complaint Counsel's suggestion, neither Intuit nor its experts had any burden to “provide ... direct evidence that consumers were not deceived.”

In addition, the Proposed Finding is incorrect for the myriad reasons provided in Intuit's proposed findings and in these responses. The analyses of the expert witnesses who testified on behalf of Intuit are reliable and relevant, and they provide strong evidence that the challenged

ads were unlikely to mislead a significant minority of consumers about their ability to file their taxes for free using TurboTax.

681. None of Intuit's experts undertake a survey that directly addresses the question whether or not, and to what extent, consumers believe they can use TurboTax for free. (GX749 (Novemsky Rebuttal Expert Report) ¶ 192; *see also* Novemsky (Complaint Counsel) Tr. 1764-1765).

Response to Finding No. 681:

The Proposed Finding is irrelevant because an expert may offer reliable and helpful opinions and testimony without conducting a survey directly asking that specific question. An expert must provide opinions and testimony that are “helpful to the trier of fact to understand the evidence,” “based on sufficient facts or data,” and “the product of reliable principles and methods,” and the expert must have “reliably applied the principles and methods to the facts of the case.” Fed. R. Evid. 702. Here, the opinions of the experts who testified on Intuit's behalf satisfy all of those requirements. Indeed, those experts conducted three consumer surveys, two of which directly assess the validity of Complaint Counsel's theory of deception (and demonstrate that it is wanting) (PFF ¶¶722-760) and the third of which assess materiality (a requirement for proving deception that Complaint Counsel disregard) (PFF ¶¶779-780, 786). Those experts also examined consumers' beliefs about their ability to file their taxes for free through multiple analyses, like their review of customer complaints and customer-level data, and found no evidence of a misimpression.

The Proposed Finding ignores all of these analyses. Indeed, it ignores Dr. Hauser's Disclosure Efficacy Survey, which provides direct evidence that the challenged ads are not deceptive because altering the ads to address Complaint Counsel's allegations caused no change in survey participants' brand consideration or product choice. (PFF ¶¶722-745). The Proposed Finding also ignores Dr. Hauser's Purchase Driver Survey, which show that consumers' selection

of a tax-preparation provider is a high-involvement process and that consumers do not rely solely on ads when making their purchase decisions. (RX1017 (Hauser Expert Report) ¶¶101-132).

The Proposed Finding ignores Ms. Kirk Fair’s survey as well, which demonstrates that consumers upgrade to paid TurboTax SKUs for reasons other than allegedly deceptive advertisements for free TurboTax SKUs, and do not feel locked into upgrading. (PFF ¶¶755-758; RX-1016-A (Kirk Fair Expert Report) ¶16, 27-30; RX1555 (Kirk Fair (Intuit) Trial Dep.) at 15). In particular, the survey shows that respondents upgrade to paid TurboTax SKUs primarily because of their particular “tax situation,” their trust in the TurboTax brand, and the additional features provided by paid SKUs—not because they expected to file for free and then felt locked in. (PFF ¶759; RX1555 (Kirk Fair (Intuit) Trial Dep.) at 46-47, 54-55; RX1016-A (Kirk Fair Expert Report) ¶36, fig. 4).

The Proposed Finding ignores Bruce Deal’s analysis. Mr. Deal explained that 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,” firms offering tax-preparation services (including Intuit) derive far greater value from exceeding customer expectations and earning repeat business than they do from one-off transactions. (PFF ¶¶39, 44-45, 89). Those features, coupled with the high cost of acquiring new customers (PFF ¶88), and the ease with which consumers can both detect and punish deception by switching providers (PFF ¶¶40, 51-55, 95), mean that Intuit (like other firms in the tax-preparation industry) has an incentive *not* to chase single-year gains by deceiving consumers in the manner alleged by Complaint Counsel (PFF ¶¶88-89, 95). In addition, Mr. Deal analyzed Intuit’s customer data to determine whether actual TurboTax customers behaved in a manner consistent with the widespread deception alleged by Complaint Counsel. (PFF ¶663). He found that they did not. To the contrary, Mr. Deal found

just 510 customers—less than 0.0009% of the 55.5 million individuals included in his analysis—associated with evidence of possible deception in the data. (PFF ¶¶679-682).

The Proposed Finding ignores Peter Golder’s analysis as well. Professor Golder explained that the number of complaints identified by Complaint Counsel is miniscule compared to the millions of TurboTax customers during the relevant time period, and far lower than the complaint rates of benchmark companies. (PFF ¶¶626-640). As he made clear, one would expect the number of consumer complaints to be significantly higher if Intuit had engaged in a multi-year, multi-channel, multimodal advertising campaign to deceive customers. (PFF ¶639). Moreover, Professor Golder’s benchmarking analysis comparing video and social media display ads for free TurboTax SKUs with ads from 18 benchmark companies demonstrated that the disclosures in TurboTax’s ads products were comparable or superior to the disclosures in the other companies’ advertisements, visible to consumers, presented in the form and manner that consumers expect, and consistent with the FTC’s Guidelines. (PFF ¶¶235-240).

All of these analyses (whether through use of a survey or otherwise) are relevant and reliable, and they provide strong evidence that the challenged ads were unlikely to mislead a significant minority of consumers about their ability to file their taxes for free using TurboTax.

Finally, the Proposed Finding is misleading insofar as it suggests that Professor Novemsky’s survey reliably addressed whether consumers believe they can file for free. He did not, for reasons Intuit has already explained at length (PFF ¶¶539-589; Responses to CCF ¶¶480-595).

A. Intuit Expert Professor Peter Golder

682. Professor Golder submitted an expert report on Intuit’s behalf and testified at trial. (RX1018 (Golder Expert Report)).

Response to Finding No. 682:

The Proposed Finding is misleading in part. Professor Golder submitted an expert report providing his expert opinions on the questions assigned to him by Intuit's counsel. (RX1018 (Golder Expert Report) ¶14). Intuit has no other specific response except to note that Professor Golder did testify at trial where he offered testimony and the following opinions:

Professor Golder explained that reasonable consumers are familiar with and regularly encounter free product offers with limitations, both outside and within the tax-preparation industry. (Golder (Intuit) Tr. 1088-1099). He also explained how reasonable consumers demonstrate skepticism toward free product offerings. (Golder (Intuit) Tr. 1095-1099). Professor Golder testified that consumers' familiarity with free offers, and in particular free offers in the tax-preparation industry, means that reasonable consumers are not likely to see a TurboTax ad and believe that all TurboTax products are free or that TurboTax would necessarily be free for them when it was not. (Golder (Intuit) Tr. 1097-1098).

Professor Golder also explained that consumers' selection of a tax-preparation provider is a high-involvement purchase process, meaning they engage with a variety of information sources, conduct research, and evaluate alternatives before making a purchase decision. (Golder (Intuit) Tr. 1060-1087). Consistent with the fact that consumers generally consider information from a variety of sources when researching tax-preparation providers, Professor Golder also testified that very few consumers rely exclusively on ads when selecting a tax-preparation provider. (Golder (Intuit) Tr. 1081-1082).

Professor Golder further opined about the effectiveness of the disclosures in Intuit's advertising for free TurboTax SKUs. He explained how the advertisements effectively communicate the existence of a restriction and the category of that restriction, that they direct consumers to the TurboTax website for more information, and that they provide information in a

manner that consumers can process it. (Golder (Intuit) Tr. 1099-1132). Professor Golder further opined that the disclosures in Intuit's advertising for free TurboTax SKUs were in the form, location, and amount of detail that consumers expect and are familiar with. (Golder (Intuit) Tr. 1111-1116, 1153-1155). Professor Golder's opinions regarding the disclosures in Intuit's advertising for free TurboTax SKUs were supported by the benchmarking analysis he performed comparing video and social media display ads for free TurboTax SKUs with ads from 18 benchmark companies, using metrics drawn from the FTC's ".com Disclosures" guidelines. (Golder (Intuit) Tr. 1132-1163). As Professor Golder explained, that benchmarking analysis showed that the disclosures in TurboTax's ads were comparable or superior to the disclosures in the other companies' advertisements. (Golder (Intuit) Tr. 1148-1151, 1156-1160). Those results, Professor Golder explained, demonstrated that the qualifications in the challenged ads were visible to consumers, presented in the form and manner that consumers expect, and consistent with the FTC's Guidelines. (Golder (Intuit) Tr. 1133, 1148-1155).

Professor Golder also provided his opinion that the TurboTax website effectively communicated qualifications for free TurboTax SKUs to consumers before they made a decision to purchase a TurboTax product. (Golder (Intuit) Tr. 1068-1069). He explained that the TurboTax website is integrated into Intuit's advertising for free TurboTax SKUs because the ads' disclosures encourage consumers to visit the TurboTax website, and because consumers in fact must visit the website in order to use or purchase TurboTax online products. (Golder (Intuit) Tr. 1067-1069, 1124-1132). Professor Golder further explained that, by encouraging consumers to visit the TurboTax website, Intuit's ads reinforce natural consumer behavior, because consumers understand that they can visit websites to find additional information. (Golder (Intuit) Tr. 1126).

Professor Golder further testified that his analyses of information reflecting consumer outcomes, including consumer complaints and retention rates, demonstrated that reasonable consumers were not likely deceived by the challenged ads. (Golder (Intuit) Tr. 1184-1214). With respect to consumer complaints, Professor Golder explained that the number of complaints identified by Complaint Counsel is miniscule compared to the millions of TurboTax customers during the relevant time period. (Golder (Intuit) Tr. 1195-1196, 1208). As he made clear, one would expect the number of consumer complaints to be significantly higher if Intuit had engaged in a multi-year, multi-channel, multimodal advertising campaign to deceive customers. (Golder (Intuit) Tr. 1189-1190, 1193-1194, 1212-1213). Professor Golder also shared his independent coding analysis of the limited number of consumer complaints that Complaint Counsel had identified, which showed that many of those complaints are not relevant to this action. (Golder (Intuit) Tr. 1197-1208). And he provided results from his complaint benchmarking analysis, which showed that Intuit's rate of BBB complaints was far lower than that of benchmark companies, further indicating that reasonable consumers were not likely deceived by the challenged ads. (Golder (Intuit) Tr. 1208-1213).

Finally, Professor Golder testified regarding the negative effects that would result from the proposed order sought by Complaint Counsel in this case. (Golder (Intuit) Tr. 1164-1184). Professor Golder explained how Complaint Counsel's burdensome proposed disclosures would lead to information overload resulting in consumers having a worse understanding of the qualifications for free TurboTax SKUs, be out of step with industry norms, lead to less TurboTax free advertising, decrease consumer awareness of free tax filing options, and ultimately lead to fewer consumers filing for free. (Golder (Intuit) Tr. 1164-1184).

Complaint Counsel offered little to no affirmative expert opinions or other testimony on these topics.

683. Professor Golder does not have a degree in psychology. (RX1018 (Golder Expert Report) ¶ 2, Appendix A; Golder (Intuit) Tr. 1042-1043, 1216; Novemsky (Complaint Counsel) Tr. 1766).

Response to Finding No. 683:

The Proposed Finding is irrelevant. This is not a case about psychology, it is about advertising and marketing and Professor Golder was more than qualified to offer the opinions in his report and that he testified to at trial. Professor Golder holds a Ph.D. in business administration (with a major in marketing) from the University of Southern California and has served as professor of marketing for almost 30 years, most recently since 2009 as a professor of marketing at the Tuck School of Business at Dartmouth College. (Golder (Intuit) Tr. 1042-1043; RX1018 (Golder Expert Report) ¶¶1-2, Appendix A). Professor Golder has taught graduate courses for MBA students relating to marketing and advertising, branding, new product development, the consumer buying process, historical research methods in marketing, and survey design. (Golder (Intuit) Tr. 1043-1044; RX1018 (Golder Expert Report) ¶3, Appendix A). Professor Golder has also authored or co-authored over 40 papers, books, and other articles on a variety of marketing topics in peer-reviewed academic journals and other publications such as the Harvard Business Review, the Journal of Marketing Research, and the Journal of Marketing, among others. (Golder (Intuit) Tr. 1044; RX1018 (Golder Expert Report) ¶3, Appendix A). Further, Professor Golder has extensive experience and expertise in the field of marketing, with research experience on topics such as marketing strategies, branding and advertising, pricing, market leaderships, and competitor and consumer responses to product development and marketing. (Golder (Intuit) Tr. 1044-1045; RX1018 (Golder Expert Report) ¶3, Appendix A). Moreover, in forming his opinions, Professor Golder relied on well-respected marketing

literature. (PFF ¶888; *see also* Golder (Intuit) Tr. 1216 (explaining that “psychology ... underlying consumer behavior is an important part of the marketing literature”)). Given that expertise and the work he performed in developing his opinions, the Court correctly rejected Complaint Counsel’s assertion that those opinions were not based on reliable principles or methods. (*See* Golder (Intuit) Tr. 1101).

1. Professor Golder Did Not Conduct a Consumer Survey

684. Professor Golder did not conduct any consumer survey as part of his work on behalf of Intuit. (RX1018 (Golder Expert Report) ¶25; Golder (Intuit) Tr. 1058; RX1394 (Golder (Intuit) Dep.) at 46)).

Response to Finding No. 684:

The Proposed Finding is irrelevant because an expert need not conduct a consumer survey to offer reliable and helpful opinions and testimony. Rather, an expert must provide opinions and testimony that are “helpful to the trier of fact to understand the evidence,” “based on sufficient facts or data,” and “the product of reliable principles and methods,” and the expert must have “reliably applied the principles and methods to the facts of the case.” Fed. R. Evid.

702. Professor Golder’s opinions easily satisfy all of those requirements, and Complaint Counsel have offered no evidence to the contrary. Indeed, the Court already rejected Complaint Counsel’s assertion that Professor Golder’s opinions were not based on reliable principles or methods. (*See* Golder (Intuit) Tr. 1101).

Professor Golder performed a variety of reliable and informative analyses based on established research methods and “principles derived from marketing research showing how consumers generally respond to ads presented in a particular way,” *Kraft, Inc.*, 114 F.T.C. 40, 121-122 (1991); *see also Thompson Medical Co.*, 104 F.T.C. 648, 790 (1984), consistent with the questions he sought to answer in this case, (Golder (Intuit) Tr. 1058-1059; RX1394 (Golder (Intuit) Dep.) at 43-46). These analyses included a review of relevant marketing research

literature and an assessment of the behaviors of reasonable consumers in the online tax-preparation industry; holistic analyses of the effectiveness of disclosures in TurboTax's free advertising and on the TurboTax website, including a TV and social media ad disclosure benchmarking analysis; analyses of customer outcome measures such as complaints and retention rates, including an independent coding analysis of consumer complaints and a BBB complaint rate benchmarking analysis; and an evaluation of the impact of Complaint Counsel's proposed disclosures. (PFF ¶¶890-896). Each of those analyses are helpful and reliable.

First, Professor Golder provided helpful and reliable testimony regarding reasonable consumers in the tax-preparation industry, providing insight into the relevant population of consumers that Complaint Counsel must prove a significant minority were likely deceived in order to prevail on their claims. Professor Golder explained that reasonable consumers are familiar with and regularly encounter free product offers with limitations, both outside and within the tax-preparation industry. (Golder (Intuit) Tr. 1088-1099). And he explained how reasonable consumers demonstrate skepticism toward free product offerings, which makes them unlikely to believe that free TurboTax SKUs would necessarily be free for them without conducting additional research. (Golder (Intuit) Tr. 1095-1099). Professor Golder further testified that consumers' familiarity with free offers, and in particular free offers in the tax-preparation industry, means that reasonable consumers are not likely to see a TurboTax ad and believe that all TurboTax products are free or that TurboTax would necessarily be free for them when it was not. (Golder (Intuit) Tr. 1097-1098).

Professor Golder also explained that consumers' selection of a tax-preparation provider is a high-involvement purchase process, meaning they engage with a variety of information sources, conduct research, and evaluate alternatives before making a purchase decision. (Golder

(Intuit) Tr. 1060-1087). Consistent with the fact that consumers generally consider information from a variety of sources when researching tax-preparation providers, Professor Golder also testified that very few consumers rely exclusively on ads when selecting a tax-preparation provider. (Golder (Intuit) Tr. 1081-1082).

Second, Professor Golder further provided helpful and reliable opinions about the effectiveness of the disclosures in Intuit’s advertising for free TurboTax SKUs, relying on “principles derived from marketing research” to demonstrate consumers understanding and respond to advertisements presented with particular elements. *Kraft, Inc.*, 114 F.T.C. 40, 121-122 (1991); *see also Thompson Medical Co.*, 104 F.T.C. 648, 790 (1984). Professor Golder explained how the advertisements effectively communicate the existence of a restriction and the category of that restriction, that they direct consumers to the TurboTax website for more information, and that they provide information in a manner that consumers can process it. (Golder (Intuit) Tr. 1099-1132). Professor Golder further opined that the disclosures in Intuit’s advertising for free TurboTax SKUs were in the form, location, and amount of detail that consumers expect and are familiar with. (Golder (Intuit) Tr. 1111-1116, 1153-1155).

Professor Golder’s opinions regarding the disclosures in Intuit’s advertising for free TurboTax SKUs were supported by the benchmarking analysis he performed comparing video and social media display ads for free TurboTax SKUs with ads from 18 benchmark companies, using metrics drawn from the FTC’s “.com Disclosures” guidelines. (Golder (Intuit) Tr. 1132-1163). That benchmarking analysis demonstrated that the disclosures in TurboTax’s ads were not only comparable or superior to the disclosures in the other companies’ advertisements, but also visible to consumers, presented in the form and manner that consumers expect, and consistent with the FTC’s Guidelines. (Golder (Intuit) Tr. 1133, 1148-1160).

Third, Professor Golder also provided helpful and reliable analyses regarding the TurboTax website, explaining how the TurboTax website effectively communicated qualifications for free TurboTax SKUs to consumers before they made a decision to purchase a TurboTax product. (Golder (Intuit) Tr. 1068-1069). He explained that the TurboTax website is integrated into Intuit's advertising for free TurboTax SKUs because the ads' disclosures encourage consumers to visit the TurboTax website, and because consumers in fact must visit the website in order to use or purchase TurboTax online products. (Golder (Intuit) Tr. 1067-1069, 1124-1132). Professor Golder further explained that, by encouraging consumers to visit the TurboTax website, Intuit's ads reinforce natural consumer behavior, because consumers understand that they can visit websites to find additional information. (Golder (Intuit) Tr. 1126).

Fourth, Professor Golder summarized his helpful and reliable analyses of information reflecting the "voice of the customer," including consumer complaints and retention rates, which demonstrated that reasonable consumers were not likely deceived by the challenged ads. (Golder (Intuit) Tr. 1184-1214, 1242). With respect to consumer complaints, Professor Golder explained that the number of complaints identified by Complaint Counsel is miniscule compared to the millions of TurboTax customers during the relevant time period. (Golder (Intuit) Tr. 1195-1196, 1208). As he made clear, one would expect the number of consumer complaints to be significantly higher if Intuit had engaged in a multi-year, multi-channel, multimodal advertising campaign to deceive customers. (Golder (Intuit) Tr. 1189-1190, 1193-1194, 1212-1213). Professor Golder also shared his independent coding analysis of the limited number of consumer complaints that Complaint Counsel had identified, which showed that many of those complaints are not relevant to this action. (Golder (Intuit) Tr. 1197-1208). And he provided results from his complaint benchmarking analysis, which showed that Intuit's rate of BBB complaints was far

lower than that of benchmark companies, further indicating that reasonable consumers were not likely deceived by the challenged ads. (Golder (Intuit) Tr. 1208-1213).

Fifth, Professor Golder provided helpful and reliable analyses regarding the proposed order sought by Complaint Counsel in this case, explaining the negative effects that would result from the burdensome and unnecessary requirements. (Golder (Intuit) Tr. 1164-1184). Professor Golder explained how Complaint Counsel's proposed disclosures would lead to information overload resulting in consumers having a worse understanding of the qualifications for free TurboTax SKUs, be out of step with industry norms, lead to less TurboTax free advertising, decrease consumer awareness of free tax filing options, and ultimately lead to fewer consumers filing for free. (Golder (Intuit) Tr. 1164-1184).

Performing a consumer survey can, of course be a helpful tool to understand consumer impressions from challenged advertisements, and Intuit put forward three surveys from two *other* experts. Professor Golder relied on those surveys in forming his own opinions in this case. (RX1018 (Golder Expert Report) Appendix C, C-2). However, a survey is only informative if done reliably. The evidence shows that Professor Novemsky's survey was scientifically invalid for numerous reasons and is not reliable evidence of anything. (See PFF ¶¶529-622; Responses to CCF ¶¶467-595).

685. Professor Golder did not ask any consumers about whether they thought TurboTax was free for them. (Golder (Intuit) Tr. 1242).

Response to Finding No. 685:

The Proposed Finding is irrelevant and misleading. Professor Golder relied on his experience, expertise, consumer data, and multiple benchmarking studies that he designed to form his opinions in this case. His methodology was sound and relied on well-established "principles derived from marketing research showing how consumers generally respond to ads

presented in a particular way.” *Kraft, Inc.*, 114 F.T.C. at 121-22; *see also Thompson Medical Co.*, 104 F.T.C. at 790. Indeed, the Court already rejected Complaint Counsel’s assertion that Professor Golder’s opinions were not based on reliable principles or methods. (*See Golder (Intuit) Tr.* 1101).

Professor Golder’s analyses sought to explain how reasonable consumers would view, interact, and understand the challenged advertisements. (*Golder (Intuit) Tr.* 1059-1060). With that framework in mind, Professor Golder constructed reliable benchmarking analyses to compare the disclosures in Intuit’s TV and social-media ads to qualifications in the ads of 18 benchmark companies, in order to “understand whether these disclosures were consistent with what consumers would be seeing in other platforms.” (PFF ¶¶234-238; *Golder (Intuit) Tr.* 1133). Professor Golder crafted his benchmarking analysis using metrics for assessing the adequacy of disclosures based on the FTC’s own guidelines. (PFF ¶¶235-236). Based on those metrics, Professor Golder concluded that Intuit’s TV and social media ads for free TurboTax SKUs contain disclosure and design elements that are consistent with the FTC guidelines and marketing literature, and that are comparable or superior to benchmark companies and the industry standards with which reasonable consumers are accustomed. (PFF ¶¶238-239, 259; *Golder (Intuit) Tr.* 1163; RX1018 (*Golder Expert Report*) ¶¶127-138, 231).

Moreover, Professor Golder analyzed evidence that would “manifest real behavior [of] real consumers in the marketplace,” (*Golder (Intuit) Tr.* 1059-1060), such as consumer complaints received by the Better Business Bureau and the FTC’s Consumer Sentinel Network, as well as consumer retention rates. (*Golder (Intuit) Tr.* 1184-1214). These sources provide the “voice of the customer” (*Golder (Intuit) Tr.* 1242; RX1394 (*Golder (Intuit) Dep.*) at 47-48), and are where one would expect consumers to express their views about whether they felt deceived

by TurboTax advertising (Golder (Intuit) Tr. 1056-1057). Because Professor Golder looked to reliable data sources to assess whether consumers' felt as though they were misled, it was unnecessary for him to separately do so through a survey. Professor Golder's analysis of that consumer voice information revealed a miniscule number of consumer complaints, many of which were not even relevant to this action, reflecting that consumers experiences matched their expectations about the price of TurboTax's SKUs and that reasonable consumers were not likely to be deceived by the challenged ads. (Golder (Intuit) Tr. 1197-1208). Data from Professor Golder's complaint benchmarking analysis also showed that Intuit's rate of BBB complaints was far lower than that of benchmark companies (Golder (Intuit) Tr. 1208-1213), providing further evidence that consumers have not complained about Intuit's advertising at rates that reflect deception. (PFF ¶¶638-640). That far fewer consumers complained about Intuit relative to other companies provides strong evidence that Intuit has not engaged in the widespread and long-term deceptive advertising campaign that Complaint Counsel allege.

686. Professor Golder did not think it was necessary to conduct a survey as part of his work on this matter. (RX1394 (Golder (Intuit) Dep.) at 184-185).

Response to Finding No. 686:

The Proposed Finding is correct. Professor Golder did not think a survey was necessary, choosing instead to review and analyze evidence that would “manifest real behavior [of] real consumers in the marketplace,” (Golder (Intuit) Tr. 1059-1060), such as consumer complaints received by the Better Business Bureau and the FTC's Consumer Sentinel Network, as well as consumer retention rates. (Golder (Intuit) Tr. 1184-1214). As Professor Golder explained, these sources provide the “voice of the customer” (Golder (Intuit) Tr. 1242; RX1394 (Golder (Intuit) Dep.) at 47-48), and are where one would expect consumers to express their views about whether they felt deceived by TurboTax advertising (Golder (Intuit) Tr. 1056-1057).

Professor Golder did perform a variety of reliable and informative analyses based on established research methods and “principles derived from marketing research showing how consumers generally respond to ads presented in a particular way,” *Kraft, Inc.*, 114 F.T.C. at 121-22; *see also Thompson Medical Co.*, 104 F.T.C. at 790, consistent with the questions he sought to answer. (Golder (Intuit) Tr. 1058-1059; RX1394 (Golder (Intuit) Dep.) at 43-46). These analyses included a review of relevant marketing research literature and an assessment of the behaviors of reasonable consumers in the online tax-preparation industry; analyses of the effectiveness of disclosures in TurboTax’s free advertising and on the TurboTax website, including a TV and social media ad disclosure benchmarking analysis; analyses of customer outcome measures such as complaints and retention rates, including an independent coding analysis of consumer complaints and a BBB complaint rate benchmarking analysis; and an evaluation of the impact of Complaint Counsel’s proposed disclosures. (PFF ¶¶890-896). Each of those analyses are helpful and reliable.

First, Professor Golder provided helpful and reliable testimony regarding reasonable consumers in the tax-preparation industry, providing insight into the relevant population of consumers that Complaint Counsel must prove a significant minority were likely deceived in order to prevail on their claims. Professor Golder explained that reasonable consumers are familiar with and regularly encounter free product offers with limitations, both outside and within the tax-preparation industry. (Golder (Intuit) Tr. 1088-1099). And he explained how reasonable consumers demonstrate skepticism toward free product offerings, which makes them unlikely to believe that free TurboTax SKUs would necessarily be free for them without conducting additional research. (Golder (Intuit) Tr. 1095-1099). Professor Golder further testified that consumers’ familiarity with free offers, and in particular free offers in the tax-

preparation industry, means that reasonable consumers are not likely to see a TurboTax ad and believe that all TurboTax products are free or that TurboTax would necessarily be free for them when it was not. (Golder (Intuit) Tr. 1097-1098).

Professor Golder also explained that consumers' selection of a tax-preparation provider is a high-involvement purchase process, meaning they engage with a variety of information sources, conduct research, and evaluate alternatives before making a purchase decision. (Golder (Intuit) Tr. 1060-1087). Consistent with the fact that consumers generally consider information from a variety of sources when researching tax-preparation providers, Professor Golder also testified that very few consumers rely exclusively on ads when selecting a tax-preparation provider. (Golder (Intuit) Tr. 1081-1082).

Second, Professor Golder further provided helpful and reliable opinions about the effectiveness of the disclosures in Intuit's advertising for free TurboTax SKUs, relying on "principles derived from marketing research" to demonstrate consumers understanding and respond to advertisements presented with particular elements. *Kraft, Inc.*, 114 F.T.C. 40, 121-122 (1991); *see also Thompson Medical Co.*, 104 F.T.C. 648, 790 (1984). Professor Golder explained how the advertisements effectively communicate the existence of a restriction and the category of that restriction, that they direct consumers to the TurboTax website for more information, and that they provide information in a manner that consumers can process it. (Golder (Intuit) Tr. 1099-1132). Professor Golder further opined that the disclosures in Intuit's advertising for free TurboTax SKUs were in the form, location, and amount of detail that consumers expect and are familiar with. (Golder (Intuit) Tr. 1111-1116, 1153-1155).

Professor Golder's opinions regarding the disclosures in Intuit's advertising for free TurboTax SKUs were supported by the benchmarking analysis he performed comparing video

and social media display ads for free TurboTax SKUs with ads from 18 benchmark companies, using metrics drawn from the FTC's ".com Disclosures" guidelines. (Golder (Intuit) Tr. 1132-1163). That benchmarking analysis demonstrated that the disclosures in TurboTax's ads were not only comparable or superior to the disclosures in the other companies' advertisements, but also visible to consumers, presented in the form and manner that consumers expect, and consistent with the FTC's Guidelines. (Golder (Intuit) Tr. 1133, 1148-1160).

Third, Professor Golder also provided helpful and reliable analyses regarding the TurboTax website, explaining how the TurboTax website effectively communicated qualifications for free TurboTax SKUs to consumers before they made a decision to purchase a TurboTax product. (Golder (Intuit) Tr. 1068-1069). He explained that the TurboTax website is integrated into Intuit's advertising for free TurboTax SKUs because the ads' disclosures encourage consumers to visit the TurboTax website, and because consumers in fact must visit the website in order to use or purchase TurboTax online products. (Golder (Intuit) Tr. 1067-1069, 1124-1132). Professor Golder further explained that, by encouraging consumers to visit the TurboTax website, Intuit's ads reinforce natural consumer behavior, because consumers understand that they can visit websites to find additional information. (Golder (Intuit) Tr. 1126).

Fourth, Professor Golder summarized his helpful and reliable analyses of information reflecting the "voice of the customer," including consumer complaints and retention rates, which demonstrated that reasonable consumers were not likely deceived by the challenged ads. (Golder (Intuit) Tr. 1184-1214, 1242). With respect to consumer complaints, Professor Golder explained that the number of complaints identified by Complaint Counsel is miniscule compared to the millions of TurboTax customers during the relevant time period. (Golder (Intuit) Tr. 1195-1196, 1208). As he made clear, one would expect the number of consumer complaints to be

significantly higher if Intuit had engaged in a multi-year, multi-channel, multimodal advertising campaign to deceive customers. (Golder (Intuit) Tr. 1189-1190, 1193-1194, 1212-1213).

Professor Golder also shared his independent coding analysis of the limited number of consumer complaints that Complaint Counsel had identified, which showed that many of those complaints are not relevant to this action. (Golder (Intuit) Tr. 1197-1208). And he provided results from his complaint benchmarking analysis, which showed that Intuit's rate of BBB complaints was far lower than that of benchmark companies, further indicating that reasonable consumers were not likely deceived by the challenged ads. (Golder (Intuit) Tr. 1208-1213).

Fifth, Professor Golder provided helpful and reliable analyses regarding the proposed order sought by Complaint Counsel in this case, explaining the negative effects that would result from the burdensome and unnecessary requirements. (Golder (Intuit) Tr. 1164-1184). Professor Golder explained how Complaint Counsel's proposed disclosures would lead to information overload resulting in consumers having a worse understanding of the qualifications for free TurboTax SKUs, be out of step with industry norms, lead to less TurboTax free advertising, decrease consumer awareness of free tax filing options, and ultimately lead to fewer consumers filing for free. (Golder (Intuit) Tr. 1164-1184).

687. Professor Golder did not ask any consumers about their understanding regarding TurboTax. (Golder (Intuit) Tr. 1242).

Response to Finding No. 687:

The Proposed Finding is just another way of restating the point Complaint Counsel have raised in the last several findings. Yes, Professor Golder did not conduct a survey. Instead, he performed a variety of reliable and informative analyses based on established research methods and "principles derived from marketing research showing how consumers generally respond to ads presented in a particular way," *Kraft, Inc.*, 114 F.T.C. at 121-122; *see also Thompson Medical*

Co., 104 F.T.C. at 790, consistent with the questions he sought to answer in this case, (Golder (Intuit) Tr. 1058-1059; RX1394 (Golder (Intuit) Dep.) at 43-46). These analyses included a review of relevant marketing research literature and an assessment of the behaviors of reasonable consumers in the online tax-preparation industry; holistic analyses of the effectiveness of disclosures in TurboTax's free advertising and on the TurboTax website, including a TV and social media ad disclosure benchmarking analysis; analyses of customer outcome measures such as complaints and retention rates, including an independent coding analysis of consumer complaints and a BBB complaint rate benchmarking analysis; and an evaluation of the impact of Complaint Counsel's proposed disclosures. (PFF ¶¶890-896). Each of those analyses are helpful and reliable.

First, Professor Golder provided helpful and reliable testimony regarding reasonable consumers in the tax-preparation industry, providing insight into the relevant population of consumers that Complaint Counsel must prove a significant minority were likely deceived in order to prevail on their claims. Professor Golder explained that reasonable consumers are familiar with and regularly encounter free product offers with limitations, both outside and within the tax-preparation industry. (Golder (Intuit) Tr. 1088-1099). And he explained how reasonable consumers demonstrate skepticism toward free product offerings, which makes them unlikely to believe that free TurboTax SKUs would necessarily be free for them without conducting additional research. (Golder (Intuit) Tr. 1095-1099). Professor Golder further testified that consumers' familiarity with free offers, and in particular free offers in the tax-preparation industry, means that reasonable consumers are not likely to see a TurboTax ad and believe that all TurboTax products are free or that TurboTax would necessarily be free for them when it was not. (Golder (Intuit) Tr. 1097-1098).

Professor Golder also explained that consumers' selection of a tax-preparation provider is a high-involvement purchase process, meaning they engage with a variety of information sources, conduct research, and evaluate alternatives before making a purchase decision. (Golder (Intuit) Tr. 1060-1087). Consistent with the fact that consumers generally consider information from a variety of sources when researching tax-preparation providers, Professor Golder also testified that very few consumers rely exclusively on ads when selecting a tax-preparation provider. (Golder (Intuit) Tr. 1081-1082).

Second, Professor Golder further provided helpful and reliable opinions about the effectiveness of the disclosures in Intuit's advertising for free TurboTax SKUs, relying on "principles derived from marketing research" to demonstrate consumers understanding and respond to advertisements presented with particular elements. *Kraft, Inc.*, 114 F.T.C. 40, 121-122 (1991); *see also Thompson Medical Co.*, 104 F.T.C. 648, 790 (1984). Professor Golder explained how the advertisements effectively communicate the existence of a restriction and the category of that restriction, that they direct consumers to the TurboTax website for more information, and that they provide information in a manner that consumers can process it. (Golder (Intuit) Tr. 1099-1132). Professor Golder further opined that the disclosures in Intuit's advertising for free TurboTax SKUs were in the form, location, and amount of detail that consumers expect and are familiar with. (Golder (Intuit) Tr. 1111-1116, 1153-1155).

Professor Golder's opinions regarding the disclosures in Intuit's advertising for free TurboTax SKUs were supported by the benchmarking analysis he performed comparing video and social media display ads for free TurboTax SKUs with ads from 18 benchmark companies, using metrics drawn from the FTC's ".com Disclosures" guidelines. (Golder (Intuit) Tr. 1132-1163). That benchmarking analysis demonstrated that the disclosures in TurboTax's ads were not

only comparable or superior to the disclosures in the other companies' advertisements, but also visible to consumers, presented in the form and manner that consumers expect, and consistent with the FTC's Guidelines. (Golder (Intuit) Tr. 1133, 1148-1160).

Third, Professor Golder also provided helpful and reliable analyses regarding the TurboTax website, explaining how the TurboTax website effectively communicated qualifications for free TurboTax SKUs to consumers before they made a decision to purchase a TurboTax product. (Golder (Intuit) Tr. 1068-1069). He explained that the TurboTax website is integrated into Intuit's advertising for free TurboTax SKUs because the ads' disclosures encourage consumers to visit the TurboTax website, and because consumers in fact must visit the website in order to use or purchase TurboTax online products. (Golder (Intuit) Tr. 1067-1069, 1124-1132). Professor Golder further explained that, by encouraging consumers to visit the TurboTax website, Intuit's ads reinforce natural consumer behavior, because consumers understand that they can visit websites to find additional information. (Golder (Intuit) Tr. 1126).

Fourth, Professor Golder summarized his helpful and reliable analyses of information reflecting the "voice of the customer," including consumer complaints and retention rates, which demonstrated that reasonable consumers were not likely deceived by the challenged ads. (Golder (Intuit) Tr. 1184-1214, 1242). With respect to consumer complaints, Professor Golder explained that the number of complaints identified by Complaint Counsel is miniscule compared to the millions of TurboTax customers during the relevant time period. (Golder (Intuit) Tr. 1195-1196, 1208). As he made clear, one would expect the number of consumer complaints to be significantly higher if Intuit had engaged in a multi-year, multi-channel, multimodal advertising campaign to deceive customers. (Golder (Intuit) Tr. 1189-1190, 1193-1194, 1212-1213). Professor Golder also shared his independent coding analysis of the limited number of consumer

complaints that Complaint Counsel had identified, which showed that many of those complaints are not relevant to this action. (Golder (Intuit) Tr. 1197-1208). And he provided results from his complaint benchmarking analysis, which showed that Intuit's rate of BBB complaints was far lower than that of benchmark companies, further indicating that reasonable consumers were not likely deceived by the challenged ads. (Golder (Intuit) Tr. 1208-1213).

Fifth, Professor Golder provided helpful and reliable analyses regarding the proposed order sought by Complaint Counsel in this case, explaining the negative effects that would result from the burdensome and unnecessary requirements. (Golder (Intuit) Tr. 1164-1184). Professor Golder explained how Complaint Counsel's proposed disclosures would lead to information overload resulting in consumers having a worse understanding of the qualifications for free TurboTax SKUs, be out of step with industry norms, lead to less TurboTax free advertising, decrease consumer awareness of free tax filing options, and ultimately lead to fewer consumers filing for free. (Golder (Intuit) Tr. 1164-1184).

Moreover, Intuit put forward three surveys from two *other* experts. Professor Golder relied on those surveys in forming his own opinions in this case. (RX1018 (Golder Expert Report) App'x C, C-2). However, a survey is only informative if done reliably. The evidence shows that Professor Novemsky's survey was scientifically invalid for numerous reasons and is not reliable evidence of anything. (See PFF ¶¶529-622; Responses to CCF ¶¶467-595).

2. Professor Golder's Advertisement Review is Uninformative

688. Professor Golder opined that TurboTax's ads are very central to this case. (Golder (Intuit) Tr. 1055-1056).

Response to Finding No. 688:

Intuit has no specific response except to note that Professor Golder opined that the *challenged* ads, for specific TurboTax SKUs, with clear disclosures, were significant in this case.

Tellingly, Complaint Counsel's own expert did not show any of the participants in his survey any of the challenged ads. (PFF ¶534; Golder (Intuit) Tr. 1055-1056).

689. His review of advertising consisted of his own opinions after reviewing ads and comparing ads to those run by other companies. (RX1018 (Golder Expert Report) ¶ 25; Golder (Intuit) Tr. 1099).

Response to Finding No. 689:

It is true that Professor Golder's expert opinions are his own. Beyond that, the Proposed Finding is inaccurate and misleading. For starters, the Court already rejected Complaint Counsel's assertion that Professor Golder's opinions were not based on reliable principles or methods. (*See* Golder (Intuit) Tr. 1101). Moreover, Complaint Counsel are wrong to imply that Professor Golder's opinions were based merely on his subjective views. They instead rested on years of professional experience and well-established "principles derived from marketing research showing how consumers generally respond to ads presented in a particular way." *Kraft, Inc.*, 114 F.T.C. at 121-22; *see also Thompson Medical Co.*, 104 F.T.C. at 790.

For example, Professor Golder relied on established research methods and principles to conduct his disclosure benchmarking analysis. First, in line with reliable research methods and principles, Professor Golder established a set of criteria based on key characteristics of the tax preparation industry: it is required for nearly all Americans; it is a repeated, annual purchase; it services a business-to-consumer market, and the product is purchased by both individuals and households. (Golder (Intuit) Tr. 1133-1137; RX1018 (Golder Expert Report) ¶86). Professor Golder then selected a variety of industries that fulfilled those key criteria, resulting in a set of 18 companies providing useful points of comparison relative to Intuit. (Golder (Intuit) Tr. 1133-1137; RX1018 (Golder Expert Report) ¶86). As Professor Golder explained, the selection of benchmarks in a benchmarking analysis provide a "reference point that can be informative." (RX1394 (Golder (Intuit) Dep.) at 64-65). Professor Golder also followed established research

methodology by first developing a set of metrics by which to measure the disclosures in Intuit's and benchmark companies' ads (Golder (Intuit) Tr. 1137-1139), based on various key factors that the FTC's own Guidelines suggest are important for assessing the quality of advertisements (PFF ¶235), before conducting his analysis measuring the disclosure elements in each ad (PFF ¶236). Based on those metrics, Professor Golder concluded that Intuit's TV and social media ads for free TurboTax SKUs contain disclosure and design elements that are consistent with the FTC guidelines and marketing literature, and that are comparable or superior to benchmark companies and the industry standards with which reasonable consumers are accustomed. (PFF ¶¶238-239, 259; Golder (Intuit) Tr. 1163; RX1018 (Golder Expert Report) ¶¶127-138, 231). Complaint Counsel are wrong to derogate these benchmark comparisons, which provide insight not only into the established advertising practices in this competitive industry, but also into the form and manner of advertising disclosures that reasonable consumers are familiar with and would expect from advertising for online tax-preparation services. (PFF ¶¶238-239, 259; Golder (Intuit) Tr. 1163).

Professor Golder further relied on established frameworks from academic marketing literature to analyze both the TurboTax website and numerous advertisements for free TurboTax SKUs. (Golder (Intuit) Tr. 1098-1099, 1103-1110). For example, Professor Golder explained that marketing literature establishes that effective disclosures generally satisfy four key criteria: they convey the existence of a qualification, give an idea of the type or category of qualification, provide where consumers can go for more, and be consistent with where consumers are in the buying process. (*See* Golder (Intuit) Tr. 1104-1105). Based on those well-established criteria and his analyses, he reached his ultimate opinion that the advertisements effectively communicate the existence of a restriction and category of that restriction, direct consumers to

the TurboTax website for more information, and provide information in a manner that consumers can process it. (Golder (Intuit) Tr. 1099-1132).

3. Professor Golder's Opinions Related to Intuit's Disclaimers is Speculative and Unsupported

690. Professor Golder's conclusions about the effectiveness of Intuit's TurboTax disclosures are speculative and unsupported. (GX749 (Novemsky Rebuttal Expert Report) ¶ 6).

Response to Finding No. 690:

The Proposed Finding is incorrect. The Court already rejected Complaint Counsel's assertion that Professor Golder's opinions were not based on reliable principles or methods. (*See* Golder (Intuit) Tr. 1101). Moreover, Professor Golder explained at trial that his opinions about the effectiveness of TurboTax advertising disclosures were based on marketing research literature related to the consumer buying process, consumer behavior, and effective disclosures, (Golder (Intuit) Tr. 1061); and the FTC's own disclosure guidelines (Golder (Intuit) Tr. 1249). He further explained that his opinions were based on an extensive review of TurboTax advertising for free SKUs across multiple mediums; evidence concerning customer outcomes, including complaints and retention rates; and his decades of research experience and overall expertise in the marketing field (PFF ¶¶887-888; Golder (Intuit) Tr. 1051-1053). Accordingly, Professor Golder's opinions were properly based on "principles derived from marketing research showing how consumers generally respond to ads presented in a particular way." *Kraft, Inc.*, 114 F.T.C. at 121-22; *see also Thompson Medical Co.*, 104 F.T.C. at 790.

In reality, it is Professor Novemsky's opinions about Professor Golder that are speculative and unsupported. Professor Novemsky's rebuttal report, the only source cited by Complaint Counsel in support of this Proposed Finding, relies on nothing at all. In fact, the entire section of Professor Novemsky's rebuttal report responding to Professor Golder's opinions regarding the effectiveness of TurboTax advertising disclosures cites zero record evidence, and

offers no credible justification for his baseless assertions. (GX749 (Novemsky Rebuttal Expert Report) ¶¶224-232).

691. In reviewing the disclaimers used by Intuit, Professor Golder compared TurboTax ads against a set of criteria he claimed established whether disclosures are effective or not, but those criteria are incomplete and did not include that consumers should be able to understand the disclosure and how it applies to their personal situation. (Golder (Intuit) Tr. 1104-1105, 1113).

Response to Finding No. 691:

The Proposed Finding is incorrect and misleading. First, it wrongly refers to language in the challenged ads as “disclaimers.” Complaint Counsel have not established that there was anything in the challenged ads that needed to be “disclaimed.” Intuit assumes Complaint Counsel are referring to text in the challenged ads that disclosed the qualifications to use the specific free product being advertised.

Second, the criteria Professor Golder used in his disclosure benchmarking analyses were based on the seven metrics identified in the FTC’s “.com Disclosures” guidelines for “How to Make Effective Disclosures in Digital Advertising”: (1) placement, (2) height, (3) color, (4) duration, (5) repetition, (6) proximity in time to the claim being qualified, and (7) the presence or absence of distracting factors. (PFF ¶¶234-236, 258; Golder (Intuit) Tr. 1137-1141; RX1018 (Golder Expert Report) ¶¶125, 130-136; *see also* Novemsky (FTC) Tr. 1799-1800). These metrics, in addition to coming from the FTC’s own guidance, also responded directly to Complaint Counsel’s criticisms of the ads and related to the relief sought in this proceeding. (PFF ¶235; Golder (Intuit) Tr. 1137-1141; RX1018 (Golder Expert Report) ¶¶130-135; RX260 (FTC) ¶¶21-36). Complaint Counsel point to no other metrics that Professor Golder failed to consider that would render these criteria “incomplete.” In contrast, Complaint Counsel—who bear the burden of proof—have based their case on the argument that the disclosures in the challenged advertisements were too “small.” (Complaint Counsel’s Post-Trial Br. 59-60 (May

23, 2023)). For this crucial proposition, they offer no evidence whatsoever. (*See* Complaint Counsel's Post-Trial Br. 59-60 (May 23, 2023); *see also* PFF ¶¶230-231, 255-256, 271, 286, 295).

The Proposed Finding is also incorrect in stating that Professor Golder did not consider whether consumers understood the disclosures in TurboTax advertising. As Professor Golder explained in his report, the FTC's guidelines include as a factor for assessing the effectiveness of disclosures "whether the language of the disclosure is understandable to the intended audience." (RX96 (Intuit) at INTUIT-FTC-PART3-000600914, INTUIT-FTC-PART3-000600928). Thus, as part of the opinions he reached in this case, Professor Golder performed a detailed and thorough analysis of how reasonable consumers were likely to understand the disclosures in the challenged ads. Reviewing each of the advertisements challenged by Complaint Counsel at the time of his report, Professor Golder concluded that advertisements for free TurboTax SKUs effectively communicate the existence of a restriction and category of that restriction, direct consumers to the TurboTax website for more information, and provide information in a manner that consumers can process it. (PFF ¶316; Golder (Intuit) Tr. 1102-1132; RX1018 (Golder Expert Report) Section V.B, ¶¶104-123).

692. Professor Golder opined that a full assessment of whether an individual's tax return is simple or complex is not feasible in an advertisement. ((RX1018 (Golder Expert Report) at 71 (section heading)).

Response to Finding No. 692:

The Proposed Finding is incomplete and misleading. Complaint Counsel rely exclusively on a non-substantive heading, disregarding both the text directly below that heading and the testimony that Professor Golder offered at trial. The Court should reject this obvious tactic. In the substantive portion of his report and later his testimony, Professor Golder explains that many consumers are familiar with their personal tax situations and the forms they are required to file,

and understand from their prior experiences whether they have simple returns. (RX1018 (Golder Expert Report) ¶114). And for consumers who are “entirely unfamiliar” with their tax situation, the “simple tax returns” disclosure in TurboTax ads for free SKUs still puts those consumers on notice that there are qualifications to use the free product related to the complexity of their return. (PFF ¶¶239, 314; COL ¶¶27, 76-77). The more individualized work of identifying whether a specific taxpayer’s return is simple can easily be performed on the TurboTax website, because the website helps guide consumers to the product that fits their particular tax situation. (PFF ¶¶364-452). Intuit also makes clear in its ads that the TurboTax website is where consumers can look for this information—by instructing consumers to “see if you qualify at TurboTax.com”—and reasonable consumers know that is where they should go for additional details. (PFF ¶¶323-326). It is 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. (PFF ¶526; Johnson (Intuit) Tr. 600-601; Golder (Intuit) Tr. 1070-1071, 1105-1107).

Moreover, Complaint Counsel ignore that Professor Golder also explained (in the section with the cited heading) that it would be unrealistic to provide a complete explanation of the qualifications for free TurboTax SKUs in a short (or otherwise space-constrained) ad. (RX1018 (Golder Rep.) ¶115). Not only do consumers not expect those details to be provided in those environments, but doing so is practically impossible given the limitations in the ads. (PFF ¶523). Further, providing complete details in an ad (if possible) would overwhelm consumers, resulting in them tuning out and not processing those qualifications. (PFF ¶¶383, 523, 834-842; COL ¶63; Golder (Intuit) Tr. 1108, 1130, 1173-1176; *see also* Novemsky (FTC) Tr. 1780, 1821). Indeed, providing a “full assessment of whether an individual’s tax return is simple or complex”

(RX1018 (Golder Expert Report) at 72), and listing all the qualification details for free TurboTax products in a single, short ad would likely overload consumers with “too much information to really read and comprehend” (Johnson (Intuit) Tr. 595). For this reason, the FTC’s “.com Disclosures” guidelines recommend that disclosures be short. (RX96 (FTC) at 21; RX1018 (Golder Expert Report) ¶118).

693. Professor Golder did not ask any consumers about whether they could see Intuit’s disclaimers. (Golder (Intuit) Tr. 1243).

Response to Finding No. 693:

The Proposed Finding is irrelevant and incorrect insofar as it suggests that Professor Golder needed to ask consumers whether they could see the disclosures in challenged ads (something Complaint Counsel—who bear the burden of proof in this case—never did in asserting that they were too small to be seen).

Professor Golder conducted robust analyses to assess the clarity of the disclosures in the challenged ads, for example, by performing a benchmarking analysis comparing the disclosures in TV and social media advertisements for free TurboTax products to ads from 18 benchmark companies. (PFF ¶234). That analysis was aimed at “understand[ing] whether these disclosures were consistent with what consumers would be seeing in other platforms,” and demonstrated that the qualifications in the challenged ads were visible and consistent with disclosures in comparable ads, presented in the form and manner that consumers expect, and consistent with the FTC’s Guidelines. (PFF ¶¶234-238; Golder (Intuit) Tr. 1133, 1148-1155; RX1018 (Golder Expert Report) ¶231). Based on that analysis, Professor Golder reliably concluded that Intuit’s TV and social media ads for free TurboTax SKUs contained disclosures and design elements that are consistent with the FTC guidelines and marketing literature, and that the disclosures were

comparable or superior to those included in benchmark companies' ads. (PFF ¶¶238-239, 259; Golder (Intuit) Tr. 1163; RX1018 (Golder Expert Report) ¶¶127-138, 231).

Moreover, the Proposed Finding is misleading to the extent it suggests that reasonable consumers could not see the disclosures about qualifications in the challenged ads. Complaint Counsel offered no evidence that reasonable consumers could not see the disclosures (PFF ¶¶230, 255, 271, 286), and evidence that Professor Golder considered in forming his opinions shows that consumers could and did see the disclosures (PFF ¶¶232-233, 257, 272, 287). Indeed, several witnesses, including both of Complaint Counsel's fact witnesses, Ms. Shiller and Ms. Baburek, acknowledged that *they* could see the disclosures. (PFF ¶¶232-233, 257). Indeed, Ms. Shiller repeatedly testified that she could see a variety of written disclosures in the challenged TV and display ads, among others, such as "TurboTax Free Edition is for simple U.S. returns only" and "See if you qualify at turbotax.com." (Shiller (FTC) Tr. 232-252). And in the federal court proceeding adjudicating this same claim, Judge Breyer examined the challenged ads and noted that the disclosure "is right there; isn't it? ... it says, 'TurboTax free edition, for simple tax returns only.'" (PFF ¶15).

694. Professor Golder did not ask consumers about whether they had a correct understanding of the term "simple returns." (RX1018 (Golder Expert Report) ¶ 25; Golder (Intuit) Tr. 1058; RX1394 (Golder (Intuit) Dep.) at 46)).

Response to Finding No. 694:

The Proposed Finding is irrelevant. Asking consumers whether they had a correct understanding of a term would make no sense, because the answer would always be yes. Assuming what Complaint Counsel actually mean is that Professor Golder did not attempt to perform the unaided memory test that Professor Novemsky attempted by asking individual consumers for their understanding of "the term 'simple returns,'" then the Proposed Finding is incomplete.

While Professor Golder did not perform a useless memory test, he did conduct a variety of reliable and informative analyses based on other established research methods and principles, consistent with the questions he sought to answer in this case. (Golder (Intuit) Tr. 1058-1059; RX1394 (Golder (Intuit) Dep.) at 43-46). These analyses included a review of relevant marketing research literature and an assessment of the behaviors of reasonable consumers in the online tax-preparation industry; analyses of the effectiveness of disclosures in TurboTax's free advertising and on the TurboTax website, including a TV and social media ad disclosure benchmarking analysis; analyses of customer outcome measures such as complaints and retention rates, including an independent coding analysis of consumer complaints and a BBB complaint rate benchmarking analysis; and an evaluation of the impact of Complaint Counsel's proposed disclosures. (PFF ¶¶890-896).

The Proposed Finding is also incorrect in stating that Professor Golder did not consider whether consumers understood the disclosures in TurboTax advertising. As Professor Golder explained in his report, the FTC's guidelines include as a factor for assessing the effectiveness of disclosures "whether the language of the disclosure is understandable to the intended audience." (RX96 (Intuit) at INTUIT-FTC-PART3-000600914, INTUIT-FTC-PART3-000600928). Thus, as part of the opinions he reached in this case, Professor Golder performed a detailed and thorough analysis of how reasonable consumers were likely to understand the disclosures in the challenged ads. Reviewing each of the advertisements challenged by Complaint Counsel at the time of his report, Professor Golder concluded that advertisements for free TurboTax SKUs effectively communicate the existence of a restriction and category of that restriction, direct consumers to the TurboTax website for more information, and provide information in a manner that consumers

can process it. (PFF ¶¶316; Golder (Intuit) Tr. 1102-1132; RX1018 (Golder Expert Report) Section V.B, ¶¶104-123).

695. Using a disclaimer that people do not correctly apply to their own tax situation is not effective at mitigating deception. (GX749 (Novemsky Rebuttal Expert Report) ¶ 222; Novemsky (Complaint Counsel) Tr. 1767).

Response to Finding No. 695:

The Proposed Finding outlines a vague and non-specific hypothetical and thus is irrelevant. If the Proposed Finding is intended to actually communicate that (1) the challenged ads are deceptive; (2) the ads contain disclaimers; and (3) those disclaimers are ineffective at mitigating deception because consumers believe they have simple tax returns when they do not, then the Proposed Finding is inaccurate. First, Complaint Counsel had the burden of proving that the challenged ads were deceptive through evidence. A general assertion that the “ads are deceptive” does not discharge that burden and it is not close. Second, the Proposed Finding wrongly refers to language in the challenged ads as “disclaimers.” Complaint Counsel have not established that there was anything in the challenged ads that needed to be “disclaimed.” And third, since there is no deception in the first place, there is nothing for the disclosures to mitigate.

The Proposed Finding is also incorrect in suggesting that the disclosures in the challenged ads are ineffective. To start, Complaint Counsel focus exclusively on the use of one element of the disclosures, that TurboTax Free Edition is for “simple tax returns only,” ignoring the other qualifications included in the challenged ads. Most of the challenged ads also identified the specific TurboTax SKU being advertised, informing consumers that the advertised offer does not apply to all TurboTax SKUs, but rather only that specific SKU. (PFF ¶¶317-321). The challenged ads also told consumers to “see if you qualify or “see details” at the TurboTax website, or linked directly to that website. (PFF ¶¶323-327, 253-254, 269-270, 284-285). Those disclosures conveyed to consumers that there were qualifications for the free offer and thus

prevented them from believing that all TurboTax was free. (PFF ¶324). And given that the challenged ads pointed or linked to the TurboTax website, it is undisputed that the information on that website was integrated into the challenged ads. (CCFF ¶455; *see also* PFF ¶¶328-330). That integrated information provided detailed information regarding the qualifications of free TurboTax SKUs and all other TurboTax SKUs and supplied consumers with easy-to-use tools like the SKU selector to help consumers assess the right TurboTax product for them. (*See* PFF ¶¶364-441).

With regard to “simple tax returns,” Intuit aligns the qualifications for TurboTax Free Edition to the IRS’s definition of a “simple tax return” in order to “easily communicate to customers which TurboTax product is right for their tax situations” and minimize consumer confusion. (PFF ¶122; (Johnson (Intuit) Tr. 581, 584-587; Ryan (Intuit) Tr. 707-708, 720; 727, 744, 750; Rubin (Intuit) Tr. 1542-1547; RX804 (Intuit) at 20; GX298 (Intuit) at -6446, -6457; RX298 (Intuit) at -5088; RX81 (Intuit) at 1; RX78 (Intuit) at 14; RX49 (Intuit) at 19-20; GX155 (Rubin (Intuit) IHT) at 48-49, 55). Intuit provides a variety of sources that consumers can consult to determine whether their tax situation would be considered simple or not, including the tax form chart located on the Free Edition landing page, which provides a complete list of particular IRS forms or tax situations and allows consumers to determine the TurboTax SKU that covers that situation. (PFF ¶395; RX1527 (Intuit); RX1528 (Intuit); RX1529 (Intuit); RX1530 (Intuit); RX1531 (Intuit); *see also* Rubin (Intuit) Tr. 1568-1569). Moreover, the record reflects that reasonable consumers do understand the meaning of “simple tax returns.” For one thing, use of the phrase “simple tax returns” is considered “industry convention” (PFF ¶141; Johnson (Intuit) Tr. 582), as each of Intuit’s major competitors also offers a free tax-preparation product that is limited to and advertised as being for taxpayers with simple tax returns, (PFF ¶141;

Johnson (Intuit) Tr. 581-582; Ryan (Intuit) Tr. 708, 777; Golder (Intuit) Tr. 1121-1122; RX1018 (Golder Expert Report) ¶¶108-112; RX79 (Intuit) at 1; RX97 (Intuit) at 1; RX98 (Intuit) at 1; GX789 (Intuit) at 1). As Professor Golder explained, competitors' widespread use of "simple tax returns" is "critically important" for showing consumers understood the term. (PFF ¶144; Golder (Intuit) Tr. 1063-1064, 1090-1091, 1121-1122). The ubiquity in the industry and common usage of the phrase is therefore strong evidence that consumers understand the meaning of "simple tax returns," as it is unlikely that government and industry actors alike would, over many years, rely on a term that taxpayers do not understand. (PFF ¶145; GX156 (Ryan (Intuit) IHT) at 40, 55).

Further, Intuit testing of comprehension of "simple tax returns" confirms that consumers understand the phrase. An Intuit qualitative study from Tax Year 2018, for example, showed that consumers found the phrase very "easy to understand." (PFF ¶134; RX304 (Intuit); Rubin (Intuit) Tr. 1544-1546;). None of the participants in that study indicated that they were confused by the phrase or did not understand it. (RX304 (Intuit)). Thus, to the extent that some reasonable consumers rely on "their own pre-existing definition of 'simple,'" there is no basis for believing that those consumers would misunderstand whether their tax situation meets the definition of "simple tax return." Complaint Counsel have not provided any evidence to the contrary. (See GX303 (Novemsky Expert Report) ¶87 (citing no authority)).

Even if consumers did not understand precisely what qualified as a simple tax return, the fact that the advertised product was for "simple tax returns only" conveyed that there was some eligibility limitation for that product and that the limitation was tied to the complexity of one's tax return. As Professor Golder put it, both "simple" and "only" mean (at the very least) not "all." (PFF ¶135). Moreover, if a reasonable consumer was uncertain about whether she had a

“simple tax return,” she would not merely assume that she did. (PFF ¶131). The evidence also shows that reasonable consumers uncertain about whether they have a simple return would do the research necessary to find out. (PFF ¶¶131-133, 503-509, 513, 782, 786). That research was in fact easy: A basic Google search for “what is a simple tax return turbotax” would have provided the answer (drawn from the TurboTax website) in less than half a second. (PFF ¶¶131-132). And on the TurboTax website, Intuit provides a variety of resources that consumers can consult to determine whether their tax situation would be considered simple or not, including the tax form chart located on the Free Edition landing page, which provides a complete list of particular IRS forms or tax situations covered by the various TurboTax SKUs. (PFF ¶395; RX1527 (Intuit); RX1528 (Intuit); RX1529 (Intuit); RX1530 (Intuit); RX1531 (Intuit); *see also* Rubin (Intuit) Tr. 1568-1569).

The Proposed Finding is also wrong that consumers do not correctly apply the term simple tax returns to their own tax situation. Many consumers are familiar with their personal tax situations and the forms they are required to file, and understand from their prior experiences whether they have simple returns. (RX1018 (Golder Expert Report) ¶114). For consumers who are “entirely unfamiliar” with their tax situation, the “simple tax returns” disclosure in TurboTax ads for free SKUs still puts those consumers on notice that there are qualifications to use the free product related to the complexity of their return. (PFF ¶¶239, 314; COL ¶¶27, 76-77). And the more individualized work of identifying whether a specific taxpayer’s return is simple can easily be performed on the TurboTax website, because the website helps guide consumers to the product that fits their particular tax situation. (PFF ¶¶364-452).

696. Professor Golder opined that use by other tax preparation services of “simple returns” disclaimers means that consumers are familiar with the concept (RX1018 (Golder Expert Report) ¶¶ 107–113; Golder (Intuit) Tr. 1121-1122), but the use of the term by some of

Intuit's competitors does not make the term more effective. (GX749 (Novemsky Rebuttal Expert Report) ¶ 223; Novemsky (Complaint Counsel) Tr. 1767).

Response to Finding No. 696:

The Proposed Finding is incorrect. As Professor Golder explained, competitors' widespread use of the phrase "simple tax returns" to explain the qualifications for their free tax-preparation product is "critically important" to understanding whether consumers understood the term. (PFF ¶144; Golder (Intuit) Tr. 1063-1064, 1090-1091, 1121-1122). Reasonable consumers have a "lifetime of experience[s]" that informs the knowledge and expectations they bring with them as they move through the consumer buying process. (Golder (Intuit) Tr. 1090-1092, 1064, 1121-1122). In seeing the phrase "simple tax returns" used by Intuit's major competitors in the online tax-preparation industry to explain the qualifications for their free tax-preparation products, reasonable consumers become familiar with the phrase and its industry-standard definition. (PFF ¶¶458-460). The fact that this term is widely and consistently used across the industry makes it far more likely that reasonable consumers would understand the phrase. Complaint Counsel offer no evidence to support the remarkable proposition that the entire online tax-preparation industry would uniformly use a phrase that reasonable consumers do not understand.

Moreover, any reasonable consumers who did not understand the phrase "simple tax returns" would not simply assume that the advertised TurboTax SKU was free for them, something Professor Novemsky did not test for. Instead, they are likely to conduct research to determine if they qualify to use the advertised free offer. (PFF¶¶487, 505-506; RX1018 (Golder Expert Report) ¶167; Golder (Intuit) Tr. 1095-1098). Given their familiarity with the term "simple tax return," and the fact that they would conduct research if they were unsure of whether their tax returns were simple, reasonable consumers were not likely to be misled by the

challenged ads into believing that all TurboTax products are free or that TurboTax would be free for them when it was not. (PFF ¶¶460, 482-483; Golder (Intuit) Tr. 1090-1091, 1095-1096, 1121-1122; RX1018 (Golder Expert Report) ¶113).

697. Other tax preparation companies use the term “simple returns” differently than Intuit does. (See RX1018 (Golder Expert Report) Figure 17 & 27; RX1017 (Hauser Expert Report) ¶ 48 Fn. 87).

Response to Finding No. 697:

The Proposed Finding is incorrect because other tax preparation companies and Intuit’s competitors in the online tax-preparation industry do not use the term “simple returns” in a meaningfully different way than Intuit. All tax preparation companies use the term to communicate that the qualifications to use a free product are tied to the complexity of a consumer’s tax returns. (PFF ¶¶141, 453). Any small variation in what constitutes a “simple return” between Intuit and other tax-preparation companies does not change the fact that Intuit used it in the same way as the IRS (PFF ¶¶119-123), or that its use is “industry convention,” (Johnson (Intuit) Tr. 582). Nor do any distinctions (not identified by Complaint Counsel) change consumer comprehension of the term. As Professor Golder explained, widespread use of the phrase “simple tax returns” to explain the qualifications for their free tax-preparation product is “critically important” to understanding whether consumers understood the term. (PFF ¶144; Golder (Intuit) Tr. 1063-1064, 1090-1091, 1121-1122). Reasonable consumers have a “lifetime of experience[s]” that informs the knowledge and expectations they bring with them as they move through the consumer buying process. (Golder (Intuit) Tr. 1090-1092, 1064, 1121-1122).

In seeing the phrase “simple tax returns” used by Intuit’s major competitors in the online tax-preparation industry to explain the qualifications for their free tax-preparation products, reasonable consumers become familiar with the phrase and its industry-standard definition. (PFF ¶¶458-460). The fact that this term is widely and consistently used across the industry makes it

far more likely that reasonable consumers would understand the phrase. For example, H&R Block's DIY "Free Online" product is limited to taxpayers with "simple returns" (RX97 (Intuit); RX1339 (Intuit); RX1341 (Intuit); Golder (Intuit) Tr. 1089). TaxSlayer's "Simply Free" is limited to qualifying "simple tax situations." (RX428 (Intuit); RX697 (Intuit); GX824 (Intuit); RX1338 (Intuit)). And TaxAct's "Free" online tax-preparation product is described as "perfect for simple federal filers." (RX422 (Intuit); GX789 (Intuit)). Complaint Counsel offer no evidence to support the remarkable proposition that the entire online tax-preparation industry would uniformly use a phrase that reasonable consumers do not understand. Additionally, Complaint Counsel have offered no evidence that minor variations in the use of simple tax returns would lead consumers to see that phrase and believe that all TurboTax products are free or that TurboTax would necessarily be free for them when that was not the case.

Moreover, the Proposed Finding is unsupported by the cited sources. Complaint Counsel cite to two figures in Professor Golder's Expert Report, comparing a Tax Year 2021 TV advertisement for H&R Block's Free Online product (containing a simple returns disclosure, RX1018 (Golder Expert Report) fig. 17), with simple returns disclosures on the TurboTax homepage in Tax Year 2022 (RX1018 (Golder Expert Report) fig. 27), in an attempt to show that Intuit and H&R Block "use the term 'simple returns' differently." These figures only show, however that TurboTax's free SKUs in Tax Year 2022 were not available to taxpayers who filed unemployment income reported on Form 1099-G; whereas H&R Block's TV advertisement indicated their Free Online product was available to taxpayers with unemployment income. This may be true, but it does not change the definition of simple returns or prove that other tax preparation companies use the term "simple returns" differently that Intuit does. It merely demonstrates that other tax preparation companies may have expanded the eligibility for their

free online tax preparation products to cover situations beyond simple tax returns in certain tax years; something Intuit has done as well (for example, in Tax Year 2020). (PFF ¶147; Ryan (Intuit) Tr. 705-706, *see also* Ryan (Intuit) Tr. 800-801; GX155 (Rubin (Intuit) IHT) at 50-51).

698. The fact that Intuit’s competitors use the term differently than Intuit does may contribute to consumer confusion about its meaning. (GX749 (Novemsky Rebuttal Expert Report) ¶ 223 Fn. 393).

Response to Finding No. 698:

The Proposed Finding is speculative and unsupported. To begin, as discussed in the above finding, Intuit’s competitors do not use the term in a meaningfully different way than Intuit does, and any marginal differences do *not* impact consumer comprehension of Intuit’s use of the phrase (which aligns with the IRS’ definition, a point Complaint Counsel do not address). (*See* Response to CCF ¶697). In disputing this proposition, Complaint Counsel rely solely on a footnote in Professor Novemsky’s report that he did not testify to at trial. (GX749 (Novemsky Rebuttal Expert Report) ¶223 fn. 393 (citing no authority)). Professor Novemsky’s footnote is entirely unsupported and is nothing more than guesswork. That fact is reinforced by Complaint Counsel’s phrasing of this Proposed Finding—they state only that “Intuit’s competitors use the term differently than Intuit does *may* contribute to consumer confusion.” As one of Complaint Counsel’s experts admitted, this kind of statement is “not a very strong claim.” PFF ¶930. And that something *may* be true does not satisfy Complaint Counsel’s burden of proof.

699. Professor Golder opined that consumers may not read written disclosures in a TV advertisement, and that consumers do not have to read written disclosures for those disclosures to be effective. (Golder (Intuit) Tr. 1111-1112).

Response to Finding No. 699:

The Proposed Findings is inaccurate, incomplete, and misleading. First, Professor Golder did not testify that consumers may not read written disclosures in a TV advertisement. Professor Golder instead explained that even *if* a consumer did not read the disclosure, the existence of

disclosures in the challenged ads was enough to put reasonable consumers on notice that the offer was qualified and that more information was available about those qualifications. (Golder (Intuit) Tr. 1111-1112, 1119-1120, 1122). That alone renders the challenged ads not deceptive, because it means consumers viewing the ads could not reasonably have been misled into believing that all TurboTax SKUs were free or that they necessarily could file for free using TurboTax regardless of their tax situation. (PFF ¶314).

Second, Professor Golder explained that consumers understand that free offers have qualifications even where no disclosure is present at all. For example, reasonable consumers understand based on their experiences that there are limitations on certain free offers, such as the Holiday Inn advertising that “Kids Stay and Eat Free” or a Domino’s Pizza offer for “Buy One Get One Free.” (PFF ¶¶474, 477; Golder (Intuit) Tr. 1092-1095; RX1049 (Intuit) at -8241-8244). Even without the presence of *any* written disclosures, reasonable consumers understand the fact that the kids have to be staying at the Holiday Inn in order to eat for free, have to be staying with a paying adult, and have to eat at the Holiday Inn’s own restaurant. (Golder (Intuit) Tr. 1092-1094). Reasonable consumers similarly understand that BOGO offers are typically limited to receiving a free product of lesser or equal value relative to the product purchased—even when no written qualification explaining this limitation is present in the advertisement. (Golder (Intuit) Tr. 1094-1095). They understand, for instance, that when Domino’s Pizza advertises a BOGO offer, they cannot buy a six-inch personal pizza with no toppings and expect to get an 18-inch large pizza with all of the toppings for free. (Golder (Intuit) Tr. 1094-1095). Most significantly, reasonable consumers understand based on their experiences that free tax-preparation offers have qualifications even if those qualifications are not stated in an advertisement. (PFF ¶483). That understanding means that, even if the challenged ads had no disclosures, consumers were not

likely to see an ad and believe that all TurboTax SKUs were free or that TurboTax would necessarily be free for them when that was not the case. (PFF ¶¶483-484).

700. Professor Golder also compared the manner in which Intuit's disclaimers appear to disclaimers used by other companies. (RX1018 (Golder Expert Report) ¶¶ 112 128 & Figure 20; Golder (Intuit) Tr. 1132-1133).

Response to Finding No. 700:

Intuit has no specific response except to note that it understands the Proposed Finding to be referring to Professor Golder's disclosure benchmarking analysis, which compared video and social media ads for free TurboTax SKUs with ads from 18 benchmark companies across four industries. This benchmarking analysis demonstrated that the qualifications in the challenged video and social media ads were visible and consistent with disclosures in comparable ads. (PFF ¶¶234-241, 258-259; Golder (Intuit) Tr. 1133-1136, 1138-1144, 1147-1163; RX1018 (Golder Expert Report) ¶¶127-138). Those "other companies" mentioned in the Proposed Finding are a set of 18 benchmark companies selected by Professor Golder because they matched a set of criteria based on key characteristics of the tax-preparation industry. (Golder (Intuit) Tr. 1133-1137; RX1018 (Golder Expert Report) ¶86). These 18 benchmark companies provide useful points of comparison relative to Intuit. (Golder (Intuit) Tr. 1133-1137; RX1018 (Golder Expert Report) ¶86). Professor Golder's benchmark analyses provide insight not only into the established advertising practices in the competitive tax-preparation industry, but also into the form and manner of advertising disclosures that reasonable consumers are familiar with and would expect to see in advertising for online tax-preparation services. (PFF ¶¶238-239, 259; Golder (Intuit) Tr. 1163).

701. Professor Golder's advertising benchmarking analysis is unsupported by anything other than his observations, assertions, and an analysis of "industry standard disclosures" which is entirely irrelevant to determining whether or not Intuit's ads were misleading. (GX749 (Novemsky Rebuttal Expert Report) ¶ 221; *see also* Novemsky (Complaint Counsel) Tr. 1769).

Response to Finding No. 701:

The Proposed Finding is incorrect in multiple respects. First, Professor Golder did not rely only on his observations, assertions, and analysis of “industry standard disclosures” (though if that were true, it is hard to understand why that amounts to a criticism of his work). Instead, Professor Golder relied on established research methods and principles to conduct his disclosure benchmarking analysis, as well as established principles derived from marketing research literature and his decades of research experience and overall expertise in the marketing field. (PFF ¶¶887-888; Golder (Intuit) Tr. 1051-1053). First, Professor Golder established a set of criteria based on key characteristics of the tax preparation industry: it is required for nearly all Americans; it is a repeated, annual purchase; it services a business-to-consumer market, and the product is purchased by both individuals and households. (Golder (Intuit) Tr. 1133-1137; RX1018 (Golder Expert Report) ¶86). Professor Golder then selected a variety of industries that fulfilled those key criteria, resulting in a set of 18 companies providing useful points of comparison relative to Intuit. (Golder (Intuit) Tr. 1133-1137; RX1018 (Golder Expert Report) ¶86). Professor Golder similarly followed established research methodology in developing a set of metrics by which to measure the disclosures in Intuit’s and benchmark companies’ ads (Golder (Intuit) Tr. 1137-1139), based on various key factors that the FTC’s own Guidelines suggest are important for assessing the quality of advertisements (PFF ¶235), before measuring the disclosure elements in each ad for each of those metrics (PFF ¶236). Professor Golder then analyzed those measurements to determine how the challenged ads compared to the ads of the 18 benchmark companies. (PFF ¶236; RX1018 (Golder Expert Report) ¶127). Based on that analysis, Professor Golder concluded that Intuit’s TV and social media ads for free TurboTax SKUs contain disclosure and design elements that are consistent with the FTC’s guidelines and marketing literature, comparable or superior to relevant benchmark companies, and consistent

with the industry standards to which reasonable consumers are accustomed. (PFF ¶¶238-239, 259; Golder (Intuit) Tr. 1163; RX1018 (Golder Expert Report) ¶¶127-138, 231). Those results supported his opinions that the disclosures in the challenged ads were effective and sufficiently conspicuous to be noticed by reasonable consumers, such that those consumers viewing Intuit's ads would not have reasonably believed that they necessarily could file for free using TurboTax regardless of their filing circumstances. (PFF ¶¶238-239, 314).

Second, the Proposed Finding is wrong that the disclosures used by other companies in the tax-preparation industry and in industries that share key characteristics with the tax-preparation industry are irrelevant. Professor Golder's benchmark analysis provides insight not only into the established advertising practices in this competitive industry, but also into the form and manner of advertising disclosures that reasonable consumers are familiar with and would expect from advertising for online tax-preparation services *and* other products and services. (PFF ¶¶238-239, 259; *see* Golder (Intuit) Tr. 1163).

Moreover, the industry standard disclosures which Professor Golder analyzed as part of his disclosure benchmarking analysis are wholly relevant to determining whether reasonable consumers were likely deceived by the challenged ads. As Professor Golder noted, competitors' widespread use of the phrase "simple tax returns" to explain the qualifications for their free tax-preparation product is "critically important" for showing consumers understood the term. (PFF ¶144; Golder (Intuit) Tr. 1063-1064, 1090-1091, 1121-1122). And as Professor Golder explained further, reasonable consumers have a "lifetime of experience[s]" as consumers that informs the knowledge and expectations they bring with them as they move through the consumer buying process. (Golder (Intuit) Tr. 1090-1092, 1064, 1121-1122). In seeing the phrase "simple tax returns" used by Intuit's major competitors in the online tax-preparation industry to explain the

qualifications for their free tax-preparation products, reasonable consumers become familiar with the phrase and its industry-standard definition. (PFF ¶¶458-460). The fact that this term is widely and consistently used across the industry makes it far more likely that reasonable consumers would understand the phrase, than if Intuit was the only company to do so. Complaint Counsel offer no evidence to support the absurd inference that the entire online tax-preparation industry would be universally using a phrase that no reasonable consumers understand.

702. Professor Golder did not ask any consumers about whether they understood disclaimers used by the benchmark companies he considered. (Golder (Intuit) Tr. 1249; *see also* GX749 (Novemsky Rebuttal Expert Report) ¶ 221; Novemsky (Complaint Counsel) Tr. 1769).

Response to Finding No. 702:

The Proposed Finding is irrelevant and incorrect insofar as it suggests that Professor Golder needed to ask consumers about whether they understood the disclosures used by the benchmark companies he considered. As noted, the fact that Professor Golder did not conduct a consumer survey does not render his opinions unhelpful or unreliable. (*See* Response to CCF ¶684). It is Complaint Counsel who bear the burden of proving that the challenged ads were deceptive. *See* 16 C.F.R. §3.43(a). Thus, contrary to Complaint Counsel’s suggestion, neither Professor Golder nor Intuit had a burden to conduct any specific analysis. Rather, an expert must provide opinions and testimony that are “helpful to the trier of fact to understand the evidence,” “based on sufficient facts or data,” and “the product of reliable principles and methods,” and the expert must have “reliably applied the principles and methods to the facts of the case.” Fed. R. Evid. 702. Professor Golder’s opinions easily satisfy all of those requirements, and Complaint Counsel have offered no evidence to the contrary.

Professor Golder performed a variety of reliable and informative analyses based on established research methods and “principles derived from marketing research showing how consumers generally respond to ads presented in a particular way,” *Kraft, Inc.*, 114 F.T.C. at 121-122; *see also Thompson Medical Co.*, 104 F.T.C. at 790, consistent with the questions he sought to answer in this case. (Golder (Intuit) Tr. 1058-1059; RX1394 (Golder (Intuit) Dep.) at 43-46). These analyses included a review of relevant marketing research literature and an assessment of the behaviors of reasonable consumers in the online tax-preparation industry; holistic analyses of the effectiveness of disclosures in TurboTax’s free advertising and on the TurboTax website, including a TV and social media ad disclosure benchmarking analysis; analyses of customer outcome measures such as complaints and retention rates, including an independent coding analysis of consumer complaints and a BBB complaint rate benchmarking analysis; and an evaluation of the impact of Complaint Counsel’s proposed disclosures. (PFF ¶¶890-896).

Professor Golder analyzed the effectiveness of the disclosures in free TurboTax SKUs by comparing the disclosures in challenged TurboTax TV and social media to the disclosures used by benchmark companies. (PFF ¶236; RX1018 (Golder Expert Report) ¶127). As Professor Golder explained, that analysis provides insight not only into the established advertising practices in this competitive industry, but also into the form and manner of advertising disclosures that reasonable consumers are familiar with and would expect from advertising for online tax-preparation services *and* other products and services. (PFF ¶¶238-239, 259; *see* Golder (Intuit) Tr. 1163). Based on that analysis, Professor Golder concluded that Intuit’s TV and social media ads for free TurboTax SKUs contain disclosure and design elements that are consistent with the FTC’s guidelines and marketing literature, comparable or superior to relevant benchmark companies, and consistent with the industry standards to which reasonable consumers

are accustomed. (PFF ¶¶238-239, 259; Golder (Intuit) Tr. 1163; RX1018 (Golder Expert Report) ¶¶127-138, 231). Those results supported his opinions that the disclosures in the challenged ads were effective and sufficiently conspicuous to be noticed by reasonable consumers, such that those consumers viewing Intuit’s ads would not have reasonably believed that they necessarily could file for free using TurboTax regardless of their filing circumstances. (PFF ¶¶238-239, 314).

The Proposed Finding is also incorrect to the extent it implies that Professor Golder did not consider whether consumers understood the disclosures in TurboTax advertising. As Professor Golder explained in his report, the FTC’s guidelines include as a factor for assessing the effectiveness of disclosures “whether the language of the disclosure is understandable to the intended audience.” (RX96 (Intuit) at INTUIT-FTC-PART3-000600914, INTUIT-FTC-PART3-000600928). Thus, as part of the opinions he reached in this case, Professor Golder performed a detailed and thorough analysis of how reasonable consumers were likely to understand the disclosures in the challenged ads. Reviewing each of the advertisements challenged by Complaint Counsel at the time of his report, Professor Golder concluded that advertisements for free TurboTax SKUs effectively communicate the existence of a restriction and category of that restriction, direct consumers to the TurboTax website for more information, and provide information in a manner that consumers can process it. (PFF ¶316; Golder (Intuit) Tr. 1102-1132; RX1018 (Golder Expert Report) Section V.B, ¶¶104-123).

Professor Golder also analyzed the effectiveness of the other disclosures in the challenged ads. Most of the challenged ads identified the specific TurboTax SKU being advertised, informing consumers that the advertised offer does not apply to all TurboTax SKUs, but rather only that specific SKU. (PFF ¶¶317-321). The challenged ads also told consumers to

“see if you qualify or “see details” at the TurboTax website, or linked directly to that website. (PFF ¶¶323-327, 253-254, 269-270, 284-285). As Professor Golder explained, those disclosures conveyed to consumers that there were qualifications for the free offer and thus prevented them from believing that all TurboTax was free. (PFF ¶324). And given that the challenged ads pointed or linked to the TurboTax website, it is undisputed that the information on that website was integrated into the challenged ads. (CCFF ¶455; *see also* PFF ¶¶328-330). That integrated information provided detailed information regarding the qualifications of free TurboTax SKUs and all other TurboTax SKUs and supplied consumers with easy-to-use tools like the SKU selector to help consumers assess the right TurboTax product for them. (*See* PFF ¶¶364-370, 374-384, 388-403, 406-407, 414-418, 424-428, 436-441). Complaint Counsel have not offered evidence showing that those disclosures were not effective.

703. The ads by third parties Professor Golder used for benchmarking contained different claims than Intuit’s “free” claims related to TurboTax, and some third-party ads did not include any “free” claims. (RX1018 (Golder Expert Report) Appendix I-1 ¶ 2; Golder (Intuit) Tr. 1245-1246).

Response to Finding No. 703:

The Proposed Finding is inaccurate and irrelevant. Professor Golder’s benchmarking analysis included ads from Intuit’s competitors in the tax-preparation industry. (RX1018 (Golder Expert Report) fig. 20). As the Court saw during Professor Golder’s testimony, many of those ads included free claims, similar to TurboTax ads. (RX1018 (Golder Expert Report) ¶128). For example, as part of his benchmarking analysis, Professor Golder reviewed advertisements from TaxSlayer for its free online tax preparation product called “TaxSlayer Simply Free,” which invited consumers with “qualifying simple tax situations” to “File for free at TaxSlayer.com” (RX1018 (Golder Expert Report) fig. 18, fig. I-2); as well as advertisements from H&R Block for its “Free Online” product, which claimed their tax preparation product available for taxpayers

with simple returns “costs nothing” such that consumers could “File free” (RX1018 (Golder Expert Report) fig. 17, fig. I-2).

Moreover, that some of the ads contained other claims—such as those pertaining to the price of a product or service, or eligibility criteria for a product or service—does not undermine the benchmarking analysis. As Professor Golder explained, he began his analysis by establishing a set of criteria based on key characteristics of the tax preparation industry: it is required for nearly all Americans; it is a repeated, annual purchase; it services a business-to-consumer market, and the product is purchased by both individuals and households. (Golder (Intuit) Tr. 1133-1137; RX1018 (Golder Expert Report) ¶86). Professor Golder then selected a variety of industries that fulfilled those key criteria, resulting in a set of 18 companies providing useful points of comparison relative to Intuit. (Golder (Intuit) Tr. 1133-1137; RX1018 (Golder Expert Report) ¶86). Professor Golder then developed a set of metrics by which to measure the disclosures in Intuit’s and benchmark companies’ ads (Golder (Intuit) Tr. 1137-1139), based on various key factors that the FTC’s own Guidelines suggest are important for assessing the quality of advertisements (PFF ¶235). Professor Golder then measured the ads using those metrics and analyzed how the challenged TurboTax ads compared to the ads of the 18 benchmark companies. (PFF ¶236; RX1018 (Golder Expert Report) ¶127). Based on that analysis, Professor Golder concluded that Intuit’s TV and social media ads for free TurboTax SKUs contain disclosure and design elements that are consistent with the FTC’s guidelines and marketing literature, comparable or superior to relevant benchmark companies, and consistent with the industry standards to which reasonable consumers are accustomed. (PFF ¶¶238-239, 259; Golder (Intuit) Tr. 1163; RX1018 (Golder Expert Report) ¶¶127-138, 231). Those results supported his opinions that the disclosures in the challenged ads were effective and sufficiently conspicuous to be

noticed by reasonable consumers, such that those consumers viewing Intuit's ads would not have reasonably believed that they necessarily could file for free using TurboTax regardless of their filing circumstances. (PFF ¶¶238-239, 314). Complaint Counsel have offered no evidence establishing that his selection of benchmark companies was improper or that his analysis is unreliable.

Complaint Counsel are also wrong that the fact that some of the ads did not include "free" claims renders the benchmarking analysis unreliable. Professor Golder selected advertisements that provided the best benchmark for the challenged ads, including by focusing on ads that included free claims or analogous claims. (RX1018 (Golder Expert Report) ¶128). Professor Golder selected the three most recent TV ads available as of July 11, 2022 (going back to 2020) for each benchmark company, that met the following criteria: (1) were 30-seconds long; (2) had a disclosure; and (3) pertained to a free offer, price of a product or service, or eligibility criteria for a product or service. (RX1018 (Golder Expert Report) Appendix I-1 ¶2). Where it was not possible to find a TV ad that met all three criteria, Professor Golder still satisfied criteria (1) and (2). (RX1018 (Golder Expert Report) Appendix I-1 ¶2). As Professor Golder explained, his decision not to exclude ads that did not have disclosures related to a free offer, price of a product or service, or eligibility criteria for a product or service was consistent with established research methods. (Golder (Intuit) Tr. 1133-1134). Rather than attempting to manipulate the data set for his analysis, Professor Golder set the criteria first, and then analyzed the benchmark companies' ads consistent with those criteria. (Golder (Intuit) Tr. 1133-1134). Moreover, Professor Golder focused his analysis where possible on free claims or analogous claims related to price or eligibility criteria. Accordingly, where an ad contained more than one disclosure on different topics, Professor Golder analyzed the disclosure related to the free offer, price of the

product or service, or eligibility criteria. (RX1018 (Golder Expert Report) Appendix I-2 ¶5).

Where there were multiple disclosures related to the free offer, price of the product or service, or eligibility criteria, Professor Golder analyzed all applicable disclosures. (RX1018 (Golder Expert Report) Appendix I-2 ¶5). And where there was no disclosure related to the free offer, price of the product or service, or eligibility criteria, Professor Golder analyzed the last disclosure that appeared in the ad. (RX1018 (Golder Expert Report) Appendix I-2 ¶5).

Complaint Counsel have not offered evidence establishing that Professor Golder's selection of benchmark ads entered his analysis unreliable.

704. Professor Golder's advertising benchmarking analysis did not include any analysis about whether consumers understood the "simple returns" disclaimer. (GX749 (Novemsky Rebuttal Expert Report) ¶ 221; Novemsky (Complaint Counsel) Tr. 1769-1770).

Response to Finding No. 704:

The Proposed Finding is misleading because while Professor Golder's benchmarking analysis did not directly consider consumer comprehension of a small portion of the relevant disclosures, it did address directly Complaint Counsel's unsupported theories regarding the visibility and prominence of those disclosures, and other work Professor Golder performed directly analyzed consumer comprehension of Intuit's disclosures in the challenged ads, including but not limited to "simple tax returns only." The purpose of Professor Golder's benchmarking analysis was to assess the effectiveness of the disclosures in challenged ads by comparing the disclosures in challenged TurboTax TV and social media to the disclosures used by benchmark companies. (PFF ¶236; RX1018 (Golder Expert Report) ¶127). As Professor Golder explained, that analysis provides insight not only into the established advertising practices in this competitive industry, but also into the form and manner of advertising disclosures that reasonable consumers are familiar with and would expect from advertising for online tax-preparation services. (PFF ¶¶238-239, 259; Golder (Intuit) Tr. 1163). Based on that

analysis, Professor Golder concluded that Intuit's TV and social media ads for free TurboTax SKUs contain disclosure and design elements that are consistent with the FTC's guidelines and marketing literature, comparable or superior to relevant benchmark companies, and consistent with the industry standards to which reasonable consumers are accustomed. (PFF ¶¶238-239, 259; Golder (Intuit) Tr. 1163; RX1018 (Golder Expert Report) ¶¶127-138, 231). Those results supported his opinions that the disclosures in the challenged ads were effective and sufficiently conspicuous to be noticed by reasonable consumers, such that those consumers viewing Intuit's ads would not have reasonably believed that they necessarily could file for free using TurboTax regardless of their filing circumstances. (PFF ¶¶238-239, 314).

Other analysis Professor Golder performed *did* consider whether consumers understood the disclosures in TurboTax advertising. As Professor Golder explained in his report, the FTC's guidelines include as a factor for assessing the effectiveness of disclosures "whether the language of the disclosure is understandable to the intended audience." (RX96 (Intuit) at INTUIT-FTC-PART3-000600914, INTUIT-FTC-PART3-000600928). Thus, as part of the opinions he reached in this case, Professor Golder performed a detailed and thorough analysis of how reasonable consumers were likely to understand the disclosures in the challenged ads. Reviewing each of the advertisements challenged by Complaint Counsel at the time of his report, Professor Golder concluded that advertisements for free TurboTax SKUs effectively communicate the existence of a restriction and category of that restriction, direct consumers to the TurboTax website for more information, and provide information in a manner that consumers can process it. (PFF ¶316; Golder (Intuit) Tr. 1102-1132; RX1018 (Golder Expert Report) Section V.B, ¶¶104-123).

705. Professor Golder also opined about the challenges related to providing more detailed disclaimers in video advertising. (Golder (Intuit) Tr. 1170-1171), but it does not follow that deceptive advertisements are acceptable just because curing a misimpression would

be challenging. (GX749 (Novemsky Rebuttal Expert Report) ¶ 226; Novemsky (Complaint Counsel) Tr. 1780-1781).

Response to Finding No. 705:

The Proposed Finding is wildly misleading. Professor Golder did not opine on general challenges regarding providing “more detailed disclaimers in video advertising.” The opinion at issue outlined the harm to consumers that would occur through the blunderbuss, compelled speech remedy Complaint Counsel seek. As Professor Golder explained, Complaint Counsel’s proposed order would require Intuit to include an exhaustive list of the specific tax situations covered and not covered by free TurboTax SKUs in advertisements for those SKUs. (PFF ¶¶830-831; RX601 (FTC) at 5; Golder (Intuit) Tr. 1166-1167). Such disclosures would be required even in space-constrained ads, where it is often impossible as a practical matter to include that information. (PFF ¶523). The proposed order would also require that ads state that free TurboTax SKUs are “not free for the majority of U.S. taxpayers.” (PFF ¶831; RX601 (FTC) at 5). These onerous requirements would be more than merely “challenging” to implement—in fact, they would affirmatively harm consumers, by confusing reasonable consumers and discouraging taxpayers who qualify to file for free from doing so. (PFF ¶¶829-347; Johnson (Intuit) Tr. 583; Ryan (Intuit) Tr. 776-777; Rubin (Intuit) Tr. 1543-1544). The disclosure requirements sought by Complaint Counsel’s proposed order would be confusing—and thus ineffective at communicating the qualifications for free TurboTax SKUs or offers—because they would cause reasonable consumers to experience information overload. (PFF ¶834; Johnson (Intuit) Tr. 583; Ryan (Intuit) Tr. 776-777; Rubin (Intuit) Tr. 1543-1544; Golder (Intuit) Tr. 1174; *see also* Novemsky (FTC) Tr. 401). This information overload would cause reasonable consumers to tune out and process less information than has been provided. (PFF ¶835; Golder (Intuit) Tr. 1175-1176). This would ultimately lead to less consumer awareness of free TurboTax

SKUs and their qualifications. (PFF ¶842; Golder (Intuit) Tr. 1177-1178). Indeed, Complaint Counsel's own expert Professor Novemsky conceded that providing "lots of complicated information" about qualifications in video advertising would lead to "poor consumer decision-making." (PFF ¶841; RX1392 (Novemsky (FTC) Dep.) at 317; Novemsky (FTC) Tr. 401-402, 1780, 1820; RX1018 (Golder Expert Report) ¶123). Likewise, the proposed order's additional requirement that ads state that free TurboTax SKUs are "not free for the majority of U.S. taxpayers" would not merely be "challenging," but would actively discourage many consumers who qualify for the free SKU from searching for more information about that SKU. (PFF ¶843; RX601 (FTC) at 5; Golder (Intuit) Tr. 1168). Reasonable consumers would instead wrongly assume, based on the disclosure, that they are among the "majority" who do not qualify to file for free, resulting in fewer people filing their taxes for free. (PFF ¶843; Golder (Intuit) Tr. 1168-1169, 1180-1181; RX1018 (Golder Expert Report) ¶¶240, 243, 246).

Further, no one on behalf of Intuit has ever said that "deceptive advertisements" are acceptable, period. What Professor Golder actually testified is that reasonable consumers' expectations regarding the level of information that will be communicated varies by the type of advertisement and where the consumer is in the purchase funnel. (Golder (Intuit) Tr. 1105-1108). Thus, reasonable consumers do not expect very detailed disclosures in video advertising since they would not have time to read them or think about them. (Golder (Intuit) Tr. 1107-1108). As a result, reasonable consumers would be unlikely to form concrete impressions about whether they qualify to use a free tax preparation product based on the video advertisement alone. (Golder (Intuit) Tr. 1076-1077). That is not the same as saying deception is acceptable, it is saying that there is a lower likelihood of deception.

4. Professor Golder's Analysis of the TurboTax Website Is Not Evidence of Lack of Deception

706. When he compared Intuit ads to ads of other companies, Professor Golder did not do anything to determine whether other companies' ads complied with the law. (*See, e.g.*, Golder (Intuit) Tr. 1229).

Response to Finding No. 706:

To start, the heading preceding the Proposed Finding is incorrect. Complaint Counsel claim that Intuit has made “additional false and deceptive” claims on the TurboTax homepage, meaning that Professor Golder's analysis of the TurboTax website effectively communicating qualifications for free TurboTax SKUs clearly is relevant evidence showing a lack of deception. Moreover, Complaint Counsel concede that the TurboTax website is “integrated” into TurboTax's free advertising (CCFF ¶455); for example, by inviting consumers to “See offer details at TurboTax.com,” all content on the TurboTax website—including detailed information about qualifications—was “integrated” into the ad, and therefore all disclosures on the website are incorporated into the ad. (PFF ¶328; CCFF ¶455). For that reason, the TurboTax website and Professor Golder's analyses of how it effectively communicated qualifications for free TurboTax SKUs to consumers is evidence of a lack of deception.

The Proposed Finding is irrelevant because experts do not opine on questions of law. *See, e.g., United States v. Richter*, 796 F.3d 1173, 1195 (10th Cir. 2015) (“an expert may not state legal conclusions drawn by applying the law to the facts”). Thus, it is entirely unremarkable that Professor Golder did not assess the “lawfulness” of the advertisements. Likewise, Complaint Counsel's insinuation that Professor Golder compared ads for free TurboTax SKUs to unlawful benchmark ads is entirely baseless; the FTC has not challenged any of the benchmark companies' ads as deceptive.

Further, Professor Golder’s disclosure benchmarking analysis was not intended to assess the legality of other companies’ advertising, but rather to compare the disclosures in video and social media display ads for free TurboTax SKUs with ads from 18 benchmark companies using the FTC’s “.com Disclosures” guidelines. (Golder (Intuit) Tr. 1132-1163). Professor Golder did not need to assess the legality of benchmark companies’ advertising practices to reach his opinions (RX1394 (Golder (Intuit) Dep.) at 74-75), as his disclosure benchmarking analysis was intended to assess the prevailing advertising practices in the tax-preparation industry, as well as the form and manner of disclosures expected by reasonable consumers in the industry (PFF ¶¶238-239, 259; Golder (Intuit) Tr. 1163).

707. Intuit engages in search engine optimization. (RX582 (Intuit) at INTUIT-FTC-PART3-000601290, FTC-PART3-000601293; GX108 (Intuit) at CC-00001088 (“Organic search Organic Search . . . Goal is to ensure that TurboTax Free Edition ranks #1. . . Searches for ‘free’ keywords are optimized to show TTO Free results”); Golder (Intuit) Tr. 1231).

Response to Finding No. 707:

Intuit has no specific response other than to note that Intuit uses search engine optimization (“SEO”) to help consumers who are actively searching for tax-preparation products find the TurboTax SKU that best fits their tax needs. (PFF ¶185; RX582 (Intuit) at -1293 (stating that SEO targets “[i]n-market consumers”). Indeed, SEO is part of Intuit’s efforts to target ads for specific TurboTax SKUs to consumers most likely to qualify for and use those SKUs. (PFF ¶203). Through SEO, Intuit attempts to direct advertising for specific TurboTax SKUs to consumers who indicate in their search query that a particular SKU might be appropriate for their tax situation. (PFF ¶199). For instance, if a consumer searches “TurboTax Free” on the internet, he will see more prominent results related to TurboTax Free Edition. (PFF ¶200; *see also* GX108 (Intuit) at -1088 (“Searches for ‘free’ keywords are optimized to show [TurboTax] Free results.”). If a consumer searches “TurboTax sold new investments” or “TurboTax rental

property,” he will see prominent organic search results for TurboTax Premier, not TurboTax Free Edition, because the sale of investments and rental property income are covered by Premier.

(PFF ¶201). And if a consumer searches “TurboTax Form 1099,” he will see prominent results for TurboTax Deluxe, Premier, or Self-Employed, not TurboTax Free Edition, because the other three SKUs cover Form 1099 income. (PFF ¶202).

708. Search engine optimization is a part of marketing strategy and involves having a website appear higher in search results, which may lead to more consumers clicking on a link for the site. (Golder (Intuit) Tr. 1230, 1231-1232, 1268-1269).

Response to Finding No. 708:

Intuit has no specific response other than to note that Intuit uses search engine optimization (“SEO”) to help consumers who are actively searching for tax-preparation products find the TurboTax SKU that best fits their tax needs. (PFF ¶185; RX582 (Intuit) at -1293 (stating that SEO targets “[i]n-market consumers”). Indeed, SEO is part of Intuit’s efforts to target ads for specific TurboTax SKUs to consumers most likely to qualify for and use those SKUs. (PFF ¶203). Through SEO, Intuit attempts to direct advertising for specific TurboTax SKUs to consumers who indicate in their search query that a particular SKU might be appropriate for their tax situation. (PFF ¶199). For instance, if a consumer searches “TurboTax Free” on the internet, he will see more prominent results related to TurboTax Free Edition. (PFF ¶200; *see also* GX108 (Intuit) at -1088 (“Searches for ‘free’ keywords are optimized to show [TurboTax] Free results.”)). If a consumer searches “TurboTax sold new investments” or “TurboTax rental property,” he will see prominent organic search results for TurboTax Premier, not TurboTax Free Edition, because the sale of investments and rental property income are covered by Premier. (PFF ¶201). And if a consumer searches “TurboTax Form 1099,” he will see prominent results for TurboTax Deluxe, Premier, or Self-Employed, not TurboTax Free Edition, because the other three SKUs cover Form 1099 income. (PFF ¶202).

709. Organic search is one of the ways consumers come to Intuit's TurboTax website. (RX1018 (Golder Expert Report) ¶ 158 & Figure 24 (citing RX825 (Intuit))).

Response to Finding No. 709:

Intuit has no specific response.

710. Professor Golder did not conduct any benchmarking of email ads or paid or organic search results for proximity and placement of disclaimers. (RX1018 (Golder Expert Report) ¶¶ 139-140; RX1394 (Golder (Intuit) Dep.) at 172-173).

Response to Finding No. 710:

The Proposed Finding is irrelevant. To start, Complaint Counsel do not challenge TurboTax's organic search results as deceptive, so benchmarking those results would make no sense. With respect to paid-search ads, search engines standardize the format of those ads such that companies do not have control over their format beyond the text displayed in an ad's URL, headline, and description—all of which are subject to character limits. (PFF ¶184; RX1018 (Golder Expert Report) ¶139). Although Intuit submits components of the advertising copy that should appear in a paid-search ad, ultimately the search engine (e.g., Google or Bing) compiles and presents the ad based on the search performed and the information the search engine has about the particular consumer who performed the search. (PFF ¶184; Ryan (Intuit) Tr. 697). Therefore, comparing Intuit's paid-search ads against those of benchmark companies would not be helpful because metrics such as disclosure proximity and placement, disclosure prominence, and distracting factors are similar for all paid-search ads and out of companies' control. (RX1018 (Golder Expert Report) ¶139). Finally, email ads were not available from benchmark companies and thus no benchmarking analysis was possible. (RX1018 (Golder Expert Report) ¶140). In any event, Intuit does not understand Complaint Counsel to be arguing that the disclosures made in non-video ads were difficult to see or illegible. Such a claim would be wrong if made. And finally, Complaint Counsel bear the burden of proving deception in this

matter, *see* 16 C.F.R. §3.43(a), yet they did not offer any expert analysis concerning the proximity and placement of disclosures in TurboTax email or paid-search ads—or any challenged TurboTax ads for that matter.

711. Consumers consider ads when making purchase decisions. (RX1394 (Golder (Intuit) Dep.) at 182).

Response to Finding No. 711:

The Proposed Finding is incomplete and misleading because ads are not the only—or even primary—source of information consumers that consider when they make decisions about trying or purchasing tax-preparation products. (PFF ¶¶505, 786-787). Consumers instead consult multiple sources of information when making such a decision, including friends, family, internet search engines, third-party reviews, news articles, competitors’ websites, and the IRS website. (PFF ¶¶505, 786-787). In fact, on average consumers consult three different sources of information when researching tax-preparation products to make a purchase decision. (PFF ¶505). Moreover, even when consumers do consider ads, they are not a primary consideration. For example, Dr. Hauser’s Purchase Driver survey showed that only 2.4% of respondents relied on advertisements when researching tax-preparation options. (PFF ¶786). And inbound traffic data for the TurboTax website from Tax Year 2021 shows that most consumers do not visit the TurboTax website through advertising, but rather most often by clicking a non-sponsored search result on an internet search engine. (PFF ¶787).

712. Professor Golder has studied and analyzed Intuit’s “simple return” disclosures and the manner in which information appears behind hyperlinks on the TurboTax website. (RX1018 (Golder Expert Report) Section V; Golder (Intuit) Tr. 1119, 1130-1131).

Response to Finding No. 712:

Intuit has no specific response except to note that Professor Golder reliably concluded that Intuit’s “simple tax returns” disclosure in ads for free TurboTax SKUs effectively conveys

the existence and category of eligibility limitations, is consistent with industry norms, and provides an appropriate amount of information to consumers in space-constrained ads without overloading them. (RX1018 (Golder Expert Report) ¶¶104-123; *see also* PFF ¶¶135-136, 138, 141, 143-144).

713. Professor Golder does not know all situations that disqualify taxpayers from being able to use Free Edition. (Golder (Intuit) Tr. 1255-1256).

Response to Finding No. 713:

The Proposed Finding mischaracterizes Professor Golder’s testimony and is irrelevant. Professor Golder did not testify that he did not know all situations that disqualify taxpayers from being able to use TurboTax Free Edition. (*See* Golder (Intuit) Tr. 1255-1256). Rather, Complaint Counsel asked Professor Golder trivia questions about whether certain esoteric tax situations—such as noncash charitable donations and profits and losses from farming income—were covered by TurboTax Free Edition without providing him the TurboTax webpage that discusses those forms. (Golder (Intuit) Tr. 1255-1259). He accurately responded that details about specific tax forms covered by TurboTax Free Edition were available on the TurboTax website (Golder (Intuit) Tr. 1256 (“[Coverage of specific forms] would be elsewhere on the website, and it would also be disclosed to the consumer as they fill out their tax return.”)), and in fact the TurboTax Free Edition webpage indicates that noncash charitable donations (Form 8283) and profit or loss from farming (Schedule F) are not covered (RX1359 (Intuit)).

The Proposed Finding is irrelevant because there is no need for anyone—Professor Golder included—to know the status of whether every tax situation qualifies or does not qualify to use TurboTax Free Edition. What arguably matters, if anything, is whether reasonable consumers can assess and/or understand whether *their* tax situation qualifies.

714. Professor Golder agreed that the pop-up that appears when consumers click on the “simple returns” hyperlink does not provide information about all tax situations not eligible for Free Edition. (Golder (Intuit) Tr. 1255-1256, 1258).

Response to Finding No. 714:

The Proposed Finding is misleading. The pop-up screen identifies the tax situations that *are* covered by TurboTax Free Edition and consumers who do not have one of those situations can therefore conclude that their returns will not qualify. Complaint Counsel have previously acknowledged the same, stating that the pop-up provides consumers with “detailed information about the tax situations covered by Free Edition.” (PFF ¶379).

The pop-up accurately explains that certain tax situations—such as W-2 income, the standard deduction, child tax credits, and the student loan interest deduction—are covered so long as the consumer has “no added tax complexity.” (RX1018 (Golder Expert Report) ¶185 & fig. 27; PFF ¶¶379-383). And it also accurately explains that other situations—such as itemized deductions, business income, stock sales, and “credits, deductions, and income reported on other forms or schedules”—are not covered. (RX1018 (Golder Expert Report) ¶185 & fig. 27; PFF ¶¶379-382).

Further, if consumers want to know every situation *not* covered, it is available elsewhere on the TurboTax website. The TurboTax Free Edition landing page, for example, includes a chart identifying which IRS tax forms and schedules Free Edition covers. (PFF ¶392). That chart also includes a search bar that allows consumers to search for a particular form or situation to determine which TurboTax SKUs cover that form or situation. (PFF ¶395).

715. Professor Golder had to visit a page on the TurboTax website (separate from the pop-up) that contained more detailed information about tax forms not found in the pop-up to confirm whether a tax situation was covered by Free Edition. (Golder (Intuit) Tr. 1255-1256 (discussing RX1359 (Intuit))).

Response to Finding No. 715:

The Proposed Finding is inaccurate. Professor Golder did not have to “visit a page on the TurboTax website” to “confirm whether a tax situation was covered by Free Edition.” Instead, he testified in the cited portion of testimony that income reported on Form 1099-G was included in the pop-up as a circumstance “not covered by Free Edition” and then testified that an obscure tax situation was not identified specifically in the pop-up but *was* included as part of the “detailed information about tax forms ... covered by Free Edition,” found on the Free Edition landing page. (*See* Golder (Intuit) Tr. 1255-1256). Again, the pop-up identifies the full range of situations that *are* covered and then common tax situations that are not. (PFF ¶379). Every single tax form’s treatment as to Free Edition—and there are hundreds—is listed on the Free Edition website. (RX1359 (Intuit)).

716. Professor Golder also inconsistently opined that consumers did *not* need to see the website with more detailed information about tax forms to understand whether they qualify for Free Edition. (RX1394 (Golder (Intuit) Dep.) at 228-229).

Response to Finding No. 716:

The Proposed Finding is incorrect. Professor Golder consistently opined that consumers do *not* need to review the TurboTax website’s detailed information concerning the specific tax forms covered by free SKUs to understand whether they are likely to qualify to use Free Edition. (RX1394 (Golder (Intuit) Dep.) at 228-229; *see* Responses to CCFF ¶¶713-715). That is because reasonable consumers in the tax-preparation industry understand—even without being told so—that whether they qualify for free tax-preparation products is based on the complexity of their return given the ubiquity of free offers with qualifications of that nature in the industry. (PFF ¶483). In addition, reasonable consumers also understand based on the “simple tax returns only” disclosure in ads for free TurboTax SKUs that whether they qualify depends on the complexity of their tax situation. (PFF ¶¶130-145). As Professor Golder explained, the “simple tax returns”

disclosure informs consumers about the “category” of eligibility qualifications for free TurboTax SKUs because it conveys that the qualification “relates to the complexity of the individual’s tax return.” (RX1018 (Golder Expert Report) ¶105; *see also* PFF ¶¶483, 892). Further, reasonable consumers understand that information about qualifications is limited in ads, but that they can find additional details about coverage of specific tax forms on the TurboTax website if needed. (PFF ¶¶323-326, 511, 526-527). And finally, as Complaint Counsel concede, the detailed information about qualifications on the website is integrated into ads for free TurboTax SKUs, meaning that the ads themselves provide information about coverage of specific tax forms. (*See* CCF ¶455; *see also* PFF ¶¶328-329).

717. Professor Golder opined and testified about the Products and Pricing page, and the manner in which consumers encounter it on the TurboTax website. (RX1018 (Golder Expert Report) ¶¶ 193, 196-197, 201, Figures 33, 34 & 36; Golder (Intuit) Tr. 1125, 1217).

Response to Finding No. 717:

Intuit has no specific response except to note that Professor Golder reliably opined that consumers who see the Products & Pricing page and thereafter start in TurboTax Free Edition despite not qualifying either know they are unlikely to qualify or at least have no reasonable expectation of qualifying, as the page provides information about what different TurboTax SKUs cover, a pop-up describing “simple tax returns,” and a SKU selector that recommends the best SKU for a customer’s tax situation. (RX1018 (Golder Expert Report) ¶¶193-198). Professor Golder also noted that the Products & Pricing page could be accessed by consumers in several ways and that all new TurboTax customers see the page. (RX1018 (Golder Expert Report) ¶193).

718. The tiles on Intuit’s Products and Pricing page do not cover all situations that do or do not qualify for Free Edition. *See, e.g.*, RX944 (including widgets for the following tax situations: maximizing deductions and credits, W-2, homeownership, paying rent, donating to charity, and having children or dependents); RX1359 (listing dozens of tax

situations not covered by Free Edition not listed in the Products and Pricing widgets, for example income related to farming, self-employment income, student loan interest, unemployment income, cancelation of debt, child and dependent care expense, or moving expenses).

Response to Finding No. 718:

The Proposed Finding completely misconstrues the purpose of the tiles used as part of Intuit's SKU selector tool. The SKU selector offers consumers a convenient and easy-to-use way to receive a recommendation for the TurboTax SKU most likely to meet their tax needs and is successful at doing so. (PFF ¶¶419-435). It is not intended to provide a detailed explanation of every possible tax situation, form, or schedule covered by each TurboTax SKU, but rather to be a user-friendly tool that covers consumers' most common tax situations through easily understood life situations rather than specific schedules or tax forms. (PFF ¶424). Detailing every single tax situation would obviously be counterproductive to that purpose. If desired, consumers can easily find detailed lists of all IRS tax forms and schedules covered by TurboTax SKUs elsewhere on the TurboTax website. The TurboTax Free Edition landing page, for example, includes a chart listing every TurboTax SKU and identifying which IRS tax forms and schedules each SKU covers. (PFF ¶392). That chart also includes a search bar that allows consumers to search for a particular form or tax situation to determine which TurboTax SKUs cover that form or situation. (PFF ¶395).

719. When consumers select that they have children or dependents in the tiles on the Products and Pricing page, Intuit recommends Free Edition. (RX1018 (Golder Expert Report) ¶ 201; Golder (Intuit) Tr. 1218).

Response to Finding No. 719:

The Proposed Finding is largely wrong and, even where true, is incomplete. When a consumer selects that they have children or dependents *and* one of several other life situations indicating that they have a complex return—for example that they are self-employed—the SKU

selector recommends a paid SKU. (See PFF ¶¶425-428). The Proposed Finding is accurate *only* if a consumer selects that they have children and not a life situation indicative of having a complex return. But even here, the Proposed Finding is incomplete because it does not provide the explanation and context for why this is so. As Mr. Rubin testified, the SKU selector recommends TurboTax Free Edition to consumers who indicate they have children or dependents because “the overwhelming majority of [such consumers] are going to take the standard deduction, and that’s available in Free Edition, and so we would love for them to use TurboTax Free Edition if they’re eligible for it.” (Rubin (Intuit) Tr. 1576-1577). He further explained that “[v]ery, very few consumers ... actually claim the child and dependent care tax credit” that is not covered by Free Edition, and so Intuit had to choose whether “to help the overwhelming majority who qualify for Free Edition to start in Free Edition, or ... choose instead, because a very small percentage of people might claim that child and dependent care tax credit, to start all of those [consumers] in [TurboTax] Deluxe.” (Rubin (Intuit) Tr. 1576-1577). Faced with that choice, Intuit decided to “have people start [in] Free Edition since the overall majority of them are not going to claim that credit and are going to take the standard deduction and, therefore, be able to file for free.” (Rubin (Intuit) Tr. 1577).

720. Free Edition does not cover deductions for certain child and dependent care expenses. (RX1359 (Intuit); Golder (Intuit) Tr. 1222-1223).

Response to Finding No. 720:

The Proposed Finding is misleading. TurboTax Free Edition does not cover Form 2441—which relates to certain child and dependent care expenses—but “[v]ery, very few consumers or taxpayers actually [file Form 2441].” (Rubin (Intuit) Tr. 1576-1577). As Mr. Rubin explained, the SKU selector recommends that consumers with children or dependents start in TurboTax Free Edition even though it does not cover Form 2441 because “the overall majority

of [consumers] are not going to [file Form 2441] and are going to take the standard deduction and, therefore, be able to file for free.” (Rubin (Intuit) 1576-1577).

721. [REDACTED] (RX53 (Intuit) at INTUIT-FTC-PART3-000601883; RX1018 (Golder Expert Report) ¶ 204).

Response to Finding No. 721:

The Proposed Finding is incorrect. Approximately 60% of consumers interacted with *the SKU selector tool* in Tax Year 2019. (PFF ¶429). That figure says nothing about how many consumers visited the Products & Pricing page, where details about TurboTax’s full product lineup and the qualifications to use the products are provided. In fact, 100% of consumers who began a TurboTax return encountered the Products & Page, as anyone had to encounter it in order to begin. (PFF ¶408).

The Proposed Finding is also inaccurate and misleading by suggesting the fact that the 60% of consumers who interact with the SKU selector tool is a small number (“only”). This is a meaningful number of consumers, especially considering that most TurboTax customers have used the product in previous years. (PFF ¶93). The SKU selector is particularly effective at guiding new TurboTax users to the right SKU for them, [REDACTED] [REDACTED] (PFF ¶659), and that the vast majority of consumers start their returns in the SKU they will finish in (PFF ¶661).

5. Professor Golder’s Analysis of Consumer Complaints Is Not Evidence of Lack of Deception

722. In his complaint analysis, Professor Golder only considered complaints in Consumer Sentinel placed into evidence by Complaint Counsel or that were made to the Better Business Bureau. (RX1018 (Golder Expert Report) ¶¶ 68, 85-86; Golder (Intuit) Tr. 1192-1193, 1208-1209).

Response to Finding No. 722:

To start, the heading preceding the Proposed Finding is not offering any purported facts. The heading is also another example of Complaint Counsel's repeated and improper attempts to shift the burden to Intuit to disprove their theory of deception. It is Complaint Counsel's burden to prove deception, not Intuit's burden to disprove it.

This Proposed Finding is also incomplete and misleading because it fails to recognize that Professor Golder focused his complaint analysis on the complaints identified by Complaint Counsel in this proceeding. Given that the complaints were put forward by Complaint Counsel, one would expect them to be their "best evidence" of consumer misunderstanding. (RX1394 (Golder (Intuit) Dep.) at 120). In other words, Professor Golder looked precisely where one would expect to find evidence to support Complaint Counsel's theory, in the evidence *Complaint Counsel* adduced in seeking to carry their burden. That the evidence does not support Complaint Counsel's theory (Golder (Intuit) Tr. 1059-1060; RX1394 (Golder (Intuit) Dep.) at 73, 116-117, 119-120, 126-128, 229-233) is unquestionably bad for Complaint Counsel, but it is not a basis to criticize Professor Golder.

Professor Golder also conducted a complaint benchmarking analysis relying on complaints submitted to the Better Business Bureau. As Professor Golder explained, that analysis allowed for a reliable, consistent comparison of equivalent data between Intuit and 18 other benchmark companies. (RX1394 (Golder (Intuit) Dep.) at 121, 229-232). The results of that analysis showed that Intuit's rate of BBB complaints (31.3 complaints per million customers) was statistically significantly less than the complaint rate of the 18 benchmark companies, including TurboTax competitors H&R Block, TaxAct, TaxSlayer, FreeTaxUSA, and Cash App Taxes. (PFF ¶638). Intuit's BBB complaint rate was also substantially lower than well-known instances of deception, reflecting how Intuit's rate should be "substantially higher"

if it had engaged in the deception alleged. (PFF ¶¶640; Golder (Intuit) Tr. 1212-1213; RX1018 (Golder Expert Report) ¶¶89-90, fig. 10). Professor Golder would not have been able to perform such a benchmarking analysis by reviewing complaints made directly to Intuit, as an equivalent source of complaints was not available for other benchmark companies. (RX1394 (Golder (Intuit) Dep.) at 121, 229-232).

723. Professor Golder did not consider complaints made directly to Intuit outside of his aggregate consideration of customer reviews. (Golder (Intuit) Tr. 1241).

Response to Finding No. 723:

The Proposed Finding does not make sense. What Complaint Counsel are actually saying is that Professor Golder did not consider complaints made directly to Intuit “outside of his aggregate consideration” of those complaints. In that sense, the Proposed Finding is correct—Professor Golder did consider complaints made to Intuit through his aggregate consideration of customer reviews. (RX1018 (Golder Expert Report) ¶¶37, 43-46). However, the Proposed Finding is misleading since it seems to suggest that this “aggregate consideration” of those complaints does not matter.

If what Complaint Counsel really mean to be pointing out here is that Professor Golder’s benchmarking analysis only addresses the forms of complaints for which it was possible to do a comparison across companies, then that is correct—but of no moment. The whole purpose of the benchmarking analysis is to compare a common source of complaints across companies. (RX1394 (Golder (Intuit) Dep.) at 108). This is exactly what was done in the article relied upon by Complaint Counsel rebuttal witness Erez Yoeli. (RX1552 (FTC) at 168-171; RX1362 (Yoeli Expert Report) ¶130; Yoeli (FTC) Tr. 1746-1749). Professor Golder was not saying that these were the only complaints in the world, but that would be true for all the companies in the analysis. Professor Golder’s opinion, which is entirely un rebutted and supported through his

years of experience (plus logic and common sense) is that if Complaint Counsel's theory of deception were true, you would see a substantially larger number of complaints *where he looked*. (Golder (Intuit) Tr. 1056-1060; RX1394 (Golder (Intuit) Dep.) at 73, 116-117, 119-120, 126-128, 229-233). And indeed, Professor Golder pointed to examples where this was true. (PFF ¶640).

The Proposed Finding is also incorrect insofar as it suggests that Professor Golder or Intuit bore the burden to separately analyze complaints made directly to Intuit. It is Complaint Counsel who bear the burden of proving that the challenged ads were deceptive. *See* 16 C.F.R. §3.43(a). If Complaint Counsel believed that the complaints submitted directly to Intuit would provide evidence that reasonable consumers were deceived by the challenged ads, they could have conducted their own analysis of that information. Yet after moving the Court to require the production of these data, Complaint Counsel presented no evidence of its contents, at trial or otherwise. The only plausible inference is that these data only further undermined Complaint Counsel's theory of deception.

724. The most reliable and likely place consumers may complain about Intuit is Intuit itself. (GX749 (Novemsky Rebuttal Expert Report) ¶ 218 & fn. 378; Novemsky (Complaint Counsel) Tr. 1773-1774).

Response to Finding No. 724:

The Proposed Finding is incorrect. Complaint Counsel offer no evidence in support of this finding beyond Professor Novemsky's say-so. Professor Novemsky offers no basis for this view and he is plainly wrong. Professor Novemsky's assertion that "[c]onsumers may not know to complain to the Better Business Bureau or other law enforcement agencies, including the FTC" (GX749 (Novemsky Rebuttal Expert Report) fn. 378) lacks any foundation and should be disregarded. It is surprising that the nation's own consumer-protection agency puts so little stock in its own tool for gathering and addressing potential consumer grievances. (PFF ¶¶627-630). And one would think that if the FTC's own consumer complaint database were hard to find,

difficult to use, or unknown by consumers, the FTC would take action to offer a better complaint-gathering tool for addressing potential consumer grievances.

Moreover, if Complaint Counsel in fact believed that the most reliable place to look for consumer complaints is Intuit's internal data, presumably that is where they would have focused their attention. Yet after moving the Court to require the production of that data, Complaint Counsel presented no evidence of its contents, at trial or otherwise. The only plausible inference is that these data only further undermined Complaint Counsel's theory of deception. Instead, Complaint Counsel have continued to rely on the consumer complaints identified through the FTC's Sentinel database. (Complaint Counsel's Post-Trial Br. 32 (May 23, 2023)). Similarly, Complaint Counsel's rebuttal witness Erez Yoeli pointed to an academic study relying solely on complaint figures in the Sentinel database. (PFF ¶624). That consistent reliance on complaints from the Sentinel database confirms that the Proposed Finding has no factual basis.

The Proposed Finding also misunderstands the purpose of Professor Golder's benchmarking analysis. The whole purpose of the benchmarking analysis is to compare a common source of complaints across companies. (RX1394 (Golder (Intuit) Dep.) at 108). This is exactly what was done in the article relied upon by Complaint Counsel rebuttal witness Erez Yoeli. (RX1552 (FTC) at 168-171; RX1362 (Yoeli Expert Report) ¶130; Yoeli (FTC) Tr. 1746-1749). Professor Golder was not saying that these were the only complaints in the world, but that would be true for all the companies in the analysis. Professor Golder's opinion—which is entirely un rebutted and supported through his years of experience (plus logic and common sense)—is that if Complaint Counsel's theory of deception were true, you would see a substantially larger number of complaints *where he looked*. (Golder (Intuit) Tr. 1056-1060; RX1394 (Golder (Intuit) Dep.) at 73, 116-117, 119-120, 126-128, 229-233). And indeed,

Professor Golder pointed to examples where this was true. (PFF ¶¶640). In this case, evidence of the expected volume of complaints was not found and it was not even close. There are not hidden or missing complaints, as the benchmarking analysis is a relative exercise. Professor Golder's analysis is further buttressed by the FTC's own staff economist, who analyzed Sentinel data across consumer protection cases and found in each of those nine cases, the number of Sentinel complaints far, far exceeded those at issue here. (PFF ¶¶641-642). As Counsel for Intuit explained in his opening statement, Complaint Counsel continue to ignore the most obvious explanation for the low complaint numbers—the ads themselves are simply not deceptive.

725. An absence of consumer complaints is not a reliable measure of an absence of deception. (GX749 (Novemsky Rebuttal Expert Report) ¶ 217; Novemsky (Complaint Counsel) Tr. 1770).

Response to Finding No. 725:

The Proposed Finding is unsupported and incorrect. Complaint Counsel offer no evidence in support of this finding beyond Professor Novemsky's say-so. And Professor Novemsky cites only unsupported "psychological reasons" why consumers may not complain about TurboTax.

Again, this line of criticism misses the whole point of Professor Golder's analysis. Even if Professor Novemsky's psychological speculation were correct, the same principles would apply with respect to the other companies in Professor Golder's benchmarking analysis. And yet, the average number of complaints at benchmark companies far exceeds those found at Intuit, and the number of complaints is far lower than those found in instances of actual deception. (PFF ¶¶638-640). Professor Golder's opinion and mode of analysis is validated by the work of an FTC staff economist relied upon by Mr. Yoeli. There, the volume of Sentinel complaints in nine different consumer protection cases by the FTC far exceeded those found here. (PFF ¶¶641-

642). As Professor Golder explained at trial, the miniscule number of complaints put forward by Complaint Counsel is strong evidence that the challenged ads were not likely to mislead a significant minority of reasonable consumers about their ability to file for free using TurboTax. (PFF ¶623). If consumers were deceived as Complaint Counsel allege, consumers would be angry and that anger would manifest itself in a higher rate of consumer complaints. (PFF ¶625). Indeed, a meaningful volume of consumer complaints is a “clear signal” of deception. (Golder (Intuit) Tr. 1189-1191, 1193-1194, 1213-1214; *see also* PFF ¶¶624-625). Yet Complaint Counsel have only put forward 218 consumer complaints from a seven-year period spanning Tax Years 2015-2021 for a widely used product in widely-run advertising campaigns. (*See* CCF ¶676). (PFF ¶625). This simply cannot be explained by psychological factors—and Novemsky identifies no unique psychological factors among the more than 55 million TurboTax customers as to why they do not complain at a higher rate when customers of other companies do so. (*See* Responses to CCF ¶¶676-678).

Once again, Complaint Counsel ignore the most obvious reason for the paucity of complaints: the challenged ads are not deceptive.

726. There are several reasons that consumers who were deceived by a company would not complain. (GX749 (Novemsky Rebuttal Expert Report) ¶¶ 203, 207, 210, 218; Novemsky (Complaint Counsel) Tr. 1770-1773).

Response to Finding No. 726:

For all the reasons set forth in the proceeding findings, this line of criticism entirely misses the point of Professor Golder’s complaint benchmark analysis. Whatever the accuracy of Professor Novemsky’s opinions, they would not apply only to Intuit and thus the incredible paucity of complaints on both a real and relative basis is explained by the absence of deception. (RX1394 (Golder (Intuit) Dep.) at 64-65, 108).

In addition, Professor Novemsky's "reasons" are *not* accurate. First, Professor Novemsky is wrong that relevant complaints are somehow undercounted because consumers would not have realized they were deceived and therefore would not have complained. If there were deception here, it would be as plain as day. As Professor Golder explained, price is "among the easiest" attributes of a product to observe and is "directly apparent" to consumers. (Golder (Intuit) Tr. 1192)).

Even if consumers thought their taxes would be free on TurboTax and they are not, consumers see the charges, and must enter their payment information to complete their returns. In that case, any difference between the price consumers expect to pay and the price they end up paying "couldn't be clearer" to reasonable consumers. (Golder (Intuit) Tr. 1192). It is difficult to imagine a form of deception *more obvious* to consumers. (PFF ¶¶624-625; Golder (Intuit) Tr. 1059-1060, 1189-1191).

Moreover, reasonable consumers would have expressed their displeasure over the supposed deception in various metrics that Professor Novemsky ignored, especially the retention rates for TurboTax. (PFF ¶¶624-625; Johnson (Intuit) Tr. 559-562, 678-679; Golder (Intuit) Tr. 1057-1060, 1189-1191, 1193-1194, 1212-1213; RX1018 (Golder Expert Report) ¶¶25, 36-37, 50). Complaint Counsel's rebuttal witness Erez Yoeli even cited evidence in support of this, in an article written by Nobel Prize-winning economist George Akerlof, which explained how "Brand names" (like the TurboTax brand) "give the consumer a means of retaliation if the quality does not meet expectations," including by "curtail[ing] future purchases." (PFF¶624; RX1370 (FTC) at 499-500; Yoeli (FTC) Tr. 1739-1740). Likewise, academic marketing literature explains that complaints are a "major source of information on the quality of products and companies." (RX1552 (FTC) at 168). As much as Complaint Counsel may wish to discredit

their value (after previously attempting to rely upon them in this case), “[c]ustomer complaints ... represent critical turning points in [a] company’s relationship with its customers” and “are associated with a substantial increase in the probability that the customer stops buying.” (RX562 (Intuit) at 42).

Second, Professor Novemsky asserts incorrectly that consumers might not complain because they do not attribute the deception to Intuit. (Novemsky (FTC) Tr. 1771; GX749 (Novemsky Rebuttal Expert Report) ¶203). This appears to be another example of Professor Novemsky contradicting Professor Novemsky since *he* opines that consumers *do* attribute their beliefs about their ability to file for free on TurboTax to Intuit’s advertising. (Novemsky (FTC) Tr. 360-362, 420-421). The Court need not decide which Novemsky is right, because whatever reasons some consumers have for not complaining does not explain the incredible paucity of complaints in this case. It is enough to conclude that if the theory of deception were true, the volume of complaints would be far higher than it was—as it is in so many other circumstances. (PFF ¶¶640-641).

Third, Professor Novemsky claims without support that consumers might not complain if they do not believe that the deception was done on purpose. (Novemsky (FTC) Tr. 1771-1772; GX749 (Novemsky Rebuttal Expert Report) ¶¶203, 207). Some might not, though it is not intuitive, and Professor Novemsky offers only his *ipse dixit*. But yet again, this speculation does nothing to explain why the volume of complaints is as low as it is, especially when compared to other companies. For example, Chime Financial—which has faced public allegations of defrauding customers—has a rate of 589.8 BBB complaints per million customers, a rate nearly 20 times greater than Intuit’s 31.3, clearly demonstrating that consumers are not shy about

expressing their grievances where they feel deceived by a company. (PFF ¶¶640; Golder (Intuit) Tr. 1212-1213; RX1018 (Golder Expert Report) ¶¶90).

Fourth, Professor Novemsky contends that consumers might not complain because it takes too much time and effort—another variation of his flawed attack on reasonable consumers as “cognitive misers.” (Novemsky (FTC) Tr. 1772; GX749 (Novemsky Rebuttal Expert Report) ¶¶218). But any implication by Professor Novemsky that there is a significant amount of time or effort required to file a complaint is not borne out in the record. The methods for filing a complaint with the FTC are well-known and relatively easy for consumers to find. (PFF ¶¶629; Golder (Intuit) Tr. 1057, 1236-1237). And as Complaint Counsel’s investigator Diana Shiller explained, consumers can easily and quickly file complaints that end up in the Consumer Sentinel database by, for example, submitting them online, calling the FTC, contacting their state attorney general’s office, or visiting the BBB website. (PFF ¶¶628-629; Shiller (FTC) Tr. 145, 149-151). And again, this was precisely the issue that Professor Golder’s benchmarking analysis controlled for. (Golder (Intuit) Tr. 1209). We know not just the small number of complaints as to Intuit, but now understand how those numbers compare to lots of different companies and the numbers remain incredibly low. (PFF ¶¶638). And what is more, the FTC’s own staff economist did his own analysis of Sentinel complaints in an article relied upon by Complaint Counsel’s rebuttal witness Erez Yoeli, and he found that in nine different consumer protection cases there were a far larger number of complaints than found here. (PFF ¶¶641-646).

Finally, Professor Novemsky’s guess that consumers might not know where to complain (GX749 (Novemsky Rebuttal Expert Report) ¶¶218) is also refuted by the record, which shows that the methods for filing a complaint captured by the FTC’s database are well-known and relatively easy for consumers to find. (PFF ¶¶629; Golder (Intuit) Tr. 1057, 1236-1237). The

Consumer Sentinel database, for example, collects complaints from a wide variety of sources to which consumers might complain—including from state attorneys general, the Better Business Bureau (“BBB”), and other federal agencies. (PFF ¶¶627; Shiller (FTC) Tr. 144-145, 150; Baburek (FTC) Tr. 336). Consumers can easily and quickly file complaints with those entities by, for example, submitting them online, calling the FTC, contacting their state attorney general’s office, or visiting the BBB website. (PFF ¶¶628-629; Shiller (FTC) Tr. 145, 149-151).

727. First of all, consumers would need to be aware that they had been deceived, which they may not have been when interacting with TurboTax. (GX749 (Novemsky Rebuttal Expert Report) ¶ 207; Novemsky (Complaint Counsel) Tr. 1770-1771).

Response to Finding No. 727:

The Proposed Finding is inaccurate, incomplete, and misleading. First, Professor Novemsky is wrong that relevant complaints are somehow undercounted because consumers would not have realized they were deceived and therefore would not have complained. If there were deception here, it would be as plain as day. As Professor Golder explained, price is “among the easiest” attributes of a product to observe and is “directly apparent” to consumers. (Golder (Intuit) Tr. 1192)). The evidence (and common sense) instead establishes that consumers would have been aware of the deception had it existed. Consumers who expect to receive a product for free but ultimately have to pay for it would know that had occurred and would be angry—this is especially true for consumers who may have paid upwards of \$100 to file their taxes when they believed they qualified to file for free. (PFF ¶¶624-625; Golder (Intuit) Tr. 1059-1060, 1189-1191).

Moreover, reasonable consumers would have expressed their displeasure over the supposed deception in various metrics that Professor Novemsky ignored, especially the retention rates for TurboTax. (PFF ¶¶624-625; Johnson (Intuit) Tr. 559-562, 678-679; Golder (Intuit) Tr. 1057-1060, 1189-1191, 1193-1194, 1212-1213; RX1018 (Golder Expert Report) ¶¶25, 36-37,

50). Complaint Counsel’s rebuttal witness Erez Yoeli even cited evidence in support of this, in an article written by Nobel Prize-winning economist George Akerlof, which explained how “Brand names” (like the TurboTax brand) “give the consumer a means of retaliation if the quality does not meet expectations,” including by “curtail[ing] future purchases.” (PFF¶624; RX1370 (FTC) at 499-500; Yoeli (FTC) Tr. 1739-1740). Likewise, academic marketing literature explains that complaints are a “major source of information on the quality of products and companies.” (RX1552 (FTC) at 168). As much as Complaint Counsel may wish to discredit their value (after previously attempting to rely upon them in this case), “[c]ustomer complaints ... represent critical turning points in [a] company’s relationship with its customers” and “are associated with a substantial increase in the probability that the customer stops buying.” (RX562 (Intuit) at 42).

728. There is a difference between objective deception, which takes place outside of the consumer’s mind, not necessarily perceived by the consumer, and perceived deception, which encompasses the consumer’s feeling that a marketer is responsible for trying to set a false belief with any type of marketing communication. (GX749 (Novemsky Rebuttal Expert Report) ¶ 207 (citing Held, Johana and Germelmann, Claas Christian, “Deception in consumer behavior research: A literature review on objective and perceived deception,” *Projectics*, 201)).

Response to Finding No. 728:

The Proposed Finding is irrelevant because whatever the accuracy of the proposed distinction Novemsky fails to support his claim that the deception alleged here is “objective deception” that “does not necessarily need to be perceived by the consumer.” (GX749 (Novemsky Rebuttal Expert Report) ¶207). In fact, it is obvious that if Complaint Counsel’s theory of deception were correct, it would meet the Novemsky definition of perceived deception. This is because if deception were present here, it would be as plain as day. As Professor Golder explained, price is “among the easiest” attributes of a product to observe and is “directly apparent” to consumers. (Golder (Intuit) Tr. 1192)). Even if consumers thought their taxes

would be free on TurboTax and they are not, consumers see the charges, and must enter their payment information to complete their returns. In that case, any difference between the price consumers expect to pay and the price they end up paying “couldn’t be clearer” to reasonable consumers. (Golder (Intuit) Tr. 1192). It is difficult to imagine a form of deception *more obvious* to consumers. (PFF ¶¶624-625; Golder (Intuit) Tr. 1059-1060, 1189-1191).

729. In order to complain, consumers would also have to attribute the deception to TurboTax rather than themselves, even though consumers may attribute the difference between the price they expected and the price they paid to their own tax situation, not Intuit’s deception, particularly considering the language used by Intuit on its hard stop screens. (GX749 (Novemsky Rebuttal Expert Report) ¶ 203; Novemsky (Complaint Counsel) Tr. 1771).

Response to Finding No. 729:

The Proposed Finding is inaccurate, incomplete, and misleading. Professor Novemsky asserts incorrectly that consumers might not complain because they do not attribute the deception to Intuit. (Novemsky (FTC) Tr. 1771; GX749 (Novemsky Rebuttal Expert Report) ¶203). This appears to be another example of Professor Novemsky contradicting Professor Novemsky since *he* opines that consumers *do* attribute their beliefs about their ability to file for free on TurboTax to Intuit’s advertising. (Novemsky (FTC) Tr. 360-362, 420-421). The Court need not decide which Novemsky is right, because whatever reasons some consumers have for not complaining does not explain the incredible paucity of complaints in this case. It is enough to conclude that if the theory of deception were true, the volume of complaints would be far higher than it was—as it is in so many other circumstances. (PFF ¶¶640-641).

730. Consumers would also have to believe that Intuit deceived them on purpose in order to be motivated to complain. (GX749 (Novemsky Rebuttal Expert Report) ¶¶ 203, 207, 218; Novemsky (Complaint Counsel) Tr. 1771-1772).

Response to Finding No. 730:

The Proposed Finding is inaccurate, incomplete, and misleading. Professor Novemsky claims without support that consumers might not complain if they do not believe that the deception was done on purpose. The evidence (and common sense) instead establishes that consumers who expect to receive a product for free but ultimately have to pay for it would be angry and would therefore complain, whether this result was intentional or accidental—this is especially true for consumers who may have paid upwards of \$100 to file their taxes when they believed they qualified to file for free. (PFF ¶¶624-625; Golder (Intuit) Tr. 1059-1060, 1189-1191).

It may be that some consumers might not complain, though it is not intuitive, and Professor Novemsky offers only his *ipse dixit* for this Proposed Finding. But yet again, this speculation does nothing to explain why the volume of complaints is as low as it is, especially when compared to other companies. For example, Chime Financial—which has faced public allegations of defrauding customers—has a rate of 589.8 BBB complaints per million customers, a rate nearly 20 times greater than Intuit’s 31.3, clearly demonstrating that consumers are not shy about expressing their grievances where they feel deceived by a company. (PFF ¶640; Golder (Intuit) Tr. 1212-1213; RX1018 (Golder Expert Report) ¶90).

731. Consumers would also have to decide that making a complaint was worth the time and effort. (GX749 (Novemsky Rebuttal Expert Report) ¶ 218; Novemsky (Complaint Counsel) Tr. 1772).

Response to Finding No. 731:

The Proposed Finding is correct as far as it goes, since consumers obviously do have to decide a complaint is “worth” doing before they make one, but the overall point is irrelevant and again misses the point of Professor Golder’s analysis. The evidence (and common sense) instead establishes that consumers who expect to receive a product for free but ultimately have to pay for

it would be angry and would therefore complain, whether this result was intentional or accidental—this is especially true for consumers who may have paid upwards of \$100 to file their taxes when they believed they qualified to file for free. (PFF ¶¶624-625; Golder (Intuit) Tr. 1059-1060, 1189-1191).

Moreover, reasonable consumers would have expressed their displeasure over the supposed deception in various metrics that Professor Novemsky ignored, especially the retention rates for TurboTax. (PFF ¶¶624-625; Johnson (Intuit) Tr. 559-562, 678-679; Golder (Intuit) Tr. 1057-1060, 1189-1191, 1193-1194, 1212-1213; RX1018 (Golder Expert Report) ¶¶25, 36-37, 50). Complaint Counsel’s rebuttal witness Erez Yoeli even cited evidence in support of this, in an article written by Nobel Prize-winning economist George Akerlof, which explained how “Brand names” (like the TurboTax brand) “give the consumer a means of retaliation if the quality does not meet expectations,” including by “curtail[ing] future purchases.” (PFF¶624; RX1370 (FTC) at 499-500; Yoeli (FTC) Tr. 1739-1740). Likewise, academic marketing literature explains that complaints are a “major source of information on the quality of products and companies.” (RX1552 (FTC) at 168). As much as Complaint Counsel may wish to discredit their value (after previously attempting to rely upon them in this case), “[c]ustomer complaints ... represent critical turning points in [a] company’s relationship with its customers” and “are associated with a substantial increase in the probability that the customer stops buying.” (RX562 (Intuit) at 42).

Moreover, any implication by Professor Novemsky that there is a significant amount of time or effort required to file a complaint is not borne out in the record. The methods for filing a complaint with the FTC are well-known and relatively easy for consumers to find. (PFF ¶629; Golder (Intuit) Tr. 1057, 1236-1237). And as Complaint Counsel’s investigator Diana Shiller

explained, consumers can easily and quickly file complaints that end up in the Consumer Sentinel database by, for example, submitting them online, calling the FTC, contacting their state attorney general's office, or visiting the BBB website. (PFF ¶¶628-629; Shiller (FTC) Tr. 145, 149-151).

And again, this was precisely the issue that Professor Golder's benchmarking analysis controlled for. (Golder (Intuit) Tr. 1209). We know not just the small number of complaints as to Intuit, but now understand how those numbers compare to lots of different companies and the numbers remain incredibly low. (PFF ¶638). And what is more, the FTC's own staff economist did his own analysis of Sentinel complaints in an article relied upon by Complaint Counsel's rebuttal witness Erez Yoeli, and he found that in nine different consumer protection cases there were a far larger number of complaints than found here. (PFF ¶¶641-646).

732. Finally, consumers would have to know where to complain. (GX749 (Novemsky Rebuttal Expert Report) ¶ 218).

Response to Finding No. 732:

The Proposed Finding is again correct as far as it goes, since a consumer would have to know where to complain to complain, but there is no evidence that consumers did *not* know where to complain about TurboTax if they were deceived as alleged by Complaint Counsel.

Professor Novemsky's assertion that consumers may not know how to complain to the BBB or the FTC is also refuted by the record, which shows that the methods for filing a complaint captured by the FTC's database are well-known and relatively easy for consumers to find. (PFF ¶629; Golder (Intuit) Tr. 1057, 1236-1237). The Consumer Sentinel database, for example, collects complaints from a wide variety of sources to which consumers might complain—including from state attorneys general, the Better Business Bureau ("BBB"), and other federal agencies. (PFF ¶627; Shiller (FTC) Tr. 144-145, 150; Baburek (FTC) Tr. 336).

Consumers can easily and quickly file complaints with those entities by, for example, submitting them online, calling the FTC, contacting their state attorney general's office, or visiting the BBB website. (PFF ¶¶628-629; Shiller (FTC) Tr. 145, 149-151). For example, Chime Financial—which has faced public allegations of defrauding customers—has a rate of 589.8 BBB complaints per million customers, a rate nearly 20 times greater than Intuit's 31.3, clearly demonstrating that consumers are not shy about expressing their grievances where they feel deceived by a company. (PFF ¶640; Golder (Intuit) Tr. 1212-1213; RX1018 (Golder Expert Report) ¶90).

And again, this was precisely the issue that Professor Golder's benchmarking analysis controlled for. (Golder (Intuit) Tr. 1209). We know not just the small number of complaints as to Intuit, but now understand how those numbers compare to lots of different companies and the numbers remain incredibly low. (PFF ¶638). And what is more, the FTC's own staff economist did his own analysis of Sentinel complaints in an article relied upon by Complaint Counsel's rebuttal witness Erez Yoeli, and he found that in nine different consumer protection cases there were a far larger number of complaints than found here. (PFF ¶¶641-646).

733.

[REDACTED] (RX765-A (Intuit) at p. 7).

Response to Finding No. 733:

The Proposed Finding, which accurately summarizes findings from a 2019 Intuit study, demonstrates that there was no deception from the challenged advertisements. The evidence in the record establishes that if consumers expected to file for free based on the challenged ads and instead had to pay on TurboTax, they would have been unhappy and considered their experience on TurboTax to be a negative one. (PFF ¶¶624-625; Johnson (Intuit) Tr. 559-562, 678-679; Golder (Intuit) Tr. 1057-1060, 1189-1191, 1193-1194, 1212-1213; RX1018 (Golder Expert

Report) ¶¶25, 50). The cited study looks at [REDACTED] [REDACTED] (RX765-A (Intuit) at Intuit-FTC-PART3-000607562), then at the even smaller percentage of consumers who [REDACTED], and then says that only [REDACTED] of that very, very small subset of customers [REDACTED]. Even if the [REDACTED] figure were of the entire customer base and not just a very narrow segment of it, it would barely exceed the 10% threshold for deception that is the lowest *ever* adopted. *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). But it is not the entire customer base or even close to it, and it therefore is a number so small it illustrates the absence of deception. And of course, that is assuming that all of those customers’ [REDACTED] is consistent with Complaint Counsel’s theory of deception. That is likely not true since often consumer unhappiness with price is over the relative price of TurboTax’s paid SKUs compared to competing offerings. (*E.g.*, GX411 (Intuit) 5 (“The cost of filing is too high. You can get a better deal from H&R Block.”; “While TurboTax does make the process easier, the price has risen dramatically over the years.”); GX51 (Intuit) at -0559 [REDACTED] [REDACTED]. TurboTax software is the industry leader in quality, but it does tend to be more expensive than its rivals. (*See* RX92 (Intuit) at 1, 4; RX502 (Intuit)).

734. Professor Golder compared the Intuit complaint rate against complaint rates at other companies. (RX1018 (Golder Expert Report) ¶ 86; Golder (Intuit) Tr. 1189), but in conducting that comparison and calculating the complaint rate, Professor Golder included complaints for all of Intuit, including for other non-tax related products like Mint or QuickBooks (RX1018 (Golder Expert Report) Appendix G-2; Golder (Intuit) Tr. 1237-1238), which inappropriately dilutes any effect of complaints related to TurboTax. (GX749 (Novemsky Rebuttal Expert Report) ¶ 219; Novemsky (Complaint Counsel) Tr. 1775).

Response to Finding No. 734:

The Proposed Finding is incorrect. Professor Golder’s decision to consider all Intuit complaints on the BBB website did not “inappropriately dilute” the effect of complaints related to TurboTax. Instead, considering all Intuit complaints allowed him to perform the analysis at all and make reliable comparisons to the complaints filed against other companies. As Professor Golder explained, the BBB reports complaints by company, not business unit or brand. (Golder (Intuit) Tr. 1237). To account for that fact and still allow for an “apples-to-apples” comparison between Intuit complaints and those of other companies, Professor Golder “normalized the total number of complaints filed against each company based on the total number of customers that each company reports in their public filings or other materials.” (RX1018 (Golder Expert Report) ¶88; Golder (Intuit) Tr. 1237-1238). By using that metric, Professor Golder eliminated any inconsistency and allowed for an accurate comparison of Intuit’s complaint rate relative to benchmark companies. (Golder (Intuit) Tr. 1237-1238). If anything, Professor Golder’s BBB complaint rate benchmarking analysis overstates the rate of complaints (in Complaint Counsel’s favor), as the complaints in the BBB database include complaints about any topic and are not limited to Complaint Counsel’s allegations in this matter. (RX1018 (Golder Expert Report) ¶87). Complaint Counsel also speculate that including other Intuit offerings was dilutive. Given that TurboTax is a beloved product, it is more likely that inclusion of the other offerings had the opposite effect.

735. Comparing complaint rates from companies in different industries is not informative about whether there was any deception related to TurboTax. (GX749 (Novemsky Rebuttal Expert Report) ¶¶ 219-220; Novemsky (Complaint Counsel) Tr. 1774-1775).

Response to Finding No. 735:

The Proposed Finding is unsupported by the cited source. Nowhere in the paragraphs cited by Complaint Counsel in Professor Novemsky’s Rebuttal Report does Professor Novemsky

criticize (let alone provide any support for such criticism of) Professor Golder's selection of benchmark companies and industries, nor does Professor Novemsky claim that comparing complaint rates from companies in other benchmark industries is "not informative" with regards to the alleged deception. Thus, Professor Golder's selection of benchmark companies was un rebutted.

The Proposed Finding is also incorrect. The "companies in different industries" mentioned in this Proposed Finding are in fact a set of 18 benchmark companies selected by Professor Golder because they fulfilled a set of criteria based on key characteristics of the tax preparation industry: the product is required for nearly all Americans; it is a repeated, annual purchase; it services a business-to-consumer market, and the product is purchased by both individuals and households. (Golder (Intuit) Tr. 1133-1137; RX1018 (Golder Expert Report) ¶86). These 18 benchmark companies are thus similar to the tax-preparation industry in critical respects and provide useful points of comparison when assessing Intuit's BBB complaint rate. (Golder (Intuit) Tr. 1133-1137; RX1018 (Golder Expert Report) ¶86). These 18 benchmark companies also include 6 of Intuit's direct competitors in the tax preparation industry; these are especially relevant benchmarks to Intuit as they are in the same business, provide similar services, and employ similar business models. Moreover, to the extent complaining customers would seek out alternative options for tax preparation services, they would likely select one of these six direct competitors in the industry. (RX1018 (Golder Expert Report) Appendix F-1, ¶2). Thus, Complaint Counsel are wrong both in their suggestion that the benchmark companies are all from "different industries," and that looking to complaint rates for companies in other industries is not informative.

More broadly, Complaint Counsel are wrong that the complaint benchmarking analysis “is not informative” about whether reasonable consumers were likely deceived by the challenged ads. Professor Golder’s complaint benchmarking provided valuable reference points to understand whether consumers complained more about Intuit than benchmark companies, and to understand the complaint rate that should exist if Complaint Counsel’s theory of deception were true. (PFF ¶¶639-640; RX1018 (Golder Expert Report) ¶¶21, 84, 90). If, as Complaint Counsel contend, Intuit engaged in a multi-year, multichannel, multi-modal scheme to deceive customers, the number of consumer complaints received by the BBB (and others) would be substantial. (PFF ¶639; Golder (Intuit) Tr. 1211; RX1018 (Golder Expert Report) ¶89, fig. 10). But Professor Golder’s complaint benchmarking analysis reflects that Intuit’s rate of BBB complaints (31.3 complaints per million customers) is statistically significantly less than the complaint rate of the 18 benchmark companies, including TurboTax competitors H&R Block, TaxAct, TaxSlayer, FreeTaxUSA, and Cash App Taxes. (PFF ¶638). Intuit’s complaint rate is also substantially lower than that of companies who have engaged in well-known instances of deception, reflecting that Intuit’s rate would be “substantially higher” if it had engaged in the deception alleged. (PFF ¶640; Golder (Intuit) Tr. 1212-1213; RX1018 (Golder Expert Report) ¶¶89-90, fig. 10). For example, Chime Financial—which has faced public allegations of defrauding customers—has a rate of 589.8 BBB complaints per million customers, a rate nearly 20 times greater than Intuit’s 31.3. (PFF ¶640; Golder (Intuit) Tr. 1212-1213; RX1018 (Golder Expert Report) ¶90).

736. Moreover, in Professor Golder’s keyword complaint analysis, Intuit had the highest complaint rates in all but one category as compared to its competitors. (RX1018 (Golder Expert Report) Figure 11; RX1394 (Golder (Intuit) Dep.) at 90; GX749 (Novemsky Rebuttal Expert Report) ¶ 220).

Response to Finding No. 736:

The Proposed Finding is inaccurate, incomplete, and misleading because Complaint Counsel misrepresent the results of Professor Golder’s keyword analysis and omit important context about that analysis.⁸ Professor Golder’s keyword analysis examined the incidence of certain keywords potentially relevant to Complaint Counsel’s allegations in the text of all BBB complaints for Intuit and the benchmark companies available on the BBB website as of January 2023. (RX1018 (Golder Expert Report) ¶¶87, 91-92, Appendix H). As part of this analysis, Professor Golder identified a set of keywords potentially related to deceptive advertising; created a methodology to account and search for variations in these words; and then applied that methodology to the set of BBB complaints for Intuit and benchmark companies. (RX1018 (Golder Expert Report) ¶¶91-92, Appendix H). Based on that analysis, Professor Golder concluded that the share of complaints in each of the keyword categories was comparable (i.e. not statistically significantly different) to the share of complaints in each keyword category for all benchmark companies. (RX1018 (Golder Expert Report) ¶92). In the “advertising” keyword category, for example, the incidence of advertising-related keywords in complaints for Intuit was comparable to benchmark companies, if not lower; the same is true for the “deception” keyword category, where, again, Intuit’s rate was in line with benchmarks, with one benchmark category showing higher rates of deception-related keywords in complaints and others slightly lower. (RX1018 (Golder Expert Report) fig. 11). In other words, Intuit’s BBB complaints did not contain words related to the issues in this case at a higher rate than benchmarks. Instead, many Intuit customers are likely to be complaining about general issues with filing their taxes, such as technical difficulties or account errors, rather than being deceived by TurboTax advertising.

⁸ Professor Golder was not cross-examined on this analysis.

737. While Professor Golder relied on TurboTax retention rates in forming his opinions, (RX1018 (Golder Expert Report) ¶ 87; Golder (Intuit) Tr. 1189), retention rates are not useful indicators of an absence of deception. (GX749 (Novemsky Rebuttal Expert Report) ¶¶ 205, 208-210; Novemsky (Complaint Counsel) Tr. 1775-1776).

Response to Finding No. 737:

The Proposed Finding is misleading, unsupported, and incorrect. To begin, Professor Golder did not “rel[y] on TurboTax retention rates in forming his opinions.” Instead, TurboTax’s retention rates were one of many sources of data he looked at to form one of his opinions that Intuit’s consumer data was inconsistent with deception. Next, Complaint Counsel rely solely on Professor Novemsky, but Professor Novemsky offers no basis for his opinion that retention rates are not useful.

And finally, Professor Novemsky and Complaint Counsel are wrong that the high retention rates of TurboTax’s paid consumers are not indicative of an absence of deception. As Mr. Johnson and Professor Golder both explained, if Complaint Counsel’s deception theory were true, consumers who felt deceived by ads for free TurboTax SKUs into believing that all TurboTax products were free or that TurboTax was free for them when it was not would be less likely to use TurboTax again. (PFF ¶¶649). Those opinions are supported by the academic literature. (See RX1018 (Golder Expert Report) ¶¶48-53). Intuit’s consistently high retention rates for its paid products, which routinely exceed the rates of competitors, reflect that consumers are choosing to use TurboTax again and again. (PFF ¶¶91-92, 650-651). Contrary to Complaint Counsel’s unsupported assertions, TurboTax’s high retention rates would not be possible if consumers had an expectation (from the challenged ads or otherwise) that they were going to be able to file for free and then could not. (RX1018 (Golder Rep.) ¶47; RX1027 (Deal Rep.) ¶¶93-95).

6. Additional Opinions and Evidence Discussed by Professor Golder Support Complaint Counsel's Allegations

738. Professor Golder opined that tax preparation services are a high-involvement buying process (RX1018 (Golder Expert Report) ¶ 144; Golder (Intuit) Tr. 1073-1076), but that is not necessarily true. (GX749 (Novemsky Rebuttal Expert Report) ¶¶ 227, 234; Novemsky (Complaint Counsel) Tr. 1776-1777).

Response to Finding No. 738:

To start, the heading that precedes this Proposed Finding is incorrect and unsupported. None of the proposed findings that follow, even if true, reflect that any of Professor Golder's opinions or the evidence he discussed support Complaint Counsel's allegations.

This Proposed Finding is also irrelevant. That an expert opinion is "not necessarily true" is not evidence of anything. Accordingly, that it is "not necessarily true" that consumers employ a high-involvement buying process when purchasing tax-preparation products does nothing to undermine the evidence showing that reasonable consumers do in fact use such a process. Complaint Counsel cannot carry their burden to prove deception simply by suggesting that Intuit's evidence might not conclusively refute their claim.

The Proposed Finding (limited as it is) is also not supported by the cited evidence. The only evidence offered for support is the report and testimony of Professor Novemsky. But Professor Novemsky offers only the general assertions (which are also incorrect) that consumers are "cognitive misers" (i.e., he thinks they are lazy) who "process[] as little information as possible to navigate their decisions" (GX749 (Novemsky Rebuttal Expert Report) ¶¶ 227, 234) (i.e., he thinks they are dumb).⁹ Professor Novemsky did not offer an opinion in his rebuttal

⁹ Intuit does not believe that reasonable consumers in this industry are lazy *or* dumb, and its success over 40 years proves that fact. If consumers were as Novemsky says, no one would do their taxes online, and yet nearly half of all Americans file their taxes online today, most using TurboTax SKUs. (PFF ¶¶ 48-50).

report that tax-preparation products were not high-involvement products. And in the testimony cited, Professor Novemsky stated only that he was “not sure” whether he agreed with Professor Golder’s conclusion that tax-preparation services involve a high-involvement buying process. (Novemsky (FTC) Tr. 1776-1777). That evidence does not support finding that it is “not necessarily true” that tax-preparation services are high-involvement products.

In fact, the evidence establishes that tax-preparation products are high-involvement products and that consumers actually engage in a high-involvement buying process. Tax-preparation products are high-involvement products because they relate to significant financial transactions involving substantial risk for consumers—such as making a costly mistake preparing one’s tax return or failing to maximize deductions. (PFF ¶¶502; Golder (Intuit) Tr. 1074-1076; RX1018 (Golder Expert Report) ¶144). As Mr. Johnson explained, selecting an online tax-preparation service or method is a significant event for taxpayers, in part because for many consumers, their tax refund is the largest paycheck they receive in a single year. (Johnson (Intuit) Tr. 577). That tax-preparation products are high-involvement products is confirmed by evidence showing that consumers do in fact conduct substantial research before choosing a provider. (See PFF ¶¶503-509). For example, consumers use on average no fewer than three different sources when researching tax-preparation products. (RX1017 (Hauser Expert Report) ¶109). Complaint Counsel have not offered any evidence to refute the fact that consumers are likely to invest time in selecting a tax-preparation product, as shown by both the nature of the product and their actual conduct before making a buying decision.

739. There are a number of high-value transactions that research shows are not high involvement transactions, for example decisions around retirement savings. (GX749 (Novemsky Rebuttal Expert Report) ¶ 227 & n. 402; Novemsky (Complaint Counsel) Tr. 1776-1777).

Response to Finding No. 739:

The Proposed Finding is irrelevant because the fact that there may be “a number of high-value transactions” that “are not high involvement transactions” in other industries says nothing about whether tax-preparation products are high-involvement products. Complaint Counsel cannot satisfy their burden of proving deception by pointing to “a number” of things that might be possible, particularly where those possibilities have no bearing on any issues in this proceeding.

The Proposed Finding is also not supported by the cited evidence. Complaint Counsel point only to Professor Novemsky to substantiate the proposition, and he in turn relies on a single article. (CCFF ¶739; GX749 (Novemsky Rebuttal Expert Report) ¶227 n. 402 (*citing* Melissa A. Z. Knoll, The Role of Behavioral Economics and Behavioral Decision Making in Americans’ Retirement Savings Decisions, 70 Soc. Sec. BULL. 1 (2010))). But neither Professor Novemsky nor that article ever characterize purchasing retirement savings as involving a low-involvement process. Further, the retirement savings context—one in which, as the article cited by Professor Novemsky admits, consumers may believe they can defer decision-making without any immediate consequences—are substantially different than tax preparation, because consumers are generally required to prepare and file accurate tax returns each year and face legal consequences if they do not do so.

740. In 2019, Intuit research showed that 49% of consumers were confident that Free Edition was truly free. (RX597 (Intuit) at INTUIT-FTC-PART3-000601665; RX1018 (Golder Expert Report) ¶ 169).

Response to Finding No. 740:

This Proposed Finding is identical to Complaint Counsel’s Proposed Finding 597 and is misleading for the same reason. It is uncontested that TurboTax Free Edition is free for consumers, and that consumers cannot pay to use it under any circumstances. (PFF ¶69). Thus,

100% of consumers would be correct in stating “that Free Edition is truly free,” regardless of whether they qualified to use Free Edition. The fact that only 49% of consumers were confident that Free Edition was “truly free,” even though it indisputably is free (*see* RX597 (Intuit) at -1665; *see also* PFF ¶¶488, 490), shows that reasonable consumers are skeptical of free offers and do not automatically assume that a free offer will be available for them. (RX597 (Intuit) at -1665). That reasonable consumers are skeptical of free offers in the tax-preparation industry, and do not believe that a legitimately free product is in fact free, demonstrates that reasonable consumers were not likely to be deceived by the challenged ads. (*See* PFF ¶¶485-493).

741. In the context of consumer skepticism of Free Edition, Professor Golder opined that both 29% and 22% were substantial, and that 29% was a “large portion” of consumers. (RX1018 (Golder Expert Report) ¶ 169; RX1394 (Golder (Intuit) Dep.) at 186).

Response to Finding No. 741:

The Proposed Finding is incomplete and misleading. The cited portion of Professor Golder’s report states that “a large portion of consumers continue to have some level of skepticism that a free product will be free for them.” (RX1018 (Golder Expert Report) ¶169). That paragraph goes on to discuss consumer research that indicates that only 49% of consumers were confident that Free Edition was truly free, indicating that a majority of consumers (51%) did not believe that Free Edition was free (even though it indisputably is free). (RX1018 (Golder Expert Report) ¶169 (citing RX597 (Intuit) at -1665)). It was that 51% of consumers who did not believe Free Edition was free that Professor Golder referred to as a “large portion” of consumers. (RX1018 (Golder Expert Report) ¶169).

Moreover, if 29% or 22% of consumers doubt that Free Edition is truly free, that is substantial, given that Free Edition is truly free. (*See* PFF ¶69). All consumers, 100%, should believe that Free Edition is truly free, as the Bureau of Consumer Protection does. (*See* GX161 (Maxson (FTC) Dep.) at 279; *see also* PFF ¶69).

742. According to Professor Golder, “the question about whether a particular individual’s return qualifies as simple or complex is an individual assessment requiring an understanding of one’s specific tax situation. Because the U.S. tax code itself is complex, a substantial amount of detailed tax information may be required to fully identify whether a particular return would be simple or complex.” (RX1018 (Golder Expert Report) ¶ 114).

Response to Finding No. 742:

The Proposed Finding—a direct quote of a point made in an earlier Proposed Finding through a paraphrase of Professor Golder’s testimony—is incomplete and misleading because it takes the quote from Professor Golder’s out of context. Contrary to the impression left by Complaint Counsel’s selective quoting, Professor Golder’s report does not state that all or even most consumers must review substantial amounts of detailed tax information to determine if they have a simple tax return. (RX1018 (Golder Expert Report) ¶114). To the contrary, the very next sentence, which is omitted from the Proposed Finding, states that “[m]any taxpayers are familiar with their personal tax situation and, from previous experience preparing their taxes, understand where they fall on the IRS continuum.” (RX1018 (Golder Expert Report) ¶114). And he goes on to explain that for those consumers who “are entirely unfamiliar, Intuit’s Simple Returns Disclosure puts consumers on notice that there are eligibility restrictions related to complexity.” (RX1018 (Golder Expert Report) ¶114). He also explains that the TurboTax website helps to minimize any uncertainty consumers might experience as a result of the complexity of the tax code because “the more individualized work of identifying whether an individual’s return is simple or complex is performed on the TurboTax website, which helps guide consumers to the product that fits their particular tax situation.” (RX1018 (Golder Expert Report) ¶114; *see also* PFF ¶¶408-418, 788-792). That same paragraph of Professor Golder’s report also provides that “Intuit makes clear in its ads that [the TurboTax website] is where consumers should look for this information and again, reasonable consumers who are comfortable enough with preparing their

taxes online would know that this is where they should go for additional details.” (RX1018 (Golder Expert Report) ¶114). Professor Golder’s report does not support any suggestion that consumers must consider substantial amounts of detailed tax information to determine if they have a simple return, or the insinuation that it is time consuming for consumers who do not know anything about their tax situation to identify whether their return is simple.

B. Intuit Expert Professor John Hauser

743. Professor Hauser submitted an expert report on Intuit’s behalf and testified at trial. (RX1017 (Hauser Expert Report); Hauser (Intuit) Tr. 844-845).

Response to Finding No. 743:

The Proposed Finding is misleading in part. Dr. Hauer submitted an expert report providing his expert opinions on the questions assigned to him by Intuit’s counsel. (RX1017 (Hauser Expert Report) ¶¶6-8). Intuit has no other specific response except to note that Professor Hauser offered credible expert opinions, including testimony at trial, about those questions assigned to him. He testified, for example, about how the results of his Disclosure Efficacy Survey are inconsistent with Complaint Counsel’s allegations in this case and indicate that the challenged ads are not deceptive. (PFF ¶882; Hauser (Intuit) 847-875, 1018-1034). He also explained how the results of his Purchase Driver Survey show that consumers’ selection of a tax-preparation provider is a high-involvement process. (RX1017 (Hauser Expert Report) ¶¶101-132). And he testified extensively about why Professor Novemsky’s survey was not reliable evidence—because (among other things) it was not designed to assess causality, asked leading questions that encouraged participants to provide the answers that Professor Novemsky wanted, and used an unrepresentative, biased survey population. (PFF ¶884; Hauser (Intuit) Tr. 893-954).

744. Professor Hauser does not have a degree in psychology. (RX1017 (Hauser Expert Report) ¶ 5, Appendix A); *see also* RX1391 (Hauser (Intuit) Dep.) at 16 (“I am not a psychologist”).

Response to Finding No. 744:

The Proposed Finding does not support an inference that Dr. Hauser was not qualified to offer his opinions and testimony. There is no requirement that an expert must have a degree in psychology to opine on advertising—rather, the expert must have “scientific, technical, or other specialized knowledge that will help the trier of fact,” and form opinions through “reliable principles and methods.” Fed. R. Evid. 702.

Dr. Hauser has extensive education and experience that qualifies him to offer expert testimony concerning the opinions contained in his expert report, which included his Disclosure Efficacy Survey and the numerous flaws in Professor Novemsky’s survey. (PFF ¶¶882-884). Dr. Hauser received a Doctor of Science from the Massachusetts Institute of Technology (MIT) Sloan School of Management, and he currently is the Kirin Professor of Marketing at the MIT Sloan School of Management, where he has taught for over forty years. (RX1017 (Hauser Expert Report) App’x A). He has published over 100 articles in peer-reviewed journals, served as editor-in-chief of the Journal of Marketing Science, and won numerous awards and prizes, including the Parlin Award, the oldest and most prestigious award given by the American Marketing Association. (Hauser (Intuit) Tr. 840-841; RX1017 (Hauser Expert Report) App’x A).

Dr. Hauser’s field of specialization is marketing science, which is the application of the scientific method—including, of course, surveys—to marketing practices. (Hauser (Intuit) Tr. 839). In light of that expertise, he has testified about marketing research, product confusion, and other topics involving consumer behavior, on behalf of companies like Sirius XM, Dish Network, Comcast, Tivo, iHeartRadio, Louis Vuitton, Apple, Johnson & Johnson, and Procter & Gamble. (RX1017 (Hauser Expert Report) ¶2, App’x A). He has also testified on behalf of the

United States Department of Justice and been retained as a non-testifying expert by the FTC. (RX1017 (Hauser Expert Report) ¶2; Hauser (Intuit) Tr. 841-842).

745. Professor Hauser did not test consumer comprehension of the phrase “simple return.” (Hauser (Intuit) Tr. 957).

Response to Finding No. 745:

Intuit has no specific response except to note that Professor Novemsky did not reliably test comprehension of the phrase “simple return” either. (*See* Responses to CCFF ¶¶491-497). Intuit also presented extensive other evidence showing that consumers do understand the meaning of “simple tax returns.” For example, an Intuit qualitative study showed that consumers found the phrase very “easy to understand.” (PFF ¶134; RX304 (Intuit); Rubin (Intuit) Tr. 1544-1546). None of the participants in that study indicated that they were confused by the phrase or did not understand it. (RX304 (Intuit)). Moreover, use of the phrase “simple tax returns” is considered “industry convention” (Johnson (Intuit) Tr. 582), as each of Intuit’s major competitors also offers a free tax-preparation product that is limited to and advertised as being for taxpayers with simple tax returns. (PFF ¶141; Johnson (Intuit) Tr. 581-582; Ryan (Intuit) Tr. 708, 777; Golder (Intuit) Tr. 1121-1122; RX1018 (Golder Expert Report) ¶¶108-112; RX79 (Intuit) at 1; RX97 (Intuit) at 1; RX98 (Intuit) at 1; GX789 (Intuit) at 1). The ubiquity in the industry and common usage of the phrase is strong evidence that consumers understand the meaning of “simple tax returns,” as it is unlikely that government and industry actors alike would, over many years, rely on a term that taxpayers do not understand. (PFF ¶145).

746. Professor Hauser also did not study consumer perceptions about the price of TurboTax. (RX1391 (Hauser (Intuit) Dep.) at 41).

Response to Finding No. 746:

The Proposed Finding is vague, misleading, and ultimately incorrect. For one thing, “TurboTax” is a brand name, under which Intuit offers several products at varying prices (PFF

¶¶60-62), so it is not clear what studying perception about the “price” (singular) of “TurboTax” would entail. For another, the Proposed Finding takes Dr. Hauser’s testimony out of context. What Dr. Hauser actually said was “I did not really take a *census* of people’s perceptions of price.” (RX1391 (Hauser (Intuit) Dep.) at 41 (emphasis added)). Instead, Dr. Hauser designed, implemented, and analyzed the Disclosure Efficacy Survey—a test-control experiment that assessed consumer behavior after being exposed to disguised TurboTax marketing communications. (PFF ¶¶722-745). Given that the assessed consumer behavior may have implicated participants’ perceptions of prices, the Proposed Finding is incorrect.

1. Professor Hauser’s Disclosure Efficacy Survey Is Not Evidence That Intuit Did Not Deceive Consumers

747. Professor Hauser conducted a Disclosure Efficacy Survey in which the respondents were shown stimuli (a video advertisement and webpages) about a fictitious company called Vertax (a disguised brand name for TurboTax) and asked questions about their consideration of starting their tax preparation with Vertax, as well as their choice of Vertax products. (RX1017 (Hauser Expert Report) ¶¶ 16, 85- 86; Hauser (Intuit) Tr. 856; GX749 (Novemsky Rebuttal Expert Report) ¶ 104).

Response to Finding No. 747:

Intuit has no specific response.

748. Professor Hauser’s Disclosure Efficacy Survey assumed that some ads containing free claims would be more likely than others to have an effect on consumers. (RX1391 (Hauser (Intuit) Dep.) at 43).

Response to Finding No. 748:

The Proposed Finding is incorrect and misleading because Dr. Hauser’s Disclosure Efficacy Survey did not “assume[]” that any ads would have any particular “effect on consumers.” Rather, Dr. Hauser designed the ads used in his Disclosure Efficacy Survey to assess the allegations that Complaint Counsel have made in this case, as the Proposed Finding’s cited deposition testimony makes clear. (See RX1391 (Hauser (Intuit) Dep. at 43 (referencing Complaint Counsel’s “hypothesis”). The complaint in this matter stressed that “‘free’ is

essentially the only word spoken by the actors” in many of the challenged ads, and that “[i]n several ads, the word ‘free’ is repeated over 40 times in a 30-second ad.” (RX260 (FTC) ¶26). Given that allegation, Dr. Hauser designed the ads in the Disclosure Efficacy Survey to (among other things) assess whether the repetition of the word “free” had an effect on consumers. (RX1017 (Hauser Expert Report ¶90; Hauser (Intuit) Tr. 861-862). In one of the ads (modeled off of the Tax Year 2021 “Dance Class” video ad), the spoken dialogue consisted entirely of a dance instructor repeating the word “free” twelve times (PFF ¶729); in the other ad, the word “free” is repeated only twice, and there is other non-free-related dialogue (PFF ¶730).

749. Professor Hauser’s Disclosure Efficacy Survey did not measure the effects of a multiyear, multichannel, multi-ad advertising and marketing campaign. (Hauser (Intuit) Tr. 968).

Response to Finding No. 749:

The Proposed Finding is misleading insofar as it suggests that the Disclosure Efficacy Survey necessarily underestimated the true impact of TurboTax’s ads. The survey measured consumers’ response immediately after exposure to an ad, when that ad’s impact would have been most powerful. (Hauser (Intuit) Tr. 885, 890-891; RX1017 (Hauser Expert Report) ¶31). As Dr. Hauser explained, it is “well established” that this immediate response will decay over time, and “simple repetition alone” in a multiyear, multichannel, multi-ad campaign would not combat that decay. (Hauser (Intuit) Tr. 884, 891). To the contrary, such repetition could lead to a “wear-out” effect, in which the ads’ impact would decrease over time. (Hauser (Intuit) Tr. 891). Moreover, Dr. Hauser used a test-control design, meaning any overmeasurement effect would be present in both of his survey groups, allowing him to reliably compare the results from both groups and draw valid causal conclusions. (Hauser (Intuit) Tr. 848-849, 1030-1031).

750. Professor Hauser’s Disclosure Efficacy Survey results cannot show whether either of Professor Hauser’s original or revised stimuli deceived respondents. (GX749 (Novemsky Rebuttal Expert Report) ¶ 106); Novemsky (Complaint Counsel) Tr. 1783-1784).

Response to Finding No. 750:

The Proposed Finding is incorrect and misleading because it is based on Complaint Counsel's unsupported argument that the revised stimuli in the Disclosure Efficacy Survey were deceptive. As Intuit explained (PFF ¶¶730-731), that contention is not credible: For one thing, on their face, the website stimuli in Dr. Hauser's survey included hyperlinked "see if you qualify" language in numerous prominent places, and the Products & Pricing page included the full qualifications for Free Edition on the page itself, such that participants did not have to click a hyperlink to access those qualifications. (PFF ¶734). And the revised video ad conspicuously informed survey participants (verbally and in written text) that "Not all taxpayers qualify" and invited them to "See if [they] qualify at Vertax.com." Those disclosures were comparable to the ones in the actual ads that Intuit subsequently produced for Tax Year 2022—which copy testing establishes are not deceptive. (PFF ¶731). Thus, Complaint Counsel's assertion that the revised stimuli were deceptive is unsupported. And because the revised stimuli caused no change in consumer behavior compared to the original stimuli (which were substantively identical to the challenged ads and website), the Disclosure Efficacy survey is strong evidence that the challenged marketing was not deceptive either.

751. The Disclosure Efficacy Survey merely measured the difference between the test and control stimuli. (RX1391 (Hauser (Intuit) Dep.) at 85).

Response to Finding No. 751:

The Proposed Finding is incorrect. The survey did not "measure[] the difference[s]" between the stimuli—those differences are discernible just by looking at the stimuli. As a test-control survey, the Disclosure Efficacy Survey was able to isolate the impact of those differences and determine whether the differences caused any change in consumer behavior. (See PFF ¶¶531-532). If the challenged ads were deceptive, one would expect that the differences would

cause some change in behavior; one would expect that changing the ads to reduce the emphasis on “free” and provide more information about Free Edition’s qualifications would discourage consumers from considering the brand and from starting in Free Edition. (PFF ¶541). But the survey results show otherwise. As explained (PFF ¶¶736-745), the differences in the stimuli did not cause any change in consumer behavior, which is the opposite of what one would expect to see if the challenged ads were deceptive.

Confronted with those results, Complaint Counsel have had no choice but to argue that the revised stimuli were just as deceptive as the originals. (PFF ¶731). But as just explained (Response to CCFF ¶750), that contention is not credible: On its face, the revised video ad conspicuously informed survey participants (verbally and in written text) that “Not all taxpayers qualify” and invited them to “See if [they] qualify at Vertax.com.” Those disclosures were comparable to the ones in the actual ads that Intuit subsequently produced for Tax Year 2022—which copy testing establishes are not deceptive. (PFF ¶731). Thus, Complaint Counsel’s assertion that the revised stimuli were deceptive is unsupported. And because the revised stimuli caused no change in consumer behavior compared to the original stimuli (which were substantively identical to the challenged ads), the Disclosure Efficacy survey is strong evidence that the challenged ads were not deceptive either.

752. Professor Hauser’s Disclosure Efficacy Survey shows that changes to disclosures related to Free Edition eligibility, as tested in the Disclosure Efficacy Survey, are unlikely to have a material impact on consumers’ consideration of using TurboTax to start their tax return. (RX1017 (Hauser Expert Report) ¶¶ 16, 91; *see also* Hauser (Intuit) Tr. 979); *see also* Novemsky (Complaint Counsel) Tr. 183).

Response to Finding No. 752:

The Proposed Finding is incorrect and misleading insofar as it suggests that both the original and revised stimuli in the Disclosure Efficacy Survey were deceptive. As just explained (Responses to CCFF ¶¶750-751), that contention is not credible: On its face, the revised video

ad conspicuously informed survey participants (verbally and in written text) that “Not all taxpayers qualify” and invited them to “See if [they] qualify at Vertax.com.” Those disclosures were also comparable to the ones in the actual ads that Intuit subsequently produced for Tax Year 2022—which copy testing establishes are not deceptive. (PFF ¶731). Thus, Complaint Counsel’s assertion that the revised stimuli were deceptive is unsupported. And because the revised stimuli caused no change in consumer behavior compared to the original stimuli (which were substantively identical to the challenged ads), the Disclosure Efficacy survey is strong evidence that the challenged ads were not deceptive either.

753. Professor Hauser found that there was no statistically significant difference between groups in respondents’ consideration of starting their taxes using Vertax. (RX1017 (Hauser Expert Report) ¶ 91).

Response to Finding No. 753:

Intuit has no specific response except to note that this finding scientifically rejects Complaint Counsel’s theory that TurboTax’s ads “served as misleading door openers” that bring consumers to the TurboTax website under the false impression that they can for free. (See PFF ¶¶737-738). If that door-opener theory were true, reducing the emphasis on “free” in the revised ad and adding more prominent qualifications about Free Edition’s qualifications would have caused respondents to be substantially less likely to consider starting their taxes with Vertax. (PFF ¶737). As the Proposed Finding concedes, the survey results show otherwise.

754. Professor Hauser did not test whether and to what extent the changes he made to the original stimuli in his survey had any effect on consumers’ misimpression that they could file their taxes for free when that was not the case. (GX749 (Novemsky Rebuttal Expert Report) ¶ 119; Novemsky (Complaint Counsel) Tr. 1781-1782, 1786).

Response to Finding No. 754:

The Proposed Finding is incorrect and misleading because it assumes that consumers have a misimpression about their ability to file their taxes for free—which Complaint Counsel

have not established. Indeed, the Proposed Finding cites Professor Novemsky's rebuttal report and trial testimony, but his scientifically invalid survey results do not establish such a misimpression. (*See* PFF ¶¶530-589).

The Proposed Finding is also incorrect and misleading because the Disclosure Efficacy Survey does provide some relevant evidence about whether a misimpression exists, and that evidence undermines Complaint Counsel's allegations. As Intuit explained (PFF ¶611), Dr. Hauser estimated from his survey results that about a third of participants in both the Original Disclosures Group and the Revised Disclosures Group would start in Vertax Free Edition. Those percentages, from both groups, are similar to the percentage of all U.S. taxpayers who qualify to file with TurboTax Free Edition (about 33%). (*See* PFF ¶744). If Complaint Counsel were correct that consumers were under a misimpression about their ability to file their taxes for free, one would expect the percentages to be much higher. (PFF ¶611).

As Intuit has explained, additional evidence also refutes Complaint Counsel's unproven assertion that consumers have the misimpression that they can file their taxes for free with TurboTax. For example, if such a misimpression existed, one would expect to see widespread consumer complaints about their inability to file for free—yet the complaint rate in this case is miniscule and nowhere near other FTC deception cases. (PFF ¶¶624-647). Moreover, the results of Intuit's copy tests indicate that, if anything, consumers *underestimate* their ability to file their taxes for free using TurboTax. (PFF ¶¶695-713). And the TY20 NPS Survey shows that customers who visit the TurboTax website expecting to file for free ultimately *are* filing for free, while consumers expecting to pay to file are finding TurboTax's paid SKUs. (PFF ¶¶714-721).

755. The revised stimuli do not account for numerous aspects of TurboTax marketing materials identified as deceptive. (GX749 (Novemsky Rebuttal Expert Report) ¶ 121).

Response to Finding No. 755:

The Proposed Finding—which is devoid of any factual content—is incorrect. Complaint Counsel’s arguments that the revised stimuli were inadequate are a blatant attempt to move the goalposts, and the Court should reject them. For one thing, to the extent those arguments are based on the fact that the revised stimuli still include “free claims” (CCFF ¶¶760-761), it would make no sense for the revised stimuli to omit any use of the word “free,” because TurboTax Free Edition is a genuinely free product for those who qualify; consumers cannot pay to use it. (Hauser (Intuit) Tr. 857; PFF ¶69).

Likewise, Complaint Counsel’s nit-picking of the prominence of the disclosures falls completely flat. The Court can review the revised stimuli itself (*see* RX1549 (Intuit); RX1017 (Hauser Expert Report) App’x C), but for the reasons Intuit has explained its length (PFF ¶¶730-734), those disclosures made the qualifications for Free Edition substantially more prominent. Among other things, the revised video ad conspicuously informed participants—both verbally and in written text—that “Not all taxpayers qualify” and invited them to “See if you qualify at Vertax.com.” (PFF ¶¶730-731). Again, those disclosures were comparable to the disclosures in the actual ads that Intuit subsequently produced for Tax Year 2022—which copy testing conclusively demonstrates are not deceptive. (PFF ¶731).

756. In his revised stimuli video, Professor Hauser shows a disclaimer for eight seconds rather than 5 seconds in the original stimulus, (RX1548 (Intuit); RX1549 (Intuit); GX749 (Novemsky Rebuttal Expert Report) ¶ 123); *see also* Novemsky (Complaint Counsel) Tr. 1786), but Professor Hauser provides no evidence that this is a meaningful change that would have an impact on consumer misimpressions. (GX749 (Novemsky Rebuttal Expert Report) ¶ 123); *see also* Novemsky (Complaint Counsel) Tr. 1786).

Response to Finding No. 756:

The Proposed Finding is incorrect in that it wrongly refers to language in the revised ad as a “disclaimer.” Complaint Counsel have not established that there was anything in the challenged ads (which the revised ad modifies) that needed to be “disclaimed.”

The Proposed Finding is also incorrect and misleading because it assumes that consumers have a misimpression about their ability to file their taxes for free—which Complaint Counsel have not established. Indeed, the Proposed Finding cites Professor Novemsky’s rebuttal report and trial testimony, but his scientifically invalid survey results do not establish such a misimpression. (*See* PFF ¶¶530-589).

Moreover, the Proposed Finding is incorrect and misleading because it ignores several important facts about the disclosure in Dr. Hauser’s revised ad. For one thing, it ignores that an 8-second disclosure is nearly twice as long as the typical disclosure for a 30-second video ad. (PFF ¶730). On top of that, the disclosure duration was not the only thing that Dr. Hauser changed; he changed the text of the written disclosure to include “Not all taxpayers qualify,” and he used larger and brighter font in the revised ad. (PFF ¶730). And the written disclosure in the revised ad was reinforced by a voiceover stating “Vertax Free Edition is for simple returns only. Not all taxpayers qualify to file for free. See if you qualify at vertax.com.” (PFF ¶730).

The Proposed Finding is also incorrect and misleading because it suggests that Dr. Hauser was required to have “evidence” about the effect of changing the disclosure *before* he designed and implemented his survey. Rather, the purpose of the Disclosure Efficacy Survey was to *test*—i.e., collect “evidence” about—the impact (if any) of changing the disclosure on consumer behavior. As explained, the survey results indicated that the change in disclosure duration had no effect on consumer behavior. (PFF ¶¶736-745).

Finally, the Proposed Finding is incorrect and misleading insofar as it suggests that the revised ad in the Disclosure Efficacy Survey was deceptive unless it caused a “meaningful change” compared to the original ad. As explained (Responses to CCF ¶¶750-752), Complaint Counsel’s contention that revised ad was deceptive is not credible. The Court can review the ad itself (RX1549 (Intuit)), but again, the disclosures in the revised ad were comparable to the ones in the actual ads that Intuit subsequently produced for Tax Year 2022—which copy testing establishes are not deceptive. (PFF ¶731). Thus, Complaint Counsel’s assertion that the revised ad was deceptive is unsupported. And 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.

757. In the revised stimuli video, five sentences are spoken (before the disclosure), two of which are “at least your taxes are free,” and the other three do not relate to any other aspect of TurboTax. (RX1549 (Intuit); Hauser (Intuit) Tr. 861-862; GX749 (Novemsky Rebuttal Expert Report) ¶ 124); *see also* Novemsky (Complaint Counsel) Tr. 1785).

Response to Finding No. 757:

The Proposed Finding is incorrect and misleading insofar as it suggests that the revised ad’s use of the sentence “at least your taxes are free” was a claim that all TurboTax (or Vertax) SKUs were free, or a claim that all consumers could necessarily file their taxes for free using TurboTax (or Vertax). Rather, as the FTC’s designee testified, the meaning of the word “free” in an ad “depends [on] whether there is any other context for the person that is hearing [it].” (PFF ¶221). And the “other context” provided by the revised ad was that a specific Vertax SKU was free, that the SKU was available for simple tax returns only, that not all taxpayers qualified to file for free with the SKU, and that viewers could “see if [they] qualify at Vertax.com.” (RX1549 (Intuit); PFF ¶730). Indeed, the revised ad did not even mention “Vertax” until the end

of the ad, when it informed viewers that the free offer applied to a specific SKU (Vertax Free Edition) that had qualifications. (RX1549 (Intuit)). Copy testing of certain challenged ads that were similar to the revised ad in this respect confirmed that consumers did not associate the ad with “TurboTax” until “TurboTax Free Edition” was mentioned at the end of the ad. (PFF ¶224).

758. In his Disclosure Efficacy Survey, Professor Hauser used two ads that were substantially similar to ads at issue in this matter that contain free claims alleged to be deceptive (the primary difference was the use of the disguised brand “Vertax” and an orange color scheme). (Hauser (Intuit) Tr. 988); RX1017 (Hauser Expert Report) ¶ 87, Appendix C ¶ 7).

Response to Finding No. 758:

The Proposed Finding is incorrect and misleading because it ignores the numerous changes that Dr. Hauser made to the revised ad used in his survey. Although the revised ad was based on the TurboTax’s Tax Year 2017 “Fishing” ad, Dr. Hauser modified the voiceover so that it informed his survey respondents: “Vertax Free Edition is for simple returns only. Not all taxpayers qualify to file for free. See if you qualify at vertax.com.” (PFF ¶730). And he made several modifications to the written disclosures. Specifically, the written disclosures included language saying “Not all taxpayers qualify for Free Edition”; were in larger and brighter font; and appeared on the screen for 8 seconds, which is roughly twice as long as the typical disclosure for a 30-second video ad. (PFF ¶730). It therefore is not true that the “primary difference” between the revised ad and the original “Fishing” ad “was the use of the disguised brand name ‘Vertax’ and an orange color scheme.” Dr. Hauser never suggested that was the case, so it is entirely unclear why his testimony is cited. (*See* Hauser (Intuit) Tr. 988)).

The Proposed Finding is also incorrect and misleading insofar as it suggests that the Vertax-branded ads’ “free claims” suggested that all Vertax SKUs were free, or that all consumers could necessarily file their taxes for free using Vertax. Rather, as the FTC’s designee testified, the meaning of the word “free” in an ad “depends [on] whether there is any other

context for the person that is hearing [it].” (PFF ¶221). And the “other context” provided by both the revised and original ad in the Disclosure Efficacy Survey was that a specific Vertax SKU was free, that the SKU was available for simple tax returns only, and that viewers could “see if [they] qualify at Vertax.com.” (RX1549 (Intuit); PFF ¶730). Indeed, neither ad even mentioned “Vertax” until the end of the ad, when it informed viewers that the free offer applied to a specific SKU (Vertax Free Edition) that had qualifications. (RX1549 (Intuit)). Copy testing of certain challenged ads that were similar to both Vertax ads in this respect confirmed that consumers did not associate the ad with “TurboTax” until “TurboTax Free Edition” was mentioned at the end of the ad. (PFF ¶224).

759. In the revised stimuli video, the font of the disclaimer is slightly larger than the font in the original stimuli, but the disclosure text remains smaller than the text emphasizing that the service is free, which is still more prominent, (RX1548 (Intuit); RX1549 (Intuit); GX749 (Novemsky Rebuttal Expert Report) ¶ 125), and Professor Hauser provides no evidence that this adjustment is meaningfully different and would generate a different reaction from survey respondents. (GX749 (Novemsky Rebuttal Expert Report) ¶ 125).

Response to Finding No. 759:

The Proposed Finding is incorrect in that it wrongly refers to language in the revised ad as a “disclaimer.” Complaint Counsel have not established that there was anything in the challenged ads (which the revised ad modifies) that needed to be “disclaimed.” (See Response to CCF ¶756). The Proposed Finding is also vague because it is not clear what Complaint Counsel mean by “text emphasizing that the service is free.”

To the extent Complaint Counsel are referring to the text providing the name of the SKU being advertised—Vertax Free Edition—the Proposed Finding is incorrect and misleading. By identifying the specific Vertax SKU being advertised as free, the revised ad informed survey participants that the advertised offer does not apply to all SKUs. (See PFF ¶¶317-321). That alone was sufficient to prevent reasonable consumers from being misled into believing that all

SKUs were free because it made clear to reasonable consumers that there were multiple SKUs and that only the one being advertised was free. (*See* PFF ¶319). In other words, the revised ad did not include *any* language suggesting that some unspecified Vertax “service [was] free.”

The Proposed Finding is also incorrect and misleading to the extent it implies that consumers would not have seen the disclosure text simply because it was smaller than the name of the SKU. As Complaint Counsel concedes, the size of the written disclosure in the revised ad was larger than in the challenged ads, and the challenged ads’ disclosures were themselves larger than in benchmark companies’ ads. (PFF ¶237). Complaint Counsel, moreover, did not offer any evidence that the qualifications in the challenged ads could not be seen by reasonable consumers. (*See* PFF ¶¶230-231). And placing disclosures at the bottom of the screen is standard practice in TV ads, so consumers are conditioned to look for them there. (PFF ¶¶238, 456; Golder (Intuit) Tr. 1153-1155; RX1018 (Golder Expert Report) ¶131).

Furthermore, the Proposed Finding is incorrect and misleading because it suggests that Dr. Hauser was required to have “evidence” about the effect of changing the size of disclosure *before* he designed and implemented his survey. Rather, the purpose of the Disclosure Efficacy Survey was to *test*—i.e., collect “evidence” about—the impact (if any) of changing the disclosure size on consumer behavior. As explained, the survey results indicated that the change in disclosure size had no effect on consumer behavior. (PFF ¶¶736-745).

Finally, the Proposed Finding is incorrect and misleading insofar as it suggests that the revised ad in the Disclosure Efficacy Survey was deceptive unless it caused a “meaningful different” reaction compared to the original ad. As explained (Responses to CCF ¶¶750-752), Complaint Counsel’s contention that the revised ad was deceptive is not credible. The Court can review the ad itself (RX1549 (Intuit)), but again, the disclosures in the revised ad were

comparable to the ones in the actual ads that Intuit subsequently produced for Tax Year 2022—which copy testing establishes are not deceptive. (PFF ¶731). Thus, Complaint Counsel’s assertion that the revised ad was deceptive is unsupported. And 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.

760. The original video stimuli include the written phrase “for simple U.S. returns only” and the revised video stimuli included (in writing and in a voiceover) the phrase “[f]or simple returns only” (RX1548 (Intuit); RX1549 (Intuit); GX749 (Novemsky Rebuttal Expert Report) ¶ 128); *see also* Novemsky (Complaint Counsel) Tr. 1786-1787), but the revised stimuli do not include any more indication as to what should be understood by “simple” (as used by TurboTax). (RX1549 (Intuit); GX749 (Novemsky Rebuttal Expert Report) ¶ 128).

Response to Finding No. 760:

The Proposed Finding is incorrect because the revised video ad did include additional “indication” about what should be understood by “simple.” Again, the revised ad expressly informed survey participants (via voiceover and written text) that “Not all taxpayers qualify to file for free”—i.e., that not all taxpayers have a simple return. (PFF ¶730). The ad also expressly invited survey participants (now via both voiceover and written text) to “See if you qualify at vertax.com.” (PFF ¶730). This additional information had no effect on consumer behavior, though, indicating that consumers do not need “any more indication as to what should be understood by ‘simple.’” Indeed, Professor Novemsky himself acknowledged, from the challenged ads, consumers understand that “simple returns only” conveys that the ability to use free TurboTax SKUs or offers depends on the “complexity or simplicity” of the taxpayer’s return. (PFF ¶136). With that understanding, consumers can learn whether their particular tax situation qualifies as a “simple tax return,” within seconds, as the answer is easily accessible through Internet search engines and the TurboTax website. (PFF ¶¶131-133).

761. Both the original and the revised website stimuli included the phrases “FREE,” “\$0” and “File for \$0.” (RX1017 (Hauser Expert Report) C-1-38, C-1-41; GX749 (Novemsky Rebuttal Expert Report) ¶ 131, Figures 10 & 11).

Response to Finding No. 761:

The Proposed Finding is incomplete and misleading because it ignores the numerous prominent qualifications included in the webpage stimuli. For one thing, both the original and revised stimuli also referenced the specific SKU at issue, Vertax Free Edition. (See RX1017 Hauser Expert Report) C-1-37 to C-1-41). That alone was sufficient to prevent reasonable consumers from being misled into believing that all SKUs were free. (See PFF ¶319). The original and revised website stimuli also included—in close proximity to the references to “free” and “\$0”—hyperlinked “For simple returns only” or “see if you qualify” language, which made clear that not all taxpayers could use Free Edition. (See RX1017 Hauser Expert Report) C-1-37 to C-1-41; PFF ¶¶733-734). And when clicked, the hyperlinks presented survey participants with a pop-up disclosure explaining the specific tax situations covered, and not covered, by Free Edition. (PFF ¶¶733-734).

762. The free claims on both the original and the revised stimuli website are prominent. (Novemsky (Complaint Counsel) Tr. 1787; Hauser (Intuit) Tr. 993-994, 1005).

Response to Finding No. 762:

The Proposed Finding is incomplete and misleading because it ignores that the “free claims” were also prominently and conspicuously qualified. As just explained (Response to CCF ¶761), both the original and revised stimuli also referenced the specific SKU at issue, Vertax Free Edition. (See RX1017 Hauser Expert Report) C-1-37 to C-1-41). That alone was sufficient to prevent reasonable consumers from being misled into believing that all SKUs were free. (See PFF ¶319). The original and revised website stimuli also included—in close proximity to the references to the “free claims”—hyperlinked “For simple returns only” or “see

if you qualify” language, which made clear that not all taxpayers could use Free Edition. (*See* RX1017 Hauser Expert Report) C-1-37 to C-1-41; PFF ¶¶733-734). And when clicked, the hyperlinks presented survey participants with a pop-up disclosure explaining the specific tax situations covered, and not covered, by Free Edition. (PFF ¶¶733-734).

763. On some revised stimuli websites, Professor Hauser only includes additional information about what “simple tax returns” are behind a hyperlink. (Hauser (Intuit) Tr. 858, 867-868; GX749 (Novemsky Rebuttal Expert Report) ¶¶ 132-133, Figure 10; Novemsky (Complaint Counsel) Tr. 1788-1789), and Professor Hauser did not measure how many, if any, respondents clicked on the hyperlink, and importantly whether his revisions increased the number of consumers clicking on the hyperlink to review terms and conditions. (Hauser (Intuit) Tr. 1004; GX749 (Novemsky Rebuttal Expert Report) ¶ 133).

Response to Finding No. 763:

The Proposed Finding is incorrect because only one (not “some”) of the revised webpages required survey participants to click a hyperlink to access the specific tax situations covered, and not covered, by Free Edition. (PFF ¶734). The other revised webpage (the Products & Pricing Page) included the full qualifications for Free Edition on the page itself, meaning participants did not have to click a hyperlink to access them. (PFF ¶734).

Moreover, the Proposed Finding is irrelevant because Dr. Hauser did not need to measure the precise number of hyperlink clicks to reliably assess whether the use of hyperlinks affects consumer behavior. Indeed, because the inclusion of the full qualifications for Vertax Free Edition on the revised Products & Pricing webpage itself did not cause any changes in consumer behavior when it came to brand consideration or product choice, the Disclosure Efficacy Survey results suggest that consumers in each of Dr. Hauser’s survey groups accessed the information about Free Edition’s qualifications to similar degrees, regardless of whether the information was “behind” a hyperlink. (*See* PFF ¶¶736-742; Hauser (Intuit) Tr. 869-870; RX1017 (Hauser Expert Report) ¶¶91-92).

764. Professor Hauser does not present any empirical evidence showing that either the original or his revised stimuli prevent consumers from being misled by the free claims contained in both stimuli. (GX749 (Novemsky Rebuttal Expert Report) ¶ 107).

Response to Finding No. 764:

The Proposed Finding is irrelevant because it is Complaint Counsel who bear the burden of proving that the challenged ads were deceptive. *See* 16 C.F.R. §3.43(a). Thus, contrary to Complaint Counsel’s suggestion, neither Dr. Hauser nor Intuit had a burden to “present ... empirical evidence” of anything.

The Proposed Finding is also incorrect because Intuit has presented “empirical evidence” indicating that the revised stimuli in Dr. Hauser’s survey were *not* misleading. Again, the disclosures in the revised ad were comparable to the ones in the actual ads that Intuit subsequently produced for Tax Year 2022—which copy testing establishes are not deceptive. (PFF ¶731). That evidence indicates that the revised ad was not deceptive either. And 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.

765. Professor Hauser’s Disclosure Efficacy Survey showed that over 75% of respondents in both original and revised disclosure groups indicate that they “would consider starting” their taxes with Vertax. (RX1017 (Hauser Expert Report) ¶ 92, Table 4, Figure 10, Exhibit 3; Hauser (Intuit) Tr. 870); RX1391 (Hauser (Intuit) Dep.) at 137-138, 139).

Response to Finding No. 765:

Intuit has no specific response except to note that the difference between the share of respondents who would consider Vertax from the Original Disclosures Group (77.7%) and the Revised Disclosures Group (75.9%) is statistically insignificant. (PFF ¶736). This lack of a significant difference is “inconsistent with the hypothesis that TurboTax’s ad[s] served as misleading door openers” that bring consumers to the TurboTax website under the false

impression that they can file for free using TurboTax. (PFF ¶737). If that were true, reducing the emphasis on “free” and adding more prominent disclosures about Free Edition’s qualifications would have caused survey participants to be substantially less likely to consider starting their taxes with Vertax. (PFF ¶737). The survey results show, however, that those changes had no such effect. (PFF ¶738).

766. The Disclosure Efficacy Survey also showed that of respondents who would consider starting their taxes with Vertax, 64.3% of respondents in the revised disclosure group and 56.1% of respondents in the original disclosure group selected a Vertax Free Edition as the product that they “would be most likely to start with” (RX1017 (Hauser Expert Report) ¶ 95, Exhibit 4a; Hauser (Intuit) Tr. 871).

Response to Finding No. 766:

Intuit has no specific response except to note that these results are inconsistent with Complaint Counsel’s hypothesis that TurboTax’s ads deceived non-qualifying consumers into thinking they can file for free. (PFF ¶740). If that were true, reducing the emphasis on “free” and adding more prominent disclosures would cause fewer respondents to choose Vertax Free Edition. (PFF ¶740). But the opposite occurred in the Disclosure Efficacy Survey: reducing the emphasis on “free” and adding more prominent disclosures about Free Edition’s qualifications caused a slight increase in the percentage of participants who chose Vertax Free Edition. (PFF ¶740).

767. The Disclosure Efficacy Survey also showed that respondents reported that on average it would be between “probable” and “very probable” that they will start their taxes with a Vertax product. (RX1017 (Hauser Expert Report) Exhibit 5a).

Response to Finding No. 767:

Intuit has no specific response except to note that these results do not “illustrate the persuasive power” of TurboTax’s ads, as Complaint Counsel contend (*see* CCF ¶768). As Dr. Hauser has explained, “literature on advertising effectiveness” shows that the impact of advertising “is greatest immediately following consumer exposure,” which is when the

Disclosure Efficacy Survey tested consumer behavior. (RX1017 (Hauser Expert Report) ¶¶31, 92). On top of that “showing respondents a stimulus in a survey context could encourage respondents to focus on the stimulus more than they might in the marketplace.” (RX1017 (Hauser Expert Report) ¶31). Together, those two dynamics mean that the survey environment could “result in an overmeasurement” of consumer impressions or reactions—which a scientist should account for when analyzing and presenting his or her survey results. (RX1017 (Hauser Expert Report) ¶31). Indeed, one way Dr. Hauser accounts for the overmeasurement is by using a test-control design, such that any measurement effect would be present in both of his survey groups, allowing him to reliably compare the results from both groups and draw valid causal conclusions. (Hauser (Intuit) Tr. 848-849, 1030-1031).

768. These results illustrate the persuasive power of the TurboTax’s free-themed ads in getting the consumers to start trying the product advertised for free. (GX749 (Novemsky Rebuttal Expert Report) ¶¶ 143-144).

Response to Finding No. 768:

The Proposed Finding is incorrect. As Dr. Hauser has explained, “literature on advertising effectiveness” shows that the impact of advertising “is greatest immediately following consumer exposure,” which is when the Disclosure Efficacy Survey tested consumer behavior. (RX1017 (Hauser Expert Report) ¶¶31, 92). On top of that “showing respondents a stimulus in a survey context could encourage respondents to focus on the stimulus more than they might in the marketplace.” (RX1017 (Hauser Expert Report) ¶31). Together, those two dynamics mean that the survey environment could “result in an overmeasurement” of consumer impressions or reactions. (RX1017 (Hauser Expert Report) ¶31). One way Dr. Hauser accounts for the overmeasurement is by using a test-control design, such that any measurement effect would be present in both of his survey groups, allowing him to reliably compare the results from both groups and draw valid causal conclusions. (Hauser (Intuit) Tr. 848-849, 1030-1031).

Moreover, Complaint Counsel ignore that, Dr. Hauser was able to calculate an estimate of the respondents in each of his survey groups who would start in Vertax Free Edition. (PFF ¶743). The estimated percentages were 33.4% in the Original Disclosures Group, and 36.8% in the Revised Disclosures Group—which, for the reasons just provided, are likely overmeasurements. But even if they are not overmeasurements, those percentages are in line with the percentage of all U.S. taxpayers who qualify to use TurboTax Free Edition (about 33%). (PFF ¶744). If the challenged ads were deceptive, one would expect those percentages from the Disclosure Efficacy Survey to be higher.

769. Professor Hauser’s results are consistent with the interpretation that both the original and the revised stimuli used in the survey are equally ineffective in curing the deceptive impression left by the “free” claims in both stimuli. (GX749 (Novemsky Rebuttal Expert Report) ¶ 136; Novemsky (Complaint Counsel) Tr. 1812).

Response to Finding No. 769:

The Proposed Finding is irrelevant because the “interpretation” that the revised stimuli were deceptive is contention is not credible: For one thing, on their face, the website stimuli in Dr. Hauser’s survey included hyperlinked “see if you qualify” language in numerous prominent places, and the Products & Pricing page included the full qualifications for Free Edition on the page itself, such that participants did not have to click a hyperlink to access those qualifications. (PFF ¶734). And the revised video ad conspicuously informed survey participants (verbally and in written text) that “Not all taxpayers qualify” and invited them to “See if [they] qualify at Vertax.com.” Those disclosures were comparable to the ones in the actual ads that Intuit subsequently produced for Tax Year 2022—which copy testing establishes are not deceptive. (PFF ¶731). Thus, Complaint Counsel’s assertion that the revised stimuli were deceptive is unsupported. And because the revised stimuli caused no change in consumer behavior compared to the original stimuli (which were substantively identical to the challenged ads and website), the

Disclosure Efficacy survey is strong evidence that the challenged marketing was not deceptive either.

770. Professor Hauser’s Disclosure Efficacy Survey included a number of demand artifacts. (GX749 (Novemsky Rebuttal Expert Report) ¶¶ 137-144).

Response to Finding No. 770:

The Proposed Finding—which is devoid of any factual content—is incorrect, unsupported, and irrelevant because Dr. Hauser safeguarded against demand artifacts. Unlike Professor Novemsky, he disguised the real purpose of his survey by substituting Vertax for TurboTax and informing respondents that they had “been selected to answer questions about a new online tax preparation service.” (PFF ¶726; RX1017 (Hauser Expert Report) at C-2-5 (underline omitted)). And also unlike Professor Novemsky, Dr. Hauser used a test-control design, such that any demand artifact effect would be present in both of his survey groups, allowing him to reliably compare the results from both groups and draw valid causal conclusions. (Hauser (Intuit) Tr. 848-849, 1030-1031).

771. Survey participants may have understood the purpose of the survey to be an examination of a new tax brand called Vertax and responded to survey questions accordingly. (GX749 (Novemsky Rebuttal Expert Report) ¶¶ 138-140).

Response to Finding No. 771:

The Proposed Finding is unsupported and irrelevant. For one thing, this kind of demand artifact would have led participants to answer the survey questions in a manner *favoring* *Complaint Counsel*: As Professor Novemsky explained, it would have caused participants to “indicate that they *would* consider stating their taxes with Vertax” (GX749 (Novemsky Rebuttal Report ¶140 (emphasis added))), thereby feeding into Complaint Counsel’s theory that the survey “illustrate[s] the persuasive power of the TurboTax’s free-themed ads” (CCFF ¶768). Moreover, unlike Professor Novemsky, Dr. Hauser used a test-control design, such that any demand artifact

effect would be present in both of his survey groups, allowing him to reliably compare the results from both groups and draw valid causal conclusions. (Hauser (Intuit) Tr. 848-849, 1030-1031).

772. Both the original and revised product page stimuli that respondents can review while answering these questions explicitly state that respondents can “Start for Free” any of the three Vertax paid products (Deluxe, Premium, and Self-Employed). (RX1017 (Hauser Expert Report) Appendix C-1-21; GX749 (Novemsky Rebuttal Expert Report) ¶ 141).

Response to Finding No. 772:

The Proposed Finding is irrelevant. The website stimuli in Dr. Hauser’s survey stated “Start for Free” because they were modeled off of the real-life Tax Year 2021 version of the TurboTax Products & Pricing page, which also stated “Start for Free.” (RX1017 (Hauser Expert Report) at C-1-20 to C-1-21). And that real-life webpage stated “Start for Free” because consumers actually can start for free in TurboTax’s paid SKUs; as the Products & Pricing page accurately informs users, consumers “Pay only when you file.” (RX1017 (Hauser Expert Report) at C-1-20). In any event, as the Proposed Finding concedes, this feature was present in both of Dr. Hauser’s survey groups, allowing him to reliably compare the results from both groups and draw valid causal conclusions. (Hauser (Intuit) Tr. 848-849, 1030-1031).

773. The Disclosure Efficacy Survey asked respondents, after viewing the stimuli, whether based on their review they would consider starting their taxes on Vertax. (RX1017 (Hauser Expert Report) ¶ 92).

Response to Finding No. 773:

Intuit has no specific response, except to note that the respondents in both survey groups were asked the same question, which was: “Based on your review of the advertisement and webpages, would you or would you not consider starting your taxes on Vertax?” (RX1017 (Hauser Expert Report) at C-2-7). The answer choices were: “Yes, I would consider stating my taxes on Vertax”; “No, I would not consider starting my taxes on Vertax”; and “Don’t know / Unsure.” (RX1017 (Hauser Expert Report) at C-2-7).

774. These elements of the stimuli, combined with the phrasing of the question likely means that respondents are less likely to think carefully about the answers to the questions asked, and instead will offer the responses they think the survey researcher wants from them. (GX749 (Novemsky Rebuttal Expert Report) ¶ 141).

Response to Finding No. 774:

The Proposed Finding is unsupported and irrelevant. Professor Novemsky baselessly asserts that the use of the word “start” rather than “file” in Dr. Hauser’s questionnaire would cause participants to think less carefully (GX749 (Novemsky Rebuttal Expert Report) ¶141), but it is entirely reasonable to assume that survey participants would choose to “start” in the Vertax SKU they would envision ultimately “filing” with. Moreover, even if some participants were to have thought less carefully, Complaint Counsel fail to identify what participants would have thought “the survey researcher want[ed] from them.” Assuming (as Complaint Counsel contend elsewhere) that “participants may have understood the purpose of the survey to be an examination of a new tax brand called Vertax” (CCFF ¶771), Professor Novemsky himself explains that this demand artifact would have led participants to answer the survey questions in a manner *favoring Complaint Counsel*, causing them “to indicate that they *would* consider starting their taxes with Vertax” (GX749 (Novemsky Rebuttal Report ¶140 (emphasis added)). In any event, once again, the elements of the survey at issue in this Proposed Finding were present in both of Dr. Hauser’s survey groups, meaning any demand artifact would be controlled for, allowing him to reliably compare the results from both groups and draw valid causal conclusions. (Hauser (Intuit) Tr. 848-849, 1030-1031).

775. Professor Hauser’s Disclosure Efficacy Survey included a typo in the survey instrument in that the product information webpage stimulus refers to a “Premier” product, while the survey question offered respondents the ability to choose “Vertax Premium” as one of the available products. (RX1017 (Hauser Expert Report) ¶ 95 fn. 204).

Response to Finding No. 775:

The Proposed Finding is irrelevant because the typo did not affect Dr. Hauser's results or opinions. Dr. Hauser conducted a post-test of his survey and found that, when participants were asked to recall the names of the products that Vertax offers, no respondents mentioned seeing both a Premium and a Premier product—indicating that they did not struggle with or find the typo-created name change confusing. (RX1017 (Hauser Expert Report) ¶95 n.204).

Accordingly, Dr. Hauser concluded: “I find this typo to be small and not material to my findings or opinions.” (RX1017 (Hauser Expert Report) ¶95 n.204). Moreover, the typo is yet another element of the survey that was present in both of Dr. Hauser's survey groups, meaning any effect from the typo would be controlled for, allowing him to reliably compare the results from both groups and draw valid causal conclusions. (Hauser (Intuit) Tr. 848-849, 1030-1031).

776. A total of 36 respondents in the original disclosures group, and 32 respondents in the revised disclosures group indicated that they would “most likely” start their taxes with “Vertax Premium,” with a high degree of likelihood even though that was not included as an option in the stimuli. (RX1017 (Hauser Expert Report) Table 5, Exhibit 5a).

Response to Finding No. 776:

The Proposed Finding is irrelevant because the typo did not affect Dr. Hauser's results or opinions. Dr. Hauser conducted a post-test of his survey and found that, when participants were asked to recall the names of the products that Vertax offers, no respondents mentioned seeing both a Premium and a Premier product—indicating that they did not struggle with or find the typo-created name change confusing. (RX1017 (Hauser Expert Report) ¶95 n.204).

Accordingly, Dr. Hauser concluded: “I find this typo to be small and not material to my findings or opinions.” (RX1017 (Hauser Expert Report) ¶95 n.204). Moreover, the typo is yet another element of the survey that was present in both of Dr. Hauser's survey groups, meaning any effect

from the typo would be controlled for, allowing him to reliably compare the results from both groups and draw valid causal conclusions. (Hauser (Intuit) Tr. 848-849, 1030-1031).

777. The typo illustrates that respondents of the Professor Hauser’s Disclosure Efficacy Survey were not reviewing the stimuli and answering the questions carefully. (GX749 (Novemsky Rebuttal Expert Report) ¶ 146).

Response to Finding No. 777:

The Proposed Finding is unsupported and irrelevant. It is entirely plausible that many survey participants were reading carefully and noticed the typo but understood that they should treat “Vertax Premium” as a reference to “Vertax Premier.” Moreover, the typo is yet another element of the survey that was present in both of Dr. Hauser’s survey groups, meaning any effect from the typo would be controlled for, allowing him to reliably compare the results from both groups and draw valid causal conclusions. (Hauser (Intuit) Tr. 848-849, 1030-1031).

2. Professor Hauser’s Purchase Driver Survey Is Not Evidence That Intuit Did Not Deceive Consumers

778. Professor Hauser conducted an online survey (the “Purchase Driver Survey”) that purports to measure the research that taxpayers may conduct, and the factors consumers consider important when selecting a tax preparation method/provider. (RX1017 (Hauser Expert Report) ¶ 103).

Response to Finding No. 778:

The Proposed Finding is incomplete insofar as it suggests that Dr. Hauser’s Purchase Driver Study was not designed to assess how “information consumers gain passively about tax preparation providers” (CCFF ¶786). Rather, Dr. Hauser stated that his purpose was “[t]o study the process of consumers’ tax preparation information acquisition” and “to provide insight on the process that tax filers go through to identify a tax preparation solution.” (RX1017 (Hauser Expert Report) ¶103). This objective, Dr. Hauser explained, included examination of the “research [consumers] may conduct, and the factors consumers consider important.” (RX1017 (Hauser Expert Report) ¶103).

779. Professor Hauser's Purchase Driver Survey did not measure whether consumers were deceived by TurboTax advertisements (Novemsky (Complaint Counsel) Tr. 1789).

Response to Finding No. 779:

The Proposed Finding is irrelevant and misleading because this was not the purpose of Dr. Hauser's Purchase Driver Survey. That fact does not mean the Purchase Driver Survey is unhelpful or unreliable, though. To the contrary, the survey provides valuable information about the high-involvement purchase process consumers engage in when choosing a tax-preparation product, the role advertising plays in that purchase process, and the factors that consumers consider. (PFF ¶¶503-505; 786).

780. The Purchase Driver Survey did not use a test/control survey design. (Hauser (Intuit) Tr. 961).

Response to Finding No. 780:

The Proposed Finding is irrelevant and misleading because, unlike Professor Novemsky's survey, the Purchase Driver Survey did not attempt to assess causality. (See Response to CCF ¶532). Indeed, the Purchase Driver Survey was simply a "census survey of the various things that people do" when choosing a tax-preparation provider, and did not attempt to evaluate what causes people to do those things. (PFF ¶786).

781. The sample population for the Purchase Driver Survey included consumers who were eligible for Free Edition. (RX1017 (Hauser Expert Report) ¶ 103, Appendix D ¶ 3; GX749 (Novemsky Rebuttal Expert Report) ¶ 189).

Response to Finding No. 781:

Intuit has no specific response.

782. Professor Hauser did not collect any information that could be used to determine whether his respondents were eligible to file their taxes for free with TurboTax. (RX1017 (Hauser Expert Report) Appendix D ¶¶ 7-14; GX749 (Novemsky Rebuttal Expert Report) ¶ 190).

Response to Finding No. 782:

The Proposed Finding is irrelevant because Dr. Hauser did not need to collect this information in order to accomplish his objective, which was “[t]o study the process of consumers’ tax preparation information acquisition” and “to provide insight on the process that tax filers go through to identify a tax preparation solution.” (RX1017 (Hauser Expert Report) ¶103). In light of that purpose, it was unnecessary for Dr. Hauser to identify the participants in his survey sample who were eligible, or not eligible, to use TurboTax Free Edition.

783. The Purchase Driver Survey results show that 55.7% of all survey respondents did not consider switching tax preparation methods. (RX1017 (Hauser Expert Report) Figure 20, Exhibit 9).

Response to Finding No. 783:

Intuit has no specific response except to note that these results do not indicate that consumers feel locked in to one tax preparation method or provider, or that consumers experience switching costs that prevent them from changing methods or providers. Rather, some consumers may find that their tax situation has not changed significantly to warrant finding a new solution, or they may feel satisfied that their current method or provider that works for them. (RX1017 (Hauser Expert Report) ¶130). Indeed, this group of Purchase Driver Survey participants who did not consider switching from the previous year’s method generally attributed their decision to the fact that their current choice was satisfactory, familiar, and/or easy to use. (RX1017 (Hauser Expert Report) ¶130).

784. The Purchase Driver Survey results show that 32.3% of survey respondents used the same tax preparation method as in the previous year but did not switch methods. (RX1017 (Hauser Expert Report) Figure 20, Exhibit 9).

Response to Finding No. 784:

The Proposed Finding is incorrect. Dr. Hauser’s Purchase Driver Survey results show that 32.3% of survey respondents used the same tax preparation method or provider as the

previous year *but had considered using a different method or provider*. (RX1017 (Hauser Expert Report) fig. 20). These results are a reflection of consumers' willingness to change how they prepare their taxes and signals that they are not "locked in" to any one provider from one year to the next. (RX1017 (Hauser Expert Report) ¶128).

785. The Purchase Driver Survey results show that 11% of survey respondents actually switched tax preparation methods year over year. (RX1017 (Hauser Expert Report) Figure 20, Exhibit 9).

Response to Finding No. 785:

Intuit has no specific response except to note that this group of respondents is further evidence that consumers' willingness to change how they prepare their taxes and signals that they are not "locked in" to any one provider from one year to the next. (RX1017 (Hauser Expert Report) ¶128).

786. The Purchase Driver Survey does not ask any questions about information consumers gain passively about tax preparation providers. (RX1017 (Hauser Expert Report) Appendix D ¶ 18 (questions limited to "research" consumers conduct); GX749 (Novemsky Rebuttal Expert Report) ¶ 158), and instead asks consumers what, if any, research they conducted into potential tax preparation methods / providers and whether there was anything else they would like to add about the research that they conducted when choosing a tax preparation method / provider. (RX1017 (Hauser Expert Report) Appendix D ¶ 18, D-2-7, D-2-8).

Response to Finding No. 786:

The Proposed Finding is incorrect because the Purchase Driver Survey did assess the way consumers may gain information passively. Indeed, one of the key questions in the survey was a closed-ended question that included answer options like "Spoke with friends / family," "Reviewed marketing emails," and "Viewed Advertisements." (RX1017 (Hauser Expert Report) at D-2-8). None of those choices is a source of information that consumers would necessarily seek out actively.

787. By asking respondents what "research" they conducted, Professor Hauser discourages respondents from indicating they viewed advertisements, because even respondents who

gleaned information from advertisements they viewed would likely not consider that activity “research.” (GX749 (Novemsky Rebuttal Expert Report) ¶ 184).

Response to Finding No. 787:

The Proposed Finding is incorrect because Professor Hauser included “Viewed advertisements” as an explicit answer option in one of his closed-ended questions. (RX1017 (Hauser Expert Report) at D-2-8). As explained in Shari Diamond’s “Reference Manual on Survey Research”—which Professor Novemsky cites (*e.g.*, CCFR ¶532)—this practice helps to “remind respondents of options that they would not otherwise consider or which simply do not come to mind as easily.” (RX709 (Intuit) at 392). Professor Novemsky himself acknowledged at trial, moreover, that “respondents are more likely to choose an answer that is explicitly mentioned than one that is not explicitly mentioned.” (Novemsky (FTC) Tr. 475). Thus, it is highly unlikely that participants would have simply disregarded advertisements as an answer after being expressly presented with it as an option. And yet, only 26.4% of respondents selected “Viewed advertisements” as one of their answers. (RX1017 (Hauser Expert Report) Figure 14).

788. Professor Hauser’s question “what research did you conduct,” (RX1017 (Hauser Expert Report) Appendix D ¶ 18, D-2-7), is subject to demand artifacts because respondents are likely to understand from the framing and emphasis of this question that the researcher believes they should have done research, encouraging them to provide examples of research they might have conducted, whether or not they in fact undertook those activities. (GX749 (Novemsky Rebuttal Expert Report) ¶ 187).

Response to Finding No. 788:

The Proposed Finding is incorrect because it misquotes Dr. Hauser’s survey questions. The questions in fact asked respondents “What, if any, research did you conduct.” (RX1017 (Hauser Expert Report) at D-2-7 to D-2-8 (emphasis added)). Thus, the question was drafted deliberately to avoid suggesting to respondents that the survey drafter expected them to have done any research.

789. The question emphasis is also likely to lead respondents to report activities that they actively pursued, and activities they think would be considered “research,” which is unlikely to include the context in which most individuals would view advertisements. (GX749 (Novemsky Rebuttal Expert Report) ¶ 187).

Response to Finding No. 789:

The Proposed Finding is incorrect because Dr. Hauser collected data on participants’ research activities using both open- and closed-ended questions. And his closed-ended question included “Viewed advertisements” as an explicit answer option. (RX1017 (Hauser Expert Report) at D-2-8). As explained in Shari Diamond’s “Reference Manual on Survey Research”—which Professor Novemsky relies on (*e.g.*, CCFF ¶ 532)—this practice helps to “remind respondents of options that they would not otherwise consider or which simply do not come to mind as easily.” (RX709 (Intuit) at 392). Professor Novemsky himself acknowledged at trial, moreover, that “respondents are more likely to choose an answer that is explicitly mentioned than one that is not explicitly mentioned.” (Novemsky (FTC) Tr. 475). Thus, it is highly unlikely that participants would have simply disregarded advertisements as an answer after being expressly presented with it as an option. And yet, only 26.4% of respondents selected “Viewed advertisements” as one of their answers. (RX1017 (Hauser Expert Report) Figure 14).

790. Response options to the closed-ended research question Professor Hauser asked survey respondents included “Explored tax preparation software / services websites” and “Tried out one or more online tax website(s) without filing” (RX1017 (Hauser Expert Report) Appendix D ¶ 18, D-2-8), and options available in the list Professor Hauser provided to respondents may overlap with one another, artificially inflating the number of activities respondents would report. (GX749 (Novemsky Rebuttal Expert Report) ¶ 164).

Response to Finding No. 790:

The Proposed Finding is unsupported, inherently speculative, and ultimately irrelevant. There is no reason to believe that survey participants who visited tax websites specifically to “tr[y] out” the software would also select “Explored tax preparation software / services websites.” Rather, if participants viewed those answer choices as overlapping or duplicative,

common sense instructs that they would likely choose the more specific option that best describes the activity they undertook.

In any event, Complaint Counsel's concern about "artificially inflating the number of activities respondents would report" is misplaced. Dr. Hauser's conclusion that choosing a tax-preparation provider is a high-involvement purchase process does not derive strictly from the number of activities that respondents reported. Rather, both "Explored tax preparation ... websites" and "Tried out one or more online tax website(s)" are, on their own, inherently high-involvement activities. That is true even if Complaint Counsel are correct that participants only "spent a few minutes" performing those activities (CCFF ¶791). Indeed, Complaint Counsel have failed to establish that it would take any reasonable consumer longer than a "few minutes" (CCFF ¶791) to determine whether they qualify to file for free with TurboTax. To the contrary, "Complaint Counsel's own 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 the free TurboTax SKUs. (PFF ¶790).

791. Respondents may consider "Explored tax preparation software / services websites" and "Tried out one or more online tax website(s) without filing" as similar activities, and check both after having spent a few minutes answering initial questions about their tax situation on a single website. (GX749 (Novemsky Rebuttal Expert Report) ¶ 164).

Response to Finding No. 791:

The Proposed Finding is unsupported, inherently speculative, and ultimately irrelevant. There is no reason to believe that survey participants who visited tax websites specifically to "tr[y] out" the software would also select "Explored tax preparation software / services websites." Rather, if participants viewed those answer choices as overlapping or duplicative, common sense instructs that they would choose the more specific option that best describes the activity they undertook.

And in any event, Complaint Counsel’s concern about “artificially inflating the number of activities respondents would report” (CCFF ¶790) is misplaced. Dr. Hauser’s conclusion that choosing a tax-preparation provider is a high-involvement purchase process does not derive strictly from the number of activities that respondents reported. Rather, both “Explored tax preparation ... websites” and “Tried out one or more online tax website(s)” are, on their own, inherently high-involvement activities. That is true even if Complaint Counsel are correct that participants only “spent a few minutes” performing those activities. Indeed, Complaint Counsel have failed to establish that it would take any reasonable consumer longer than a “few minutes” to determine whether they qualify to file for free with TurboTax. To the contrary, Complaint Counsel’s own expert (Dr. Yoeli) 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 the free TurboTax SKUs. (PFF ¶790; PFF ¶369).

792. The most common response to Professor Hauser’s Purchase Driver Survey open-ended questions regarding activities consumers undertook as research in selecting their tax preparation method and provider relate to using a search engine, with 38% of responses listing search engine. (RX1017 (Hauser Expert Report) Exhibit 11b; GX749 (Novemsky Rebuttal Expert Report) ¶ 179; *see also* Hauser (Intuit) 963-964).

Response to Finding No. 792:

Intuit has no specific response except to note that Dr. Hauser used blind coders to categorize the open-ended responses in his Purchase Driver Survey. Professor Novemsky, however, did not use blind coders to review the responses in his survey. (*See* GX749 (Novemsky Rebuttal Expert Report) ¶61 (referencing “my review” of responses)).

793. Consumers using a search engine and going to a TurboTax website encounter TurboTax advertising and/or marketing. (GX749 (Novemsky Rebuttal Expert Report) ¶ 179; *see also* GX156 (Ryan (Intuit) IHT) at 30-31; RX582 (Intuit) at INTUIT-FTC-PART3-000601293; Golder (Intuit) Tr. 1231).

Response to Finding No. 793:

Intuit has no specific response except to clarify that consumers would not “encounter TurboTax advertising and/or marketing” through any and all use of a search engine. Intuit agrees, however, that consumers are able to use a search engine to find the TurboTax website, where they would encounter TurboTax marketing. In fact, this process would enable consumers to find detailed information about the qualifications for TurboTax’s free SKUs within a few seconds. (PFF ¶¶131-132, 369).

794. Survey respondents were not provided with a “search engine” option for closed-ended responses. (RX1017 (Hauser Expert Report) Figure 14, Exhibit 11a; Hauser (Intuit) Tr. 965; RX1391 (Hauser (Intuit) Dep.) at 129-130).

Response to Finding No. 794:

The Proposed Finding is irrelevant because, as Complaint Counsel concede (CCFF ¶795), respondents were provided with other closed-ended answers that likely described respondents’ use of a search engine with more specificity. Those answers included “Explor[ing] tax preparation software / service websites,” “Explor[ing] the IRS or state government websites,” “Read[ing] customer reviews or testimonials,” and “Read[ing] articles, rankings, or third-party reviews.” (RX1017 (Hauser Expert Report) fig. 14).

795. It is possible that consumers who described “search engine” in their open-ended responses may have selected the option or options most like “search engine,” which could have been “Explor[ing] tax preparation software / service websites” or “Explor[ing] the IRS or state government websites.” (RX1391 (Hauser (Intuit) Dep.) at 132-133; GX749 (Novemsky Rebuttal Expert Report) ¶ 163 fn. 264).

Response to Finding No. 795:

Intuit has no specific response.

796. Results of the Purchase Driver Survey related to research and important factors in tax preparation are based on only those respondents that considered switching (or actually switched) tax preparation providers, which is less than half of respondents, (RX1017 (Hauser Expert Report) Figure 20, ¶ 103 fn. 225), and because most survey results are based on less than half of respondents, the Purchase Driver Survey leads to inflated

results and unreliable conclusions. (GX749 (Novemsky Rebuttal Expert Report) ¶¶ 5, 152, 154-155, 161).

Response to Finding No. 796:

The Proposed Finding is incorrect because this aspect of the Purchase Driver Survey did not “lead[] to inflated results” or “unreliable conclusions.” Quite the opposite: It ensured that the survey results were reliable and not influenced by respondents’ inaccurate memories. As Dr. Hauser explained, the respondents who did not consider switching were not asked “questions about their decision-making process” because they had not made a “considered decision regarding their tax method/provider” in at least a year (if not more) and therefore “may no longer have detailed recollection of their thinking.” (RX1017 (Hauser Expert Report) at D-1-6 to D-1-7; *see also* RX1391 (Hauser (Intuit) Dep. 118-19, 126). Thus, the Purchase Driver Survey instead asked those respondents “open-ended questions about why they did not consider using another method / provider to prepare and file their taxes in 2021.” (RX1017 (Hauser Expert Report) at D-1-7). Those respondents indicated that the survey participants had not considered switching methods because their current choice was satisfactory, familiar, and/or easy to use. (RX1017 (Hauser Expert Report) ¶130).

797. Professor Hauser provides no justification for why individuals who did not consider switching tax preparation methods or providers (55.7% of the sample) were not asked how they selected the tax preparation service they use, and as a consequence, why they are excluded from the main analyses in the report. (GX749 (Novemsky Rebuttal Expert Report) ¶ 181).

Response to Finding No. 797:

The Proposed Finding is incorrect because Dr. Hauser did provide a justification. As Dr. Hauser explained, the respondents who did not consider switching were not asked the same “questions about their decision-making process” because they had not made a “considered decision regarding their tax method/provider” in at least a year (if not more) and therefore “may

no longer have detailed recollection of their thinking.” (RX1017 (Hauser Expert Report) at D-1-6 to D-1-7; *see also* RX1391 (Hauser (Intuit) Dep. 118-19, 126). Thus, the Purchase Driver Survey instead asked those respondents “open-ended questions about why they did not consider using another method / provider to prepare and file their taxes in 2021.” (RX1017 (Hauser Expert Report) at D-1-7). Those respondents indicated that the survey participants had not considered switching methods because their current choice was satisfactory, familiar, and/or easy to use. (RX1017 (Hauser Expert Report) ¶130).

798. Professor Hauser fails to account for two important facts related to information from family and friends, namely that: 1) family and friends may also have been influenced by Intuit’s advertising; and 2) even if an individual’s family and friends have accurate information, they may not have the same tax situation as the individual, and thus may not provide accurate information to the individual on whether or not they can file for free using TurboTax. (GX749 (Novemsky Rebuttal Expert Report) ¶ 186).

Response to Finding No. 798:

The Proposed Finding is incorrect, speculative, and irrelevant. Indeed, the Proposed Finding repeatedly uses the word “may”—illustrating that it is unsupported and based entirely on speculation. As one of Complaint Counsel’s experts admitted, this kind of statement is “not a very strong claim.” (PFF ¶930). Moreover, the Proposed Finding is irrelevant because Dr. Hauser never assumes or argues that conversations with family and friends would always provide accurate information. His Purchase Driver Survey was instead simply a “census survey of the various things that people do” when choosing a tax-preparation provider (PFF ¶786), and it shows that consumers rely on a variety of information sources—conversations with friends and family being just one of those possible sources. (RX1017 (Hauser Expert Report) ¶¶105-111).

799. Professor Hauser assumes, without support, that individuals could not be misled by TurboTax’s advertising unless they relied solely on advertising in researching tax preparation providers, because (according to Professor Hauser) any other sources of information (including word of mouth from family and friends, or reading articles from third-party sources) would not be influenced by TurboTax’s marketing, and would

completely correct any misimpression about one's ability to file for free. (GX749 (Novemsky Rebuttal Expert Report) ¶ 149, 162).

Response to Finding No. 799:

The Proposed Finding is incorrect because Dr. Hauser never makes this assumption, as his Purchase Driver Survey was not designed to assess whether any “misimpression” exists. The Purchase Driver Survey was simply a “census survey of the various things that people do” when choosing a tax-preparation provider (PFF ¶786), and it shows that consumers rely on a variety of information sources. (RX1017 (Hauser Expert Report) ¶¶105-111). It also bears emphasis that Complaint Counsel have identified a single “article[] from third-party sources” that provides inaccurate information about the qualifications for free TurboTax SKUs because of the “influence” of “TurboTax marketing.” Thus, they have failed to establish that consumers’ use of such articles would not correct any misimpression.

800. Word-of-mouth is influenced by advertising a substantial amount of the time, with one study showing that up to 25% of conversations about brands mention advertising. (GX749 (Novemsky Rebuttal Expert Report) fn. 421 (citing Ed Keller and Brad Fay, “Word-of-Mouth Advocacy A New Key to Advertising Effectiveness,” *Journal of Advertising Research* 52, no. 4, 2012, pp. 459–464 at 462)).

Response to Finding No. 800:

The Proposed Finding is misleading, speculative, and appears to be unsupported by the cited article (which is not itself an exhibit in the record). That some portion of conversations “mention advertising” does not mean that the consumers participating in those conversation are necessarily “influenced” by such ads to believe that they can file their taxes for free. Complaint Counsel have not introduced any evidence establishing that fact in this case.

801. Professor Hauser claims that the process of selecting a tax preparation provider is high-involvement, (RX1017 (Hauser Expert Report) ¶¶ 102, 105, 107), but none of the academic sources he cites to for this proposition relate to tax preparation. (RX1017 (Hauser Expert Report) ¶¶ 102 fn. 222, (citing RX546 (Intuit) at FTC-PART3-000595158- FTC-PART3-000595159) & RX772 (Intuit) (a report from JP Morgan

Chase), 105 fn. 228 (citing RX546 (Intuit) at FTC-PART3-000595173); GX749 (Novemsky Rebuttal Expert Report) ¶ 165).

Response to Finding No. 801:

The Proposed Finding is incorrect because one of the sources Dr. Hauser cites literally includes “Filing Taxes” in the title. *See* (RX1017 (Hauser Expert Report) ¶102 n.222 (citing RX772, Farrell, D., Greig, F. and Hamoudi, A., “Filing Taxes Early, Getting Healthcare Late,” JPMorgan Chase & Co., April 2018). To the extent Complaint Counsel do not view that source as “academic,” they fail to explain why that renders the source unreliable.

Complaint Counsel’s false criticism of Dr. Hauser can, however, be legitimately asserted against Professor Novemsky. In arguing that tax-preparation is *not* a high-involvement process, he cites only to articles about retirement and healthcare decisions—he does not cite any sources about tax-preparation. (*See* GX749 (Novemsky Rebuttal Expert Report) ¶227 nn.402-403 (citing Melissa A. Z. Knoll, *The Role of Behavioral Economics and Behavioral Decision Making in Americans’ Retirement Savings Decisions*, 70 Soc. Sec. BULL. 1 (2010); Richard H. Thaler and Cass R. Sunstein, *Nudge: Improving Decisions About Health, Wealth, and Happiness* (New York, NY: Penguin, 2009), pp. 179–197, 218–249); *see also* Response to CCFF ¶739).

802. Many individuals file close to the filing deadline and may not have the time before the deadline to perform the extensive research. (GX303 (Novemsky Expert Report) ¶ 22 fn. 20; GX749 (Novemsky Rebuttal Expert Report) ¶ 165).

Response to Finding No. 802:

The Proposed Finding is incorrect, misleading, and speculative. For one thing, 60% of taxpayers file their taxes by March, well before the filing deadline. (*See* PFF ¶¶546-547). For another, even for consumers who file on the deadline day, there is no reason to believe that they would lack the requisite time to determine whether they qualify to file for free with TurboTax. Complaint Counsel’s own expert (Dr. Yoeli) admitted 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 the free TurboTax SKUs. (PFF ¶790; PFF ¶369).

Finally, Complaint Counsel’s phrasing of this Proposed Finding—which uses the word “may”—concedes its speculative nature. As Dr. Yoeli also admitted, this kind of statement is “not a very strong claim.” (PFF ¶930).

803. Individuals also may not have the inclination to research different tax preparation services. (GX749 (Novemsky Rebuttal Expert Report) ¶¶ 165, 227, 234; *see also* Novemsky (Complaint Counsel) Tr. 1776-1777).

Response to Finding No. 803:

The Proposed Finding is inherently speculative and unsupported by any evidence other than Professor Novemsky’s baseless assertions. Indeed, the phrasing of the finding—which uses the word “may”—concedes its speculative nature. As Complaint Counsel’s other expert (Dr. Yoeli) admitted, this kind of statement is “not a very strong claim.” (PFF ¶930). Such a claim certainly does not undermine the results of Dr. Hauser’s Purchase Driver Survey, which confirmed that on average, consumers use no fewer than three different sources when researching tax-preparation products. (RX1017 (Hauser Expert Report) ¶109).

804. The Purchase Driver Survey confirms that price is an important factor that consumers considered in choosing a tax preparation provider. (RX1017 (Hauser Expert Report) ¶ 112).

Response to Finding No. 804:

Intuit has no specific response except to note that only six out of 125 respondents (4.8%) selected price as their *only* important factor. (RX1017 (Hauser Expert Report) ¶113). Moreover, respondents frequently cited non-price factors such as ease of use (68.8% of respondents), confidence in the accuracy and reliability of the results (52.8%), and data security (45.6%) as important factors as well. (RX1017 (Hauser Expert Report) ¶113). On average, respondents

reported 4.6 different factors that were important, and 91.2% of respondents selected two or more factors. (RX1017 (Hauser Expert Report) ¶113).

805. The Purchase Driver Survey shows that that 70.4% of respondents consider price an important factor in their choice of a tax preparation provider. (RX1017 (Hauser Expert Report) ¶ 113; Hauser (Intuit) Tr. 967); RX1391 (Hauser (Intuit) Dep.) at 112).

Response to Finding No. 805:

Intuit has no specific response except to note that only six out of 125 respondents (4.8%) selected price as their *only* important factor. (RX1017 (Hauser Expert Report) ¶113). Moreover, respondents frequently cited non-price factors such as ease of use (68.8% of respondents), confidence in the accuracy and reliability of the results (52.8%), and data security (45.6%) as important factors as well. (RX1017 (Hauser Expert Report) ¶113). On average, respondents reported 4.6 different factors that were important, and 91.2% of respondents selected two or more factors. (RX1017 (Hauser Expert Report) ¶113).

806. Price was the most commonly cited factor important to consumers shopping for tax services. (RX1017 (Hauser Expert Report) ¶ 113; Hauser (Intuit) Tr. 967; Novemsky (Complaint Counsel) Tr. 1789-1790).

Response to Finding No. 806:

Intuit has no specific response except to note that only six out of 125 respondents (4.8%) selected price as their *only* important factor. (RX1017 (Hauser Expert Report) ¶113). Moreover, respondents frequently cited non-price factors such as ease of use (68.8% of respondents), confidence in the accuracy and reliability of the results (52.8%), and data security (45.6%) as important factors as well. (RX1017 (Hauser Expert Report) ¶113). On average, respondents reported 4.6 different factors that were important, and 91.2% of respondents selected two or more factors. (RX1017 (Hauser Expert Report) ¶113).

807. Professor Hauser did not ask survey respondents to rank which factor was most important to them in selecting a tax preparation service provider. (RX1017 (Hauser Expert Report) ¶ 113 fn. 260; RX1391 (Hauser (Intuit) Dep.) at 126-127; GX749 (Novemsky Rebuttal

Expert Report) ¶ 169), and the Purchase Driver Survey has no way of determining how respondents would consider or weigh the importance of each of the factors named (including price), and thus cannot reliably conclude that respondents made trade-offs between factors when making a decision of which tax preparation method or service to use, or that “free” was not a driver of consumer choice. (GX749 (Novemsky Rebuttal Expert Report) ¶ 169).

Response to Finding No. 807:

The Proposed Finding is incorrect because the various factors that survey participants identified in response to Dr. Hauser’s survey necessarily would require consumers to make tradeoffs in the actual marketplace. For example, consumers who identify both “Price” and “Having expert help / individualized attention” or “Availability of additional services” would inherently need to make trade-offs, because those non-price priorities will require consumers to pay additional money. (See RX1017 (Hauser Expert Report) fig. 16). The same will often be true for other non-price factors like “Ease of use,” “Confidence in accuracy,” “Data security,” “Tax refund amount,” “Brand / reputation,” and “Getting refund quickly.” (See RX1017 (Hauser Expert Report) fig. 16).

808. The Hauser Purchase Driver Survey is not designed to evaluate whether consumers feel “locked in” after having filled in their personal and financial information. (RX1017 (Hauser Expert Report) ¶ 125; GX749 (Novemsky Rebuttal Expert Report) ¶ 174).

Response to Finding No. 808:

The Proposed Finding is incomplete because although the Purchase Driver Survey was not designed for this purpose, Dr. Hauser made clear that the survey did provide evidence undermining the allegation that consumers feel “locked in” to a particular method or provider. As he explained, over 20% of respondents reported trial use of different online tax-preparation companies. (RX1017 (Hauser Expert Report) ¶125). That some consumers engage in this type of comparison shopping before filing their taxes undermines the allegation that the sunk cost of tax filers’ time necessarily “locks” them into filing.

C. Intuit Expert Bruce Deal

809. Bruce Deal submitted an expert report on behalf of Intuit and testified at trial. (*See generally* RX1027 (Deal Expert Report); Deal (Intuit) Tr. 1291-1496).

Response to Finding No. 809:

The Proposed Finding is misleading in part. Mr. Deal submitted an expert report providing his expert opinions on the questions assigned to him by Intuit’s counsel. (RX1027 (Deal Expert Report) ¶¶6-7). Intuit has no other specific response except to note that Mr. Deal did testify at trial where he offered testimony and the following opinions:

Intuit (like other providers of tax-preparation services) has substantial economic incentives *not* to engage in deception. (RX1027 (Deal Expert Report) ¶10; *see also* PFF ¶¶94-95). 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,” firms offering tax-preparation services (including Intuit) derive far greater value from exceeding customer expectations and earning repeat business than they do from one-off transactions. (PFF ¶¶39, 44-45, 89). Those features, coupled with the high cost of acquiring new customers (PFF ¶88) and the ease with which consumers can both detect and punish deception, including by switching to another tax preparation service and sharing their negative experiences, mean that Intuit (like other firms in the tax-preparation industry) has an incentive *not* to chase single-year gains by deceiving consumers in the manner alleged by Complaint Counsel (PFF ¶95; *see also* PFF ¶¶40, 51-55, 89).

The actual evidence from Intuit’s customer-level data is not consistent with a “bait and switch” strategy as alleged by Complaint Counsel. Complaint Counsel’s allegations of deception cannot apply to the vast majority (97.6 percent) of the individuals who logged into their TurboTax accounts in Tax Year 2021. (PFF ¶674). This percentage includes customers who

used TurboTax to file their federal and state tax returns for free (13.4 million) (PFF ¶¶665), customers who switched from TurboTax to another form of tax preparation (17.6 million, of whom 6.8 million never even started a return with TurboTax) (PFF ¶¶666; *see also* PFF ¶¶667-668), and customers for whom the data showed either familiarity with or preference for paid TurboTax SKUs or services (e.g., customers who used or had been recommended a paid SKU in the two prior years) (23.1 million customers) (PFF ¶¶669; *see also* PFF ¶¶670-673). For the remaining 1.3 million paying TurboTax customers, Mr. Deal examined those customers most susceptible to the deception Complaint Counsel allege: new Free Edition customers (i.e., those unfamiliar with the product), who found the product through a TurboTax advertisement, spent a material amount of time using it (at least 60 minutes) before being told they were not eligible for Free Edition, and switched to a paid TurboTax SKU. (PFF ¶¶678; *see also* PFF ¶¶669-677). And among those customers, Mr. Deal found just 510 customers—less than 0.0009% of the 55.5 million individuals (or 1 in 100,000) included in his analysis—for whom there was evidence of possible deception in the data. (PFF ¶¶679-682).

Complaint Counsel offered little to no affirmative expert opinions or other testimony on these topics.

810. Mr. Deal does not have a PhD. (RX1027 (Deal Expert Report) Appendix A-1; Deal (Intuit) Tr. 1292, 1389).

Response to Finding No. 810:

Intuit has no specific response except to note that Mr. Deal’s qualifications to offer his opinions in this case went unquestioned. (PFF ¶¶899-900). There is no requirement that an expert must have a PhD to offer helpful opinions to the Court—rather, the expert must have “scientific, technical, or other specialized knowledge that will help the trier of fact,” and form opinions through “reliable principles and methods.” Fed. R. Evid. 702. Mr. Deal is an

economist and holds multiple academic degrees from well-regarded institutions, including Harvard University. (RX1027 (Deal Expert Report) App’x A at A-1; Deal (Intuit) Tr. 1291-1293; *see also* PFF ¶898). He has offered expert opinions within the scope of his training, experience, and specialized knowledge as an economist in scores of other proceedings and has never once been deemed unqualified to do so. (Deal (Intuit) Tr. 1293). Complaint Counsel’s suggestion that Mr. Deal was unqualified because he does not hold a PhD degree is not just meritless, it also is untimely. If Complaint Counsel wished to exclude Mr. Deal’s opinions on the grounds that he was unqualified, their deadline to make such motion lapsed long before trial.

811. Mr. Deal does not have any background in consumer psychology. (Deal (Intuit) Tr. 1389).

Response to Finding No. 811:

The Proposed Finding is misleading and irrelevant. While Mr. Deal testified that he did not have a background in consumer psychology “*per se*,” he has extensive experience offering opinions in cases involving allegations of consumer fraud and false advertising and analyzing consumer data related to such allegations. (RX1027 (Deal Expert Report) ¶4). That is precisely the work he performed in this case. (*See* RX1395 (Deal (Intuit) Dep.) at 21-22).

Further, Mr. Deal is not lots of things, not just *not a psychologist*. None of that matters, however, because Mr. Deal did not offer opinions regarding or requiring psychology, and he was eminently qualified to offer the opinions that he did offer.

Mr. Deal first evaluated the competitive dynamics of the tax-preparation industry and firms’ economic incentives in that industry, and concluded that Intuit (like other providers of tax-preparation services) has substantial economic incentives *not* to engage in deception. (RX1027 (Deal Expert Report) ¶10; *see also* PFF ¶¶94-95). At trial, Mr. Deal explained that 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,” firms offering tax-preparation

services (including Intuit) derive far greater value from exceeding customer expectations and earning repeat business than they do from one-off transactions. (PFF ¶¶39, 44-45, 89). Those features, coupled with the high cost of acquiring new customers (PFF ¶88) and the ease with which consumers can both detect and punish deception, including by switching to another tax preparation service and sharing their negative experiences, mean that Intuit (like other firms in the tax-preparation industry) has an incentive *not* to chase single-year gains by deceiving consumers in the manner alleged by Complaint Counsel (PFF ¶95, *see also* PFF ¶¶40, 51-55, 88-89).

Mr. Deal next analyzed Intuit's customer data to determine whether actual TurboTax customers behaved in a manner consistent with the widespread deception alleged by Complaint Counsel. (PFF ¶663). He found that they did not. Mr. Deal instead observed that among the 55.5 million Intuit consumers in who created or logged into an existing TurboTax account in Tax Year 2021, approximately 97.6% exhibited characteristics or behaviors inconsistent with the deception Complaint Counsel allege. (PFF ¶674). These include customers who actually used TurboTax to file their federal and state tax returns for free (13.4 million) (PFF ¶665), customers who switched from TurboTax to another form of tax preparation (17.6 million, of whom 6.8 million never even started a return with TurboTax) (PFF ¶666; *see also* PFF ¶¶667-668), and customers for whom the data showed either familiarity with or preference for paid TurboTax SKUs or services (e.g., customers who used or had been recommended a paid SKU in the two prior years) (23.1 million customers) (PFF ¶669; *see also* PFF ¶¶670-673). For the remaining 1.3 million paying TurboTax customers, Mr. Deal focused his analysis on those most susceptible to the deception Complaint Counsel allege: new Free Edition customers (i.e., those unfamiliar with the product) who found it through a TurboTax advertisement, spent a material amount of

time using the product (at least 60 minutes) before being told they were not eligible for Free Edition, and switched to a paid TurboTax SKU. (PFF ¶¶678; *see also* PFF ¶¶669-677). And among those customers, Mr. Deal found just 510 customers—less than 0.0009% of the 55.5 million individuals (or 1 in 100,000) included in his analysis—for whom there was evidence of possible deception in the data. (PFF ¶¶679-682).

812. Mr. Deal has spent the majority of his career, at least 25 years, working for Analysis Group. (Deal (Intuit) Tr. 1381-1382; *see* RX1027 (Deal Expert Report) Appendix A-1).

Response to Finding No. 812:

Intuit has no specific response to the Proposed Finding except to note that Professor Novemsky has worked for the same employer for the majority of his career: at least 23 years. (GX303 (Novemsky Expert Report) App’x A at 1). To the extent that Complaint Counsel are trying to cast aspersions on Analysis Group for some reason, that is bizarre. The FTC routinely hires experts affiliated with Analysis Group. (GX364 (*FTC v. DirecTV*, No. 15-cv-01129, 2018 WL 3911196 (N.D. Ca. Aug. 16, 2018) (FTC relying upon expert testimony from Dr. Tülin Erdem)). What matters is that Mr. Deal’s opinions were both relevant and reliable. (PFF ¶¶898-903; COL ¶102). And on that score, Complaint Counsel have far less to say. (PFF ¶¶899-900, 903).

813. Mr. Deal has acted as an expert “many, many times” in “a variety of different industries.” (Deal (Intuit) Tr. 1382-86; *see* RX1027 (Deal Expert Report) Appendix A-18-23; RX1395 (Deal (Intuit) Dep.) at 23-25).

Response to Finding No. 813:

The Proposed Finding is correct. Mr. Deal has been qualified by courts all across the country as an expert witness, his testimony is routinely credited by those courts, and he has worked in a “variety of different industries” during his career. Drawing on that expertise, Mr. Deal offered the following opinions in this case. First, Mr. Deal opined that Intuit has substantial

economic incentives not to engage in deception. (RX1027 (Deal Expert Report) ¶10; PFF ¶¶39-40, 44-45, 51-55, 88-89, 95, 901). Second, Mr. Deal opined that the actual evidence from Intuit's customer-level data is not consistent with a "bait and switch" strategy as alleged by Complaint Counsel. (PFF ¶¶663-682, 902). Those opinions were not credibly rebutted at trial.

814. Mr. Deal provides expert testimony at a trial or at an arbitration "probably once a month or maybe even a little more. (Deal (Intuit) Tr. 1385-1386; *see* RX1027 (Deal Expert Report) Appendix A-18-23; RX1395 (Deal (Intuit) Dep.) at 24).

Response to Finding No. 814:

Mr. Deal is routinely asked to offer expert opinions within the scope of his training, experience, and specialized knowledge as an economist, and, critically, he has never once been deemed unqualified to do so. (Deal (Intuit) Tr. 1293). As relevant here, Mr. Deal is an economist with extensive experience in working with consumer data, including in the financial services sector, and has brought that experience to bear in developing the opinions offered in his report and at the hearing. (Deal (Intuit) Tr. 1291-1293; RX1395 (Deal (Intuit) Dep.) at 21-23; RX1027 (Deal Expert Report) ¶4).

815. Mr. Deal "file[s] lots of reports and [does] lots of depositions in various trials and hearings." (Deal (Intuit) Tr. 1386; *see* RX1027 (Deal Expert Report) Appendix A-18-23; RX1395 (Deal (Intuit) Dep.) at 24-25).

Response to Finding No. 815:

With each entirely unnecessary Proposed Finding regarding Mr. Deal's background, it becomes increasingly clear just how damaging Mr. Deal's almost entirely un rebutted testimony was to Complaint Counsel's theory of deception. Again, Mr. Deal is a well-qualified expert in demand for that reason. His opinions in this case are credible and compelling.

816. Dr. Erez Yoeli was hired by Complaint Counsel as an expert in economics to rebut Mr. Deal. (GX743 (Yoeli Expert Report) ¶¶ 8-10).

Response to Finding No. 816:

Intuit has no specific response other than to note that Dr. Yoeli is also not a psychologist, and in contrast to Mr. Deal, has not been retained as an expert by anyone other than Complaint Counsel at any point in his career. (RX1396 (Yoeli (FTC) Dep.) 98-99).

817. Dr. Yoeli has a Ph.D. in economics from the University of Chicago Booth School of Business. (GX743 (Yoeli Expert Report) ¶ 1).

Response to Finding No. 817:

Intuit has no specific response.

818. Dr. Yoeli is a research scientist at the Massachusetts Institute of Technology's Sloan School of Management, and the founder and co-director of its Applied Cooperation Team. Prior to joining MIT's Sloan School of Management in 2018, he held academic and research positions at Harvard and Yale universities. Dr. Yoeli has also taught undergraduate and graduate courses on economics topics at Harvard University, Stanford Graduate School of Business, MIT, Boston College, University of California San Diego, Johns Hopkins University, and Technion. (GX743 (Yoeli Expert Report) ¶¶ 1-4).

Response to Finding No. 818:

Intuit has no specific response.

819. Dr. Yoeli has published in numerous top scientific and economics journals, including Nature, the Proceedings of the National Academy of Sciences, the New England Journal of Medicine, British Medical Journal Global Health, and the Journal of Economic Behavior and Organization. In 2022, Dr. Yoeli co-authored a book on game theory, titled "Hidden Games: The Surprising Power of Game Theory to Explain Irrational Human Behavior." (GX743 (Yoeli Expert Report) ¶ 5).

Response to Finding No. 819:

Intuit has no specific response except to note that much of Dr. Yoeli's published work—for example, articles entitled, *The Risks of Avoiding a Debate on Gender Differences*; *Encouraging the resumption of economic activity after COVID-19: Evidence from a large scale field experiment in China*; and *Digital Health Support in Treatment for Tuberculosis*, to name just a few (GX743 (Yoeli Expert Report) App'x A; RX1361 (Intuit))—have absolutely no bearing on the issues in this case or his proffered opinions.

820. From 2009 to 2015, Dr. Yoeli worked as an economist at the U.S. Federal Trade Commission. (GX743 (Yoeli Expert Report) ¶ 6).

Response to Finding No. 820:

Intuit has no specific response except to note that no litigant other than the Federal Trade Commission—his former employer—has ever retained Dr. Yoeli as an expert witness. (RX1396 (Yoeli (FTC) Dep.) 98-99).

2. Mr. Deal's Methodology

821. Mr. Deal did not survey any consumers. (*See generally* RX1027 (Intuit) at IV to VII; Deal (Intuit) Tr. 1459 (“Q: ...you never did any analysis to find out consumer’s expectations, right? You didn’t survey any consumers? A: The answer is still no, I didn’t survey any consumers.”)).

Response to Finding No. 821:

Intuit has no specific response to the Proposed Finding except to note that Mr. Deal’s work did not in any way require a survey. Instead, Mr. Deal’s work relied on an analysis of industry dynamics and then an assessment of real-world consumer data. (RX1027 (Deal Expert Report) ¶¶6-7). On the latter, a survey was particularly unnecessary because a survey looks at only a sample of respondents and attempts to extrapolate. Mr. Deal considered *all* TurboTax consumers in TY21 and thus did not need a mechanism for extrapolation. (PFF ¶664).

First, Mr. Deal evaluated the competitive dynamics of the tax-preparation industry and firms’ economic incentives in that context and concluded that Intuit (like other providers of tax-preparation services) has substantial economic incentives *not* to engage in deception. (RX1027 (Deal Expert Report) ¶10; *see also* PFF ¶¶94-95). At trial, Mr. Deal explained that 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,” firms offering tax-preparation services (including Intuit) derive far greater value from exceeding customer expectations and earning repeat business than they do from one-off transactions. (PFF ¶¶39, 44-45, 89). Those features,

coupled with the high cost of acquiring new customers (PFF ¶88) and the ease with which consumers can both detect and punish deception, including by switching to another tax preparation service and sharing their negative experiences, mean that Intuit (like other firms in the tax-preparation industry) has an incentive *not* to chase single-year gains by deceiving consumers in the manner alleged by Complaint Counsel (PFF ¶95, *see also* PFF ¶¶40, 51-55,89).

Second, Mr. Deal analyzed Intuit's customer data to determine whether actual TurboTax customers behaved in a manner consistent with the widespread deception alleged by Complaint Counsel. (PFF ¶663). He found that they did not. Mr. Deal instead observed that among the 55.5 million Intuit consumers in who created or logged into an existing TurboTax account in Tax Year 2021, approximately 97.6% exhibited characteristics or behaviors inconsistent with the deception Complaint Counsel allege. (PFF ¶674). These include customers who actually used TurboTax to file their federal and state tax returns for free in Tax Year 2021 (13.4 million) (PFF ¶665), customers who switched from TurboTax to another form of tax preparation in Tax Year 2021 (17.6 million, of whom 6.8 million never even started a return with TurboTax) (PFF ¶666; *see also* PFF ¶¶667-668), and customers for whom the data showed either familiarity with or preference for paid TurboTax SKUs or services (e.g., customers who used or had been recommended a paid SKU in the two prior years) (23.1 million customers) (PFF ¶669; *see also* PFF ¶¶670-673). For the remaining 1.3 million paying TurboTax customers, Mr. Deal focused his analysis on those most susceptible to the deception Complaint Counsel allege: new Free Edition customers (i.e., those unfamiliar with the product) who found it through a TurboTax advertisement, spent a material amount of time using the product (at least 60 minutes) before being told they were not eligible for Free Edition, and switched to a paid TurboTax SKU. (PFF ¶678; *see also* PFF ¶¶669-677). And among those customers, Mr. Deal found just 510

customers—less than 0.0009% of the 55.5 million individuals (or 1 in 100,000) included in his analysis—for whom there was evidence of possible deception in the data. (PFF ¶¶679-682).

822. Mr. Deal “can’t speak to what any individual consumer might do or perceive.” (Deal (Intuit) Tr. 1394).

Response to Finding No. 822:

The Proposed Finding is inaccurate and misleading because Complaint Counsel have selectively excerpted Mr. Deal’s testimony to misconstrue its meaning. The testimony quoted in the Proposed Finding was offered in response to Complaint Counsel’s question: “[D]o customers always defect from a firm upon realizing that they’re deceived?” (Deal (Intuit) Tr. 1394). In response, Mr. Deal explained that while he could not testify to the subjective beliefs of any individual consumer a “*rational* consumer, upon detection of being deceived and having choices, would not continue with the company.” (Deal (Intuit) Tr. 1394-1395). That testimony was also elicited in the context of Mr. Deal’s first analysis regarding firms’ economic incentives in the tax preparation industry, which did not purport to speak to what individual consumers in the industry might do or perceive. Rather, Mr. Deal’s opinion on the subject, which was corroborated by several of Intuit’s fact witnesses, was that the deception alleged in this case would be easy for rational consumers both to detect and then punish the offending firm, including by switching to a competitor and sharing their negative experiences. (Deal (Intuit) Tr. 1319-1320 (“with regards to deception in the tax preparation industry ... You can clearly detect if you have been deceived ... [D]id you pay or not? So it’s what we call a binary situation. So it’s not one of, gee, I thought I was buying a pound of apples but instead you only gave me nine-tenths of a pound. This is quite clear, so they can detect it.”); PFF ¶95). To the extent the Proposed Finding is intended to offer comment on any other aspect of Mr. Deal’s opinions or testimony, that is not supported by the evidence cited or any other part of the record.

823. Mr. Deal defines deception as occurring: “from the perspective of an economist and the type of work that I’ve done in this and other cases, but it would be developing an inaccurate perception, presumably as a result of some type of representation by a company that’s not accurate, and then not being able to realize that expectation.” (Deal (Intuit) Tr. 1404).

Response to Finding No. 823:

The Proposed Finding is inaccurate and misleading to the extent it omits important context. Mr. Deal was clear in his testimony that his understanding of the deception relevant to this case was derived from the Complaint, and that he used that definition in forming his opinions. (Deal (Intuit) Tr. 1402). Mr. Deal explained that he understood Complaint Counsel to allege a widespread deception wherein a “customer develops an expectation of filing for free ... as a result of seeing an ad, and they develop this expectation, they go to the website, they use the Free Edition product. They discover at some point that they’re not eligible for it, but they’ve invested so much time that ... it doesn’t make sense to switch or they don’t perceive that they’re able to switch, and, therefore, they would pay to file their return.” (Deal (Intuit) Tr. at 1402-1403; *see also* Deal (Intuit) Tr. at 1404 (“developing an inaccurate perception, presumably as a result of some type of representation by a company that’s not accurate, and then not being able to realize that expectation”)).

3. Intuit Economic Incentives

824. Mr. Deal argues that Intuit’s economic incentives are inconsistent with deception. His analysis of Intuit’s economic incentives “assumes rational economic behavior to firms.” (RX1027 (Deal Expert Report) Section IV; RX1395 (Deal (Intuit) Dep.) at 28-29).

Response to Finding No. 824:

Intuit has no specific response except to note that courts generally assume that firms correctly perceive and will act in their economic self-interest. (*See, e.g., Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 218 (7th Cir. 1986) (“we assume that economic actors generally usually have accurate perceptions of economic realities.”)). Complaint Counsel

adduced no evidence to suggest that Intuit—a successful company for over 40 years—was unable to correctly perceive its economic interest or acted irrationally.

825. It is possible, however, for firms to act against their economic best interest and, in doing so, break the law. (GX743 (Yoeli Expert Report) ¶ 30; *see* RX1395 (Deal (Intuit) Dep. at 29-32).

Response to Finding No. 825:

The Proposed Finding is irrelevant. It may theoretically be possible for a company to act against their economic best interest but there is no evidence that Intuit, specifically, was “act[ing] against their economic best interest.” Mr. Deal concluded that, based on the competitive dynamics of the tax-preparation industry and firms’ economic incentives in that context, Intuit (like other providers of tax-preparation services) has substantial economic incentives *not* to engage in deception. (RX1027 (Deal Expert Report) ¶10; *see also* PFF ¶¶94-95). Unrefuted testimony offered by Intuit’s executives, including Mr. Johnson, Ms. Ryan, and Mr. Rubin, confirmed the company was aware of those same incentives, including the negative repercussions that would result from a business strategy to mislead customers, and that Intuit did not pursue such a strategy. (PFF ¶¶94-97, 870). Complaint Counsel also have not proffered evidence that the alleged theory of deception benefitted Intuit, which would be a logical predicate to proving that deception was in Intuit’s “economic best interest.” (PFF ¶97).

826. Whether firms will act in an economically rational way can depend on “managements’ and employees’ abilities and knowledge at the time.” (RX1395 (Deal (Intuit) Dep. at 31-32).

Response to Finding No. 826:

The Proposed Finding is incomplete and misleading because it misrepresents Mr. Deal’s deposition testimony. Mr. Deal testified at his deposition that “generally, businesses operate in economically rational ways that maximize their value, at least to the best of management’s and employees’ abilities and knowledge at the time.” (RX1395 (Deal (Intuit) Dep.) at 31-32). Mr.

Deal accordingly testified that the firms' ability to "maximize their value" may depend on management's and employees' actions, not that such actions dictate whether the firm acts in an economically rational manner. Complaint Counsel also have not offered any evidence that Intuit, specifically, was not acting in an economically rational manner in its marketing of its free TurboTax SKUs. Unrefuted testimony offered by Intuit's executives, including Mr. Johnson, Ms. Ryan, and Mr. Rubin, confirmed the company was aware that were it to engage in a strategy of widespread deception akin to what is alleged by Complaint Counsel the results would be catastrophic for TurboTax's business. (PFF ¶¶94-97, 870). And consistent with those incentives, Intuit's executives testified that the company did not, in fact, engage in a strategy to deceive consumers into believing either that all TurboTax products were free or that TurboTax was free for them when it was not. (PFF ¶¶94-97, 870).

827. Intuit's economic incentives do not preclude deception. (Deal (Intuit) Tr. 1388; GX743 (Yoeli Expert Report) ¶ 32).

Response to Finding No. 827:

The Proposed Finding attacks a strawman—Mr. Deal has not offered the opinion that Intuit's economic incentives *preclude* deception. Instead, Mr. Deal offered reliable testimony that, based on the competitive dynamics of the tax-preparation industry and firms' economic incentives in that context, Intuit (like other providers of tax-preparation services) has substantial economic incentives not to engage in deception. (RX1027 (Deal Expert Report) ¶10; PFF ¶901). Unrefuted testimony offered by Intuit's executives, including Mr. Johnson, Ms. Ryan, and Mr. Rubin, confirmed the company was aware of those same incentives, including the negative repercussions that would result from a business strategy to mislead customers, and that Intuit did not pursue such strategy. (PFF ¶¶94-97, 870). Accordingly, while Mr. Deal's opinion did not purport to preclude deception, he did offer expert testimony that deception was inconsistent with

Intuit's economic incentives, which opinion was confirmed by the testimony of multiple Intuit executives. (PFF ¶¶94-97, 870, 901).

The Proposed Finding also is not supported by paragraph 32 of Dr. Yoeli's expert report (GX743 (FTC)), which does not address whether Intuit's economic incentives preclude deception. Finally, the Proposed Finding incorrectly suggests it is Intuit's burden to show deception was "preclude[d]," when in fact it is Complaint Counsel's burden to show, by a preponderance of the evidence, that the challenged ads were in fact deceptive. (COL ¶¶3-4).

Finally, the Proposed Finding is misleading insofar as it suggests Intuit bears a burden to "preclude deception." Complaint Counsel bear the burden to show, by a preponderance of the evidence, that the challenged ads were deceptive. (COL ¶¶3-4).

828. If consumers who were deceived into visiting turbotax.com have some tendency towards using a tax preparation solution that is in front of them, then deception could be in Intuit's economic best interest. (GX743 (Yoeli Expert Report) ¶ 18).

Response to Finding No. 828:

To begin, because the Proposed Finding rests only on Dr. Yoeli's expert report, it should be rejected. Dr. Yoeli's opinions in this case should be entitled to little or no weight. Dr. Yoeli did not consider most of the record, he did not review the challenged ads, misapplied the definition of deception, and did "very little new analysis" of his own. (PFF ¶¶929-931). Furthermore, this opinion, like each opinion he offers, is by his own admission "not a very strong claim." (RX1396 (Yoeli (FTC) Dep.) at 60; Yoeli (FTC) Tr. 1738).

This Proposed Finding amply illustrates why Dr. Yoeli's opinions should be given no weight. The cited portion of Dr. Yoeli's rebuttal expert report cites to no record evidence, no testimony, and no economic literature to support the Proposed Finding; instead, Dr. Yoeli offers only conjecture and speculation. He outlines a hypothetical scenario in which consumers deceived into visiting the TurboTax website have "*some tendency*" to use TurboTax, and then

states (again, without any evidence in support) that deception then “*could*” be “in Intuit’s economic interest.” (GX743 (Yoeli Expert Report) ¶18).

As Dr. Yoeli would know if he had reviewed the record, Intuit presented credible and unrebutted testimony from its executives that a strategy to deceive consumers into believing that they can file taxes for free with TurboTax when they cannot, would be catastrophic for Intuit’s business. (PFF ¶¶94-96). That is because such a deception would “erode trust” in the TurboTax brand, result in negative word-of-mouth among consumers, and undercut Intuit’s ability to retain customers, thereby preventing it from establishing the long-term relationships necessary to the success of its free-tax growth strategy. (PFF ¶96). Further, the expected negative repercussions identified by Intuit’s executives are consistent with Mr. Deal’s assessment of the economic incentives at play in the tax-preparation industry, which showed that Intuit (like other firms in this industry) has an incentive *not* to chase single-year gains by deceiving consumers in the manner alleged by Complaint Counsel. (PFF ¶95; *see also* PFF ¶¶40, 51-55, 89).

829. If consumers who were deceived into visiting turbotax.com have some tendency towards preparing their taxes using the same service they used in the previous year, then deception could be in Intuit’s economic best interest. (GX743 (Yoeli Expert Report) ¶ 18).

Response to Finding No. 829:

This Proposed Finding should be rejected because it rests only on Dr. Yoeli’s expert report. Dr. Yoeli’s opinions in this case should be entitled to little or no weight. Yoeli did not consider most of the record, he did not review the challenged ads, misapplied the definition of deception, and did “very little new analysis” of his own. (PFF ¶¶929-931). Furthermore, this opinion, like each opinion he offers, is by his own admission “not a very strong claim.” (RX1396 (Yoeli (FTC) Dep.) at 60; Yoeli (FTC) Tr. 1738).

This Proposed Finding amply illustrates why Dr. Yoeli's opinions should be given no weight. The cited portion of Dr. Yoeli's rebuttal expert report cites to no record evidence, no testimony, and no economic literature to support the Proposed Finding; instead, Dr. Yoeli offers only conjecture and speculation. He outlines a hypothetical scenario in which consumers deceived into visiting the TurboTax website have "*some tendency*" to use TurboTax, and then states (again, without any evidence in support) that deception then "*could*" be "in Intuit's economic interest." (GX743 (Yoeli Expert Report) ¶18).

As Dr. Yoeli would know if he had reviewed the record, Intuit presented credible and unrebutted testimony from its executives that a strategy to deceive consumers into believing that they can file taxes for free with TurboTax when they cannot, would be catastrophic for Intuit's business. (PFF ¶¶94-96). That is because such a deception would "erode trust" in the TurboTax brand, result in negative word-of-mouth among consumers, and undercut Intuit's ability to retain customers, thereby preventing it from establishing the long-term relationships necessary to the success of its free-tax growth strategy. (PFF ¶96). Further, the expected negative repercussions identified by Intuit's executives are consistent with Mr. Deal's assessment of the economic incentives at play in the tax-preparation industry, which showed that Intuit (like other firms in this industry) has an incentive *not* to chase single-year gains by deceiving consumers in the manner alleged by Complaint Counsel. (PFF ¶95; *see also* PFF ¶¶40, 51-55, 89).

830. If consumers who were deceived into visiting turbotax.com prefer not to start afresh in another solution, then deception could be in Intuit's economic best interest. (GX743 (Yoeli Expert Report) ¶ 18).

Response to Finding No. 830:

This Proposed Finding should be rejected because it rests only on Dr. Yoeli's expert report. Dr. Yoeli's opinions in this case should be entitled to little or no weight. Dr. Yoeli did not consider most of the record, he did not review the challenged ads, misapplied the definition of

deception, and did “very little new analysis” of his own. (PFF ¶¶929-931). Furthermore, this opinion, like each opinion he offers, is by his own admission “not a very strong claim.” (RX1396 (Yoeli (FTC) Dep.) at 60; Yoeli (FTC) Tr. 1738).

This Proposed Finding amply illustrates why Dr. Yoeli’s opinions should be given no weight. The cited portion of Dr. Yoeli’s rebuttal expert report cites to no record evidence, no testimony, and no economic literature to support the Proposed Finding; instead, Dr. Yoeli offers only conjecture and speculation. He outlines a hypothetical scenario in which consumers deceived into visiting the TurboTax website might prefer not to start afresh in another solution, and then states (again, without any evidence in support) that deception then “*could*” be “in Intuit’s economic interest.” (GX743 (Yoeli Expert Report) ¶18).

As Dr. Yoeli would know if he had reviewed the record, Intuit presented credible and unrebutted testimony from its executives that a strategy to deceive consumers into believing that they can file taxes for free with TurboTax when they cannot, would be catastrophic for Intuit’s business. (PFF ¶¶94-96). That is because such a deception would “erode trust” in the TurboTax brand, result in negative word-of-mouth among consumers, and undercut Intuit’s ability to retain customers, thereby preventing it from establishing the long-term relationships necessary to the success of its free-tax growth strategy. (PFF ¶96). Indeed, contrary to the supposition offered in the Proposed Finding, the evidence presented at trial shows that consumers are easily able to switch from TurboTax to another form of tax preparation, providing a ready means by which they could punish Intuit if they believed themselves to have been deceived. (PFF ¶¶51-55, 95). Further, the expected negative repercussions identified by Intuit’s executives are consistent with Mr. Deal’s assessment of the economic incentives at play in the tax-preparation industry, which showed that Intuit (like other firms in this industry) has an incentive *not* to chase single-year

gains by deceiving consumers in the manner alleged by Complaint Counsel. (PFF ¶¶95; *see also* PFF ¶¶40, 51-55, 89).

831. If consumers who were deceived into visiting *turbotax.com* tend to discount other firms' advertising claims after encountering Intuit's deception, then deception could be in Intuit's economic best interest. (GX743 (Yoeli Expert Report) ¶ 18).

Response to Finding No. 831:

This Proposed Finding should be rejected because it rests only on Dr. Yoeli's expert report. Dr. Yoeli's opinions in this case should be entitled to little or no weight. Dr. Yoeli did not consider most of the record, he did not review the challenged ads, misapplied the definition of deception, and did "very little new analysis" of his own. (PFF ¶¶929-931).

The Proposed Finding is also irrelevant. As Dr. Yoeli himself concedes, to state something "could" be true is "not a very strong claim." (Yoeli (FTC) Tr. 1738; RX1396 (Yoeli (FTC) Dep.) at 60). Second, this opinion is pure speculation and there are no facts in the record that support this theory. Third, the opinion makes no sense. If consumers are aware that they are deceived in the manner alleged and are sufficiently upset about it to no longer believe advertising claims from anyone in the industry, Intuit still does not benefit, because regardless of consumer belief of the claims at issue, those consumers will not stay with Intuit. (PFF ¶¶51-55, 94-96).

b. Mr. Deal Assumes (Incorrectly) that Repeated Interactions Preclude Deception Because Consumers Will Abandon

832. Mr. Deal argues that the deception outlined by Complaint Counsel, which Mr. Deal characterizes as "bait and switch," is inconsistent with the economic framework that firms will act to maximize firm value where the firm (here Intuits) relies on repeated interactions with customers who can (i) detect deception early on, and (ii) can switch to a competitor. The "main economic intuition for this result comes from [Mr. Deal's] analysis of repeated games in game theory." (RX1027 (Deal Expert Report) at ¶¶ 24-25). As explained below (*see* FF-833—FF-834), however, analysis of repeated interactions in the field of game theory show that repeated interactions do not preclude deception. (GX743 (Yoeli Expert Report) ¶ 52).

Response to Finding No. 832:

The Proposed Finding attacks a strawman—Mr. Deal has not offered the opinion that Intuit’s economic incentives *preclude* deception. The Proposed Finding misconstrues Mr. Deal’s opinion regarding Intuit’s economic incentives in the tax-preparation industry. Based on his review of the competitive dynamics in the tax-preparation industry (a review not undertaken by Dr. Yoeli) Mr. Deal determined that because the industry has a “largely fixed set of consumers,” and because of the “very low marginal costs” and the “annual requirement to file taxes,” firms offering tax-preparation services (including Intuit) derive far greater value from exceeding customer expectations and earning repeat business than they do from one-off transactions. (PFF ¶¶39, 44-45, 89). Those features, coupled with the high cost of acquiring new customers (PFF ¶88) and the ease with which consumers can both detect and punish deception, including by switching to another tax preparation service and sharing their negative experiences, mean that Intuit (like other firms in the tax-preparation industry) has an incentive not to chase single-year gains by deceiving consumers in the manner alleged by Complaint Counsel (PFF ¶95; *see also* PFF ¶¶40, 51-55,89).

Mr. Deal did not, as the Proposed Finding suggests, merely find that customers in the tax-preparation industry can “detect deception early on.” Rather, he found that consumers *necessarily* will identify the purported deception—at the very latest—before having to pay for filing their tax returns. (RX1027 (Deal Expert Report) ¶31). In fact, most customers who do not qualify for TurboTax Free Edition are told that within 30 minutes or less of starting their return. (PFF ¶¶449-450). Nor was Mr. Deal’s opinion merely based on an observation that consumers “can switch to a competitor”; instead, Mr. Deal concluded that customers can (and do) easily switch between different tax-preparation products and methods, both within each Tax Year and also from one year to the next. (PFF ¶¶51-55). Taken together, these features of the tax-

preparation industry serve as self-correcting mechanism that results in firms (including Intuit) having a substantial economic incentive *not* to engage in deception. (RX1027 (Deal Expert Report) ¶10).

833. Specifically, (i) empirical studies of repeated games, (ii) computer simulations of repeated games, and (iii) theoretical models of repeated games all demonstrate that parties often do not behave in others' interest. (GX743 (Yoeli Expert Report) ¶ 52).

Response to Finding No. 833:

This Proposed Finding should be rejected because it rests only on Dr. Yoeli's expert report. Dr. Yoeli's opinions in this case should be entitled to little or no weight. Dr. Yoeli did not consider most of the record, he did not review the challenged ads, misapplied the definition of deception, and did "very little new analysis" of his own. (PFF ¶¶929-931).

The Proposed Finding is misleading and irrelevant. Mr. Deal's analysis of Intuit's economic incentives, to which Dr. Yoeli's report (the sole evidence supporting the Proposed Finding) and the Proposed Finding itself are offered in rebuttal, did not rely on a finding that parties always (or even often) "behave in *others'* interest." Quite to the contrary, Mr. Deal concluded that it was in *Intuit's* best interest, given the competitive dynamics in the tax-preparation industry, to pursue a business strategy that prioritized exceeding customer expectations and earning repeat business because firms offering tax-preparation services (including Intuit) derive far greater value from long-term customer relationships than they do one-off transactions. (PFF ¶¶39, 44-45, 89). That opinion was corroborated at trial by the testimony of Intuit's executives, who confirmed that Intuit's actual strategy was to deliver an exceptional experience in its free TurboTax SKUs and thereby develop a long-term relationship with simple filers so that they will continue to use TurboTax as their tax situations become more complex—and hence require the use of paid TurboTax SKUs—over time. (PFF ¶83; *see also* PFF ¶¶84-86).

Further, Dr. Yoeli makes no attempt in his rebuttal report (which serves as the sole support for the Proposed Finding) to explain how his theoretical, conclusory observations regarding game theory actually apply to Intuit or to the facts of this case. (COL ¶¶3-4).

834. There is theoretical literature that focuses on deception by firms, and finds deception is possible even when there are repeated interactions, or reputations are otherwise important. (GX743 (Yoeli Expert Report) ¶ 52).

Response to Finding No. 834:

This Proposed Finding should be rejected because it rests only on Dr. Yoeli's expert report. Dr. Yoeli's opinions in this case should be entitled to little or no weight. Dr. Yoeli did not consider most of the record, he did not review the challenged ads, misapplied the definition of deception, and did "very little new analysis" of his own. (PFF ¶¶929-931).

The Proposed Finding is misleading and irrelevant. Mr. Deal's analysis of Intuit's economic incentives, to which Dr. Yoeli's report (the sole evidence supporting the Proposed Finding) and the Proposed Finding itself are offered in rebuttal, did not conclude that deception was *impossible*. Instead, Mr. Deal concluded that Intuit had substantial economic incentives *not* to engage in deception, and that the deception alleged by Complaint Counsel therefore would not have been an economically rational strategy. (PFF ¶901; *see also* PFF ¶¶88-97). That opinion is not challenged by the Proposed Finding and was corroborated by the testimony of Intuit's executives, who explained at trial that a strategy to deceive consumers into believing that they can file taxes for free with TurboTax when they cannot, would be catastrophic for Intuit's business. (PFF ¶¶94-97). That is because such a deception would "erode trust" in the TurboTax brand, result in negative word-of-mouth among consumers, and undercut Intuit's ability to retain customers, thereby preventing it from establishing the long-term relationships necessary to the success of its free-tax growth strategy. (PFF ¶96).

In response to Mr. Deal's economic analysis and unrebutted testimony of Intuit's executives, Complaint Counsel offer only "theoretical literature" (and just a single academic article, at that) cited in Dr. Yoeli's rebuttal report. However, the single article cited by Dr. Yoeli does not analyze the tax-preparation industry, and Dr. Yoeli himself does not bother to explain how the principles discussed in that article would impact firms' incentives in the tax-preparation industry.

835. Deception has often been perpetrated by firms that interact with consumers repeatedly. (GX743 (Yoeli Expert Report) ¶ 52).

Response to Finding No. 835:

This Proposed Finding should be rejected because it rests only on Dr. Yoeli's expert report. Dr. Yoeli's opinions in this case should be entitled to little or no weight. Dr. Yoeli did not consider most of the record, he did not review the challenged ads, misapplied the definition of deception, and did "very little new analysis" of his own. (PFF ¶¶929-931).

The Proposed Finding is misleading and irrelevant. The cited paragraph in Dr. Yoeli's rebuttal report offers just two examples of what he asserts to be deception engaged in by firms that interact with customers repeatedly. (GX743 (Yoeli Expert Report) ¶52). Even if Dr. Yoeli's characterization of these occurrences were accurate or relevant to this case (and they are not, as explained below) citing just two examples over ten-year period does not prove the Proposed Finding's assertion that deception "often" is perpetrated by firms that interact with consumers repeatedly. And one of his two examples did not even involve a claim of deception, as the Proposed Finding misleadingly asserts (that case was limited to "unfair" and "abusive" practices). Nor does Dr. Yoeli offer any explanation or justification for how the two firms involved in his cited examples are engaged in repeat transactions akin to the annual interactions

that characterize the tax-preparation industry. His *ipse dixit* that it is so does not provide support for the Proposed Finding.

Finally, the Proposed Finding also incorrectly suggests it is Intuit's burden to "preclude deception," whether through Mr. Deal's analysis or otherwise, when in fact it is Complaint Counsel's burden to show, by a preponderance of the evidence, that the challenged ads were deceptive. (COL ¶¶3-4).

836. Firms that interact repeatedly with consumers and, over time have developed good reputations can, under the right conditions, benefit by engaging in "reputation mining" and deceive consumers at some cost to their reputations. (GX743 (Yoeli Expert Report) ¶ 52).

Response to Finding No. 836:

This Proposed Finding should be rejected because it rests only on Dr. Yoeli's expert report. Dr. Yoeli's opinions in this case should be entitled to little or no weight. Dr. Yoeli did not consider most of the record, he did not review the challenged ads, misapplied the definition of deception, and did "very little new analysis" of his own. (PFF ¶¶929-931). Furthermore, this opinion, like each opinion he offers, is by his own admission "not a very strong claim." (Yoeli (FTC) Tr. 1738; RX1396 (Yoeli (FTC) Dep.) at 60).

The Proposed Finding is misleading and irrelevant. The Proposed Finding posits a theoretical situation in which a firm can "under the right conditions" benefit by "deceiv[ing] consumers at some cost to their reputations." But neither the Proposed Finding nor Dr. Yoeli's rebuttal report, which provides the only support for the Proposed Finding, identify what constitutes "the right conditions," nor do they explain what balance firms strike when deciding to sacrifice "some cost to their reputations" in adhering to a "reputation mining" strategy. And neither the Proposed Finding nor Dr. Yoeli offer any explanation for how these theoretical observations apply to Intuit or the tax-preparation industry. What the evidence presented at trial

does show, however, is that a strategy to deceive consumers into believing that they can file taxes for free with TurboTax when they cannot would be *catastrophic* for Intuit's business. (PFF ¶¶94-97). Far from simply sacrificing "some" of its reputation, Intuit's executives explained at length that deception alleged by Complaint Counsel would "erode trust" in the TurboTax brand, result in negative word-of-mouth among consumers, and undercut Intuit's ability to retain customers, thereby preventing it from establishing the long-term relationships necessary to the success of its free-tax growth strategy. (PFF ¶96). The conceptual musings of Dr. Yoeli, which draw no support from the record, do not overcome that clear showing.

837. The fact that Intuit has repeated interactions with customers does not preclude deception. (Deal (Intuit) Tr. 1390-1391).

Response to Finding No. 837:

The Proposed Finding attacks a strawman—Mr. Deal has not offered the opinion that the fact that Intuit has repeated interactions with consumers *precludes* deception. Instead, Mr. Deal offered reliable testimony that, based on the competitive dynamics of the tax-preparation industry and firms' economic incentives in that context, Intuit (like other providers of tax-preparation services) has substantial economic incentives not to engage in deception. (RX1027 (Deal Expert Report) ¶10; *see also* PFF ¶¶94-95). Unrefuted testimony offered by Intuit's executives, including Mr. Johnson, Ms. Ryan, and Mr. Rubin, confirmed the company was aware of those same incentives, including the negative repercussions that would result from a business strategy to mislead customers, and that Intuit did not pursue such strategy. (PFF ¶¶94-97, 870).

While Mr. Deal's analysis did not purport to preclude deception, the record evidence shows that Intuit is successful in driving repeat interactions with its customers, which is itself strong proof of an absence of deception. If Complaint Counsel's deception theory were true, consumers who felt deceived by ads for free TurboTax SKUs into believing that all TurboTax

products were free or that TurboTax was free for them when it was not would be less likely to use TurboTax again. (PFF ¶¶649). But the retention rate for users of paid TurboTax SKUs (83%) is higher than that for users of free products, even though those would be the consumers necessarily deceived under Complaint Counsel's theory. (PFF ¶¶90-93, 650). TurboTax's high paid retention rate demonstrates that the price these customers are paying is consistent with their expectations, and that there is no unfulfilled expectation among TurboTax customers about their ability to file for free—i.e., those customers are not deceived. (PFF ¶¶651).

838. Economics provides a “way of describing interactions and -- incentives and interactions” but “can't tell us what any one specific consumer would do.” (Deal (Intuit) Tr. 1396).

Response to Finding No. 838:

The Proposed Finding is misleading because it suggests the phrase “can't tell us what any one specific consumer would do” was uttered by Mr. Deal, when in fact it was uttered by Complaint Counsel. (Deal (Intuit) Tr. 1396). In any event, the Proposed Finding is irrelevant. The question is whether a *significant minority* of reasonable consumers were likely to be misled. (COL ¶¶41-48, 58, 96-99).

839. Mr. Deal's economic analysis “assume[s] that if Intuit was engaged in deception, consumers would cease using TurboTax and file with a different tax provider once they realized they were deceived.” In Mr. Deal's “view, a rational consumer who detects true deception would defect” “every time.” (Deal (Intuit) Tr. 1397).

Response to Finding No. 839:

The Proposed Finding is misleading because it selectively excerpts and reorders Mr. Deal's testimony and the questions asked by Complaint Counsel. Complaint Counsel asked Mr. Deal, “If the consumer has other reasons for staying with the vegetable seller -- I gave the example that they like the strawberries there or they like the layout, they're more familiar with that store -- they might not necessarily defect, right?” Mr. Deal responded, “Again, in my view, a rational consumer who detects true deception would defect.” Complaint Counsel asked,

“Every time?” Mr. Deal responded, “If there's actual deception, yes.” (Deal (Intuit) Tr. 1396-1397). This was not testimony about TurboTax.

840. Mr. Deal did not establish empirically that consumers would cease using TurboTax and file with a different tax provider once they realized they were deceived. (GX743 (Yoeli Expert Report) ¶ 32, 39; *see generally* RX1027 (Deal Expert Report) at Sections IV to VII).

Response to Finding No. 840:

Intuit has no specific response except to note that the Proposed Finding is unclear as to what is intended by the phrase “establish empirically” when it comes to showing consumers would switch from TurboTax to a competing tax preparation service if they realized they had been deceived. Whatever it may mean, Mr. Deal’s opinion concerning the self-disciplinary mechanism present in the tax-preparation industry (i.e., that consumers could easily detect and punish deception) was based on his review of the economic literature and analysis of industry characteristics. (RX1027 (Deal Expert Report) ¶¶23-33).

First, Mr. Deal found that consumers could detect the deception alleged by Complaint Counsel in this case with ease—i.e., either the consumer was able to prepare their taxes using TurboTax for free, or they were not. (Deal (Intuit) Tr. 1348, 1494-1495). He also found that consumers necessarily would identify the purported deception—at the very latest—before having to pay for filing their tax returns. (RX1027 (Deal Expert Report) ¶31). In fact, both Mr. Deal’s analysis and additional evidence presented at trial established that most customers who do not qualify for TurboTax Free Edition are told that within 30 minutes or less of starting their return. (PFF ¶¶449-450).

Second, Mr. Deal found that consumers who detected the alleged deception also could readily punish Intuit, including by switching to a competitor and sharing their negative experiences. (PFF ¶95). Consumers can (and do) easily switch between different tax-

preparation products and methods, both within each Tax Year and also from one year to the next. (PFF ¶¶51-55; *see also* Deal (Intuit) Tr. 1302, 1310-1311; RX1027 (Deal Expert Report) ¶¶15, 51-54, 129). That ease of switching is attributable to several factors, including the wealth of different methods and providers of tax-preparation services available to consumers, efforts in the tax-preparation industry to actively encourage customers to switch (and product-review websites that discuss the ease of doing so), and the fact that tax-preparation software typically does not require a financial commitment until the end of the tax-filing process. (PFF ¶¶51-55; *see also* RX1027 (Deal Expert Report) ¶¶12, 15, 51-54, 129; Deal (Intuit) Tr. 1302, 1309-1311, 1346).

Taken together, Mr. Deal concluded these features serve as self-correcting mechanism that contribute to firms (including Intuit) having a substantial economic incentive *not* to engage in deception. (RX1027 (Deal Expert Report) ¶10).

841. Consumers may not cease using TurboTax if the consumer lacks certainty about whether they were deceived. (GX743 (Yoeli Expert Report) ¶ 41; *see* Deal (Intuit) Tr. 1395).

Response to Finding No. 841:

The Proposed Finding is misleading and incomplete. The Proposed Finding relies on a misimpression (or deliberate misrepresentation) of Mr. Deal's testimony. In the response cited as support for the Proposed Finding, Mr. Deal opined that while he could "imagine" a scenario in which a consumer may not defect if they lack certainty about whether they were deceived, he testified that he did not "think that's the situation here." (Deal (Intuit) Tr. 1395). Mr. Deal explained that "a rational consumer, upon detection of being deceived and having choices, would not continue with the company" that deceived him or her. (Deal (Intuit) Tr. 1394-1395). Finding no support in Mr. Deal's testimony, the Proposed Finding is left to rely on a single paragraph from Dr. Yoeli's rebuttal report. But that paragraph offers only hypotheticals and surmise, stating consumers "may" lack certainty about whether they were deceived because the "could" be

uncertain about whether what they received was in fact what they were promised, or whether they understood the promise correctly. In reality, as Mr. Deal and Intuit's executives explained, consumers could easily detect the deception alleged by Complaint Counsel in this case without confusion—i.e., either the consumer was able to prepare their taxes using TurboTax for free, or they were not. (PFF ¶95; Deal (Intuit) Tr. 1348, 1494-1495).

842. A firm might even leverage the customer's ignorance to create uncertainty about whether there was a deception or merely a misunderstanding. The initial promise could be framed through the use of industry-specific jargon which can be explained in the course of the upsell, for example having promised free tax preparation of "simple" returns to a consumer base that is largely unequipped to know intuitively what that means. (GX743 (Yoeli Expert Report) ¶ 41).

Response to Finding No. 842:

This Proposed Finding should be rejected because it rests only on Dr. Yoeli's expert report. Dr. Yoeli's opinions in this case should be entitled to little or no weight. Dr. Yoeli did not consider most of the record, he did not review the challenged ads, misapplied the definition of deception, and did "very little new analysis" of his own. (PFF ¶¶929-931). Furthermore, this opinion, like each opinion he offers, is by his own admission "not a very strong claim." (Yoeli (FTC) Tr. 1738; RX1396 (Yoeli (FTC) Dep.) at 60).

The Proposed Finding is incorrect, misleading, and incomplete. Dr. Yoeli's rebuttal report, which is the only cited support for this Proposed Finding, provides no explanation or support for the Proposed Finding's assertion that Intuit "promised free tax preparation of 'simple' returns to a consumer base that is largely unequipped to know intuitively what that means." In fact, the cited paragraph from Dr. Yoeli's report makes clear that is merely his characterization of Complaint Counsel's allegations in this case, which Complaint Counsel attempt to pass off as fact in the Proposed Finding. (GX743 (Yoeli Expert Report) ¶41). In reality, the evidence offered at trial establishes that reasonable consumers in in the tax-preparation industry did

understand what “simple” returns means, and they were not misled by Intuit’s use of that industry-standard term to define eligibility for its free TurboTax SKUs. (PFF ¶¶130-145). Most importantly, reasonable consumers who file their taxes online were readily equipped to easily determine what “simple tax returns only” means, including by conducting a google search if they did not know. (PFF ¶¶502-513, 521, 524, 526-527). What remains of the Proposed Finding amounts to a hypothetical observation that firms “might” “leverage a customer’s ignorance to create uncertainty about whether there was a deception or merely a misunderstanding.” But neither Complaint Counsel nor Dr. Yoeli offers any record evidence that Intuit acted in this manner. To the contrary, the evidence shows that Intuit went to great lengths to ensure consumers understood the eligibility criteria of both its free and paid TurboTax SKUs. (PFF ¶¶204,365-366; *see also* PFF ¶¶367-452).

843. Some consumers may not cease using TurboTax if the consumer perceives the deception as ‘sunk’ and not especially informative about the relationship going forward. (GX743 (Yoeli Expert Report) ¶ 41; *see* Deal (Intuit) Tr. 1396-97).

Response to Finding No. 843:

The Proposed Finding is incorrect, misleading, and incomplete. None of the cited evidence supports the Proposed Finding. The cited paragraph in Dr. Yoeli’s rebuttal report does not offer any support for the Proposed Finding, and indeed does not refer to “sunk” costs at all. Nor does Mr. Deal’s testimony offer any support, as he too does not address “sunk” costs and instead testified, repeatedly, that rational consumers who detect actual deception will cease using TurboTax. (Deal (Intuit) Tr. 1396-1397). Even if the evidence cited were on point, the Proposed Finding still amounts to nothing more than a hypothetical that neither the Proposed Finding nor Dr. Yoeli purport to apply to the facts of this case. The evidence shows that the deception alleged by Complaint Counsel was both easy for consumers to detect and to readily punish, including by switching to a competitor and sharing their negative experiences. (PFF ¶95). Taken together,

and in conjunction with the other market dynamics observed by Mr. Deal, this disciplinary mechanism contributed to Intuit having substantial incentives not to deceive customers. (PFF ¶¶95; RX1027 (Deal Expert Report) ¶¶23-33).

c. Mr. Deal Assumes (Incorrectly) that Switching Costs Are Low

844. Throughout his report, Mr. Deal presumes that switching from an online DIY tax preparation service, here TurboTax, is relatively low cost. (See RX1027 (Deal Expert Report) Sections IV.A., IV.B.4., V.D., and VI.C.).

Response to Finding No. 844:

The Proposed Finding is inaccurate. Mr. Deal did not “presume” (or, as contended in the header, “assume[.]”) that switching costs were low. Instead, based on his review of academic literature and Intuit’s internal documents (nearly all of which were ignored by Dr. Yoeli), Mr. Deal concluded that consumers willing to consider digital DIY tax-preparation solutions face very low switching costs. (Deal (Intuit) Tr. 1310-1311; RX1027 (Deal Expert Report) ¶¶15, 51-54, 129). The ease with which consumers can switch away from a DIY software product is attributable to several factors, including the array of different methods and providers of tax-preparation services available to consumers, efforts in the tax-preparation industry to actively encourage customers to switch (and product-review websites that discuss the ease of doing so), and the fact that tax-preparation software typically does not require a financial commitment until the end of the tax-filing process, among other features. (PFF ¶¶51-55; *see also* RX1027 (Deal Expert Report) ¶¶12, 15, 51-54, 129; Deal (Intuit) Tr. 1302, 1309-1311, 1346). Mr. Deal’s opinion also is corroborated by consumers actual behavior. Consumers can (and do) easily switch between different tax-preparation products and methods, both within each Tax Year and also from one year to the next. (PFF ¶¶51-55; *see also* Deal (Intuit) Tr. 1302, 1310-1311; RX1027 (Deal Expert Report) ¶¶15, 51-54, 129). Every year, in fact, approximately 20% of taxpayers use a different tax preparation method than they used the year before. (PFF ¶¶52).

845. Low switching costs do not preclude deception. (GX743 (Yoeli Expert Report) ¶ 59). Switching costs can be low for Intuit to benefit from its deception. (GX743 (Yoeli Expert Report) ¶¶ 33, 60-61).

Response to Finding No. 845:

This Proposed Finding should be rejected, as it rests only on Dr. Yoeli's expert report. Dr. Yoeli's opinions in this case should be entitled to little or no weight. Dr. Yoeli did not consider most of the record, he did not review the challenged ads, misapplied the definition of deception, and did "very little new analysis" of his own. (PFF ¶¶929-931). Furthermore, this opinion, like each opinion he offers, is by his own admission "not a very strong claim." (Yoeli (FTC) Tr. 1738; RX1396 (Yoeli (FTC) Dep.) at 60).

The Proposed Finding attacks a strawman—Mr. Deal has not offered the opinion that low switching costs *preclude* deception. Instead, in assessing Intuit's economic incentives in the tax-preparation industry, Mr. Deal observed that consumers willing to consider digital DIY tax-preparation solutions face very low costs when switching to a competing provider of tax-preparation services. (Deal (Intuit) Tr. 1310-1311; RX1027 (Deal Expert Report) ¶¶15, 51-54, 129). The ease with which consumers can switch away from a DIY software product is attributable to several factors, including the array of different methods and providers of tax-preparation services available to consumers, efforts in the tax-preparation industry to actively encourage customers to switch (and product-review websites that discuss the ease of doing so), and the fact that tax-preparation software typically does not require a financial commitment until the end of the tax-filing process, among other features. (PFF ¶¶51-55; *see also* RX1027 (Deal Expert Report) ¶¶12, 15, 51-54, 129; Deal (Intuit) Tr. 1302, 1309-1311, 1346). Mr. Deal's observation also is corroborated by consumers' actual behavior. Consumers can (and do) easily switch between different tax-preparation products and methods, both within each Tax Year and also from one year to the next. (PFF ¶¶51-55; *see also* Deal (Intuit) Tr. 1302, 1310-1311;

RX1027 (Deal Expert Report) ¶¶15, 51-54, 129). Every year, in fact, approximately 20% of taxpayers use a different tax preparation method than they used the year before. (PFF ¶52).

While Mr. Deal did not opine that these low switching costs “*preclude*” deception, he did explain that when considered alongside the ease with which consumers can detect the deception alleged by Complaint Counsel (PFF ¶¶449-450; *see also* Deal (Intuit) Tr. 1348, 1494-1495; RX1027 (Deal Expert Report) ¶31), and the fact that Intuit (like its competitors) derives far greater value from exceeding customer expectations and earning repeat business than it does from one-off transactions, that Intuit has a substantial economic incentive not to deceive customers in the manner alleged. (PFF ¶¶88-89, 94-95). Unrebutted testimony offered by Intuit’s executives also confirmed they too were aware that consumers could easily detect and punish deception, including by switching to a competitor or sharing their negative experiences, and therefore a strategy to deceive consumers into believing they can file their taxes for free with TurboTax when they cannot, would be catastrophic to Intuit, and was not the strategy pursued. (PFF ¶¶94-97).

846. There are some psychological factors that can increase the perceived cost of switching. For instance, consumers might exhibit a status quo bias which would lead them to give preference to the tax preparation method they are already working with. (GX743 (Yoeli Expert Report) ¶ 46; GX749 (Novemsky Rebuttal Expert Report) ¶¶ 205, 269).

Response to Finding No. 846:

The Proposed Finding is an irrelevant hypothetical. Both the Proposed Finding and Professor Novemsky and Dr. Yoeli, on whom the Proposed Finding relies, posit that there *may* be psychological factors that *can* increase consumers’ subjective perception of switching costs, including status quo bias. (GX743 (Yoeli Expert Report) ¶46; GX749 (Novemsky Rebuttal Expert Report) ¶¶205, 269). But Complaint Counsel have presented no evidence to establish that, in fact, such psychological factors are present among Intuit’s customer base. The evidence

presented at trial shows unequivocally that consumers can (and do) easily switch between different tax-preparation products and methods, both within each Tax Year and also from one year to the next. (PFF ¶¶51-55; *see also* Deal (Intuit) Tr. 1302, 1310-1311; RX1027 (Deal Expert Report) ¶¶15, 51-54, 129). Every year, in fact, approximately 20% of taxpayers use a different tax preparation method than they used the year before. (PFF ¶52). That rate of switching among methods and providers of tax-preparation services corroborates Mr. Deal's analysis showing consumers willing to consider digital DIY tax-preparation solutions face very low costs when switching to a competing provider of tax-preparation services. (Deal (Intuit) Tr. 1310-1311; RX1027 (Deal Expert Report) ¶¶15, 51-54, 129).

847. Status quo bias can develop even over very short time periods and can lead consumers to make suboptimal choices. (GX743 (Yoeli Expert Report) ¶ 46).

Response to Finding No. 847:

This Proposed Finding should be rejected, as it rests only on Dr. Yoeli's expert report. Dr. Yoeli's opinions in this case should be entitled to little or no weight. Dr. Yoeli did not consider most of the record, he did not review the challenged ads, misapplied the definition of deception, and did "very little new analysis" of his own. (PFF ¶¶929-931). Furthermore, this opinion, like each opinion he offers, is by his own admission "not a very strong claim." (Yoeli (FTC) Tr. 1738; RX1396 (Yoeli (FTC) Dep.) at 60).

The Proposed Finding is irrelevant. Both the Proposed Finding and Dr. Yoeli's expert report, which provides the sole support for the Proposed Finding, posit only that status quo bias "can" develop over a short period of time and "can" lead consumers to make suboptimal choices. (GX743 (Yoeli Expert Report) ¶46). But Complaint Counsel have presented no evidence to establish that, in fact, status quo bias was present among Intuit's customer base, or that those customers were led by such biases to make suboptimal choices.

d. Mr. Deal's Economic Analysis Ignores the Anticompetitive Benefits of Deception

848. One effect of deception is that it makes it more difficult for consumers to rely on ads. This means the deceiving firm can benefit not only because it unfairly acquires consumers, but also because it makes it harder for its competitors to acquire consumers. (See GX743 (Yoeli Expert Report) ¶¶ 62-63).

Response to Finding No. 848:

This Proposed Finding should be rejected, as it rests only on Dr. Yoeli's expert report. Dr. Yoeli's opinions in this case should be entitled to little or no weight. Dr. Yoeli did not consider most of the record, he did not review the challenged ads, misapplied the definition of deception, and did "very little new analysis" of his own. (PFF ¶¶929-931).

The Proposed Finding is inaccurate, misleading, and irrelevant. Complaint Counsel provided no credible or reliable evidence that Intuit's advertisements "made it harder for competitors to advertise their own free products" or caused consumers "to doubt that those products are, in fact, free." The Proposed Finding cites only to an expert report prepared by Dr. Erez Yoeli, in which the sole support for the contention is an academic article that relates to product *quality*, not price. (GX743 (Yoeli Expert Report) ¶¶62-63; RX1370 (Intuit) at 495). The article discusses the effect of certain firms undercutting the marketplace on quality and thus driving the marketplace out of existence—which is unresponsive of the Proposed Finding that attempts to extend this theory to advertisements, consumer skepticism, and free product offerings. (RX1370 (Intuit) at 495). Moreover, Dr. Yoeli did not know, and therefore did not account for the fact that Intuit competitors also advertise a free product, which undermines the entire premise of the Proposed Finding. (RX1396 (Yoeli (FTC) Dep.) at 43-44). And when asked if it's useful for TurboTax to communicate to consumers that it has a truly free option for consumers who qualify, Dr. Yoeli agreed that he "do[es] think that that's the case" that it's useful for consumers. (RX1396 (Yoeli (FTC) Dep.) at 242).

849. Intuit's free claims would have made it harder for competitors to advertise their own free products, because, after encountering Intuit's deception, consumers would have come to doubt that those products are, in fact, free. (GX743 (Yoeli Expert Report) ¶ 63).

Response to Finding No. 849:

This Proposed Finding should be rejected, as it rests only on Dr. Yoeli's expert report. Dr. Yoeli's opinions in this case should be entitled to little or no weight. Dr. Yoeli did not consider most of the record, he did not review the challenged ads, misapplied the definition of deception, and did "very little new analysis" of his own. (PFF ¶¶929-931).

The Proposed Finding is inaccurate and misleading. Complaint Counsel provided no credible or reliable evidence that Intuit's advertisements "made it harder for competitors to advertise their own free products" or caused consumers "to doubt that those products are, in fact, free." The Proposed Finding cites only to an unsupported paragraph in Dr. Yoeli's report that was pure speculation. (GX743 (Yoeli Expert Report ¶63). Moreover, Dr. Yoeli's speculation does not account for the fact that Intuit competitors also advertise a free product, which undermines the entire premise of the Proposed Finding. (RX1396 (Yoeli (FTC) Dep.) at 43-44). And when asked if it's useful for TurboTax to communicate to consumers that it has a truly free option for consumers who qualify, Dr. Yoeli agreed that he "do[es] think that that's the case" that it's useful for consumers. (RX1396 (Yoeli (FTC) Dep.) at 242).

The Proposed finding also omits important context. Intuit's internal documents demonstrate that consumers are skeptical of any claims of "free" products or services. (PFF ¶¶490-493). Professor Golder also provided credible testimony regarding consumers' natural skepticism of truly free offers. (Golder (Intuit) Tr. 1095-1098). Consumers also understand that free tax preparation offers by Intuit and its competitors are qualified, perform extensive research before deciding which tax preparation product to use, and know where to look and find

qualifications for free tax preparation offers both in the ads and on the websites with additional detailed information. (PFF ¶¶471, 486).

850. Intuit's deception made it harder for consumers to understand and rely upon ads for tax preparation services. This would not only disincentivize TurboTax customers from searching for alternatives, but also impact consumers who don't use TurboTax. For all of these consumers, they would, likewise be less likely to search, and thus end up in a product that does not suit their needs as well. It could also lead consumers to distrust DIY services and, thus, pay more for 'live' ones. In other words, deception does not just lead to ill-gotten gains for the perpetrator of the deception, it also harms all consumers by making it harder to make well-informed decisions in the marketplace, which has implications for the products they purchase, and the gains they obtain from engaging in the marketplace. (GX743 (Yoeli Expert Report) ¶ 64).

Response to Finding No. 850:

This Proposed Finding should be rejected, as it rests only on Dr. Yoeli's expert report. Dr. Yoeli's opinions in this case should be entitled to little or no weight. Dr. Yoeli did not consider most of the record, he did not review the challenged ads, misapplied the definition of deception, and did "very little new analysis" of his own. (PFF ¶¶929-931).

The Proposed Finding is inaccurate and misleading Complaint Counsel provided no credible or reliable evidence that Intuit's advertisements "made it harder for consumers to understand and rely upon ads for tax preparation services." Complaint Counsel provided no credible or reliable evidence that Intuit's advertisements caused consumers "to distrust DIY services" or made "it harder [for consumers] to make well-informed decisions in the marketplace." The Proposed Finding cites only to an unsupported paragraph in Dr. Yoeli's report. (GX743 (Yoeli Expert Report) ¶63). Moreover, Dr. Yoeli's speculation does not account for the fact that Intuit competitors also advertise a free product, which undermines the entire premise of the Proposed Finding. (RX1396 (Yoeli (FTC) Dep.) at 43-44). And when asked if it's useful for TurboTax to communicate to consumers that it has a truly free option for

consumers who qualify, Dr. Yoeli agreed that he “do[es] think that that’s the case” that it’s useful for consumers. (RX1396 (Yoeli (FTC) Dep.) at 242).

The Proposed Finding also omits important context. Intuit’s internal documents demonstrate that consumers are skeptical of any claims of “free” products or services. (PFF ¶¶490-493). Professor Golder also provided credible testimony regarding consumers’ natural skepticism of truly free offers. (Golder (Intuit) Tr. 1095-1098). Consumers also understand that free tax preparation offers by Intuit and its competitors are qualified, perform extensive research before deciding which tax preparation product to use, and know where to look and find qualifications for free tax preparation offers both in the ads and on the websites with additional detailed information. (PFF ¶¶471, 486).

4. Intuit Customer Level Data

851. While consumers visited the TurboTax website approximately [REDACTED] times in TY21, (RX1027 (Deal Expert Report) ¶ 98 at Figure 9 (*citing* RX052)), Mr. Deal started his data analysis with those 55.5 million TY21 consumers who arrived at the TurboTax website and either created a new account or logged into an existing account—Deal’s “TY 21 customer base.” (RX1027 (Deal Expert Report) ¶ 98; Deal (Intuit) Tr. 1398-99).

Response to Finding No. 851:

The Proposed Finding is inaccurate and misleading. At the outset, the Proposed Finding cites to a metric that RX52 (the Intuit document relied upon) expressly states is [REDACTED] [REDACTED] (RX52 (Intuit) at 27). Further, as explained at trial, Mr. Deal designed his empirical analysis of Intuit’s customer data to assess the customer experiences of tens of millions of individual consumers who used TurboTax in Tax year 2021. (Deal (Intuit) Tr. 1322; RX1027 (Deal Expert Report) ¶96). By combining different datasets maintained by Intuit, Mr. Deal was able to develop models of customer behavior and assess whether actual TurboTax customers behaved in a manner consistent with the widespread deception alleged by Complaint Counsel. (PFF ¶663). Through that analysis, Mr. Deal concluded that Intuit’s customer-level data was

even *potentially* consistent with the deception alleged by Complaint Counsel for less than 0.0009% of the 55.5 million individuals he analyzed (or 1 in 100,000 TurboTax users). (PFF ¶¶663, 682; *see also* PFF ¶¶664-680).

Complaint Counsel attack Mr. Deal's decision not to include in his empirical analysis those consumers who merely visited the TurboTax website but did not create a new TurboTax account or log into an existing account. Not only would the inclusion of those consumers be inconsistent with the design of Mr. Deal's empirical analysis, it also would have been pointless—the entire purpose of Mr. Deal's analysis was to examine the behavior of actual TurboTax customers, which is impossible if the consumer did not even bother to open up the product. (Deal (Intuit) Tr. 1399). Indeed, the frivolity of this criticism is borne out in the very data cited in the Proposed Finding. Among the “consumers” who Complaint Counsel wrongly assume visited the TurboTax website and excluded in Mr. Deal's empirical analysis, █████ did not even click or otherwise interact with the TurboTax website itself, suggesting these additional “consumers” were overwhelmingly not actually considering whether to use TurboTax to prepare and file their taxes in Tax Year 2021. (RX1027 (Deal Expert Report) fig. 9).

852. Mr. Deal's TY21 customer base excludes anyone who saw an Intuit advertisement (including television ads), went to the TurboTax website, but left the website before logging into an account. (Deal (Intuit) Tr. 1399; GX743 (Yoeli Expert Report) ¶ 93 (“Mr. Deal begins his analysis by restricting his dataset to the 55.5 million customers who “logged into their existing TurboTax account or created new accounts...”, calling this TurboTax's “customer base.”).

Response to Finding No. 852:

Intuit has no specific response except to note that Mr. Deal designed his empirical analysis of Intuit's customer data to assess the customer experiences of tens of millions of individual consumers who used TurboTax in Tax year 2021. (Deal (Intuit) Tr. 1322; RX1027 (Deal Expert Report) ¶96). By combining different datasets maintained by Intuit, Mr. Deal was

able to develop models of customer behavior and assess whether actual TurboTax customers behaved in a manner consistent with the widespread deception alleged by Complaint Counsel. (PFF ¶¶663). Through that analysis, Mr. Deal concluded that Intuit’s customer-level data was even *potentially* consistent with the deception alleged by Complaint Counsel for less than 0.0009% of the 55.5 million individuals he analyzed (or 1 in 100,000 TurboTax users). (PFF ¶¶663, 682; *see also* PFF ¶¶664-680). Complaint Counsel have presented no evidence (because there is none) to support a finding that consumers who saw an Intuit advertisement, went to the TurboTax website, but left the website before logging into an account would evidence any greater rate of unfavorable experiences suggestive of deception. (PFF ¶¶681).

Complaint Counsel criticize Mr. Deal’s decision not to include in his empirical analysis consumers who may have seen a TurboTax advertisement, visited the TurboTax website, but left before logging into an account. Not only would the inclusion of those consumers be inconsistent with the design of Mr. Deal’s empirical analysis, it also would have been pointless—the entire purpose of Mr. Deal’s analysis was to examine the behavior of actual TurboTax customers, which is impossible if the consumer did not even bother to open up the product. (Deal (Intuit) Tr. 1399).

853. This methodology omits from the TY21 customer base the [REDACTED] consumers who visited the TurboTax website in TY21 but left before logging into an account. (GX743 (Yoeli Expert Report) ¶ 94 (as corrected by GX748 (Yoeli Expert Report Errata) at p. 3); GX749 (Novemsky Rebuttal Expert Report) ¶ 283 (“[T]his measure sets aside, without any reason or support, that millions of consumers who come to the TurboTax website because of Intuit’s free advertising may very well have been deceived by that marketing.”)).

Response to Finding No. 853:

The Proposed Finding is incorrect and misleading. At the outset, the Proposed Finding incorrectly asserts (citing Yoeli’s expert report) that there were [REDACTED] who visited the TurboTax website and not included in Mr. Deal’s analysis. Not so. As the data relied

upon by Yoeli makes clear, the specific Intuit metric underpinning the [REDACTED] [REDACTED] (RX52 (Intuit) at 27). Even if there were [REDACTED] consumers (and there are not), the data also shows these visitors to the TurboTax website were not actually considering using TurboTax to prepare and file their taxes— [REDACTED] [REDACTED] left the website without a single click or other interaction. (RX52 (Intuit) at 4). Furthermore, Complaint Counsel’s criticism of Mr. Deal’s analysis on the grounds that he did not include consumers who merely visited the website but never actually logged into the product ignores the purpose of his analysis entirely. Mr. Deal designed his empirical analysis of Intuit’s customer data to assess the customer experiences of tens of millions of individual consumers who used TurboTax in Tax year 2021. (Deal (Intuit) Tr. 1322; RX1027 (Deal Expert Report) ¶96). By combining different datasets maintained by Intuit, Mr. Deal was able to develop models of customer behavior and assess whether actual TurboTax customers behaved in a manner consistent with the widespread deception alleged by Complaint Counsel. (PFF ¶663). That would be impossible for the [REDACTED] “consumers” identified in the Proposed Finding, about whom there was no behavioral data to analyze. (Deal (Intuit) Tr. 1399).

The Proposed Finding is also irrelevant. Consumers who came to the TurboTax website but never logged in were not deceived. They did not pay Intuit a cent, and the fact that they did not log in shows that they never even tried to begin filling out their tax forms using TurboTax. Nor is it plausible that these consumers would have spent any material time on the website without logging in. Indeed, Complaint Counsel and their witnesses recognized that the TurboTax website repeatedly disclosed the qualifications of free TurboTax offers and provided detailed information about those qualifications. (PFF ¶¶369-370). For example, Dr. Yoeli 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 the free TurboTax offers. (PFF ¶790).

854. Mr. Deal also omits from the TY21 customer base consumers who saw Intuit’s ads but did not choose to visit turbotax.com. Mr. Deal does not present an estimate of how many such consumers there were, though we know, for example, that Intuit ran 16,128 free-themed advertisements nationwide in the first 5 months of 2020, receiving over 3.9 billion impressions. (GX743 (Yoeli Expert Report) ¶ 95; *see also supra* at FF-215—FF-448 (setting out the billions of total impressions for Intuit’s free-themed advertisements).

Response to Finding No. 854:

The Proposed Finding is irrelevant. Consumers who saw the challenged ads and did not even visit TurboTax.com were obviously not deceived. (PFF ¶794).

The Proposed Finding is also misleading because it purports to compare ad dissemination metrics for the first five months of 2020 with an empirical analysis run for Tax Year 2021 (for which consumers would have been preparing their taxes in 2022). (RX1027 (Deal Expert Report) ¶7 n.5 (explaining the IRS began accepting Tax Year 2021 returns on January 24, 2022, with a deadline for most taxpayers of April 18, 2022)). Finally, that Intuit’s free-themed advertisements received “over 3.9 billion impressions” in just the first five months of 2020 and Complaint Counsel were able to identify just 218 consumer complaints *for the entire time period* at issue is compelling evidence that reasonable consumers were not deceived by the challenged ads. (*See* PFF ¶¶632, 637, 639, 641-647).

855. Mr. Deal performs a data analysis of the TY21 customer base, and argues that 97.6% of those customers exhibit characteristics contradicting Complaint Counsel’s theory of harm. Mr. Deal, however, “can’t preclude deception for any specific one of those consumers.” (RX1027 (Deal Expert Report) ¶ 100; Deal (Intuit) Tr. 1399).

Response to Finding No. 855:

The Intuit has no specific response except to note that the Proposed Finding incorrectly suggests it is Intuit’s burden to “preclude deception,” whether through Mr. Deal’s analysis or otherwise, when in fact it is Complaint Counsel’s burden to show, by a preponderance of the

evidence, that the challenged ads were deceptive. (COL ¶¶3-4). Mr. Deal's analysis is that consumer data for the 97.6% of TY21 customers is *inconsistent* with deception.

856. Mr. Deal admits that it is “too strong” to say “that none of those [97.6%] consumers were deceived.” (Deal (Intuit) Tr. 1389).

Response to Finding No. 856:

The Proposed Finding is misleading because it omits important context from Mr. Deal's testimony. Mr. Deal explained that it would be “a little too strong” to say that none of the 97.6% of consumers identified in the first phase could have been deceived because he did not conduct an analysis of their subjective views. Instead, Mr. Deal's analysis focused on the more reliable *objective* customer-level data showing how those consumers actually behaved. And that analysis showed that 97.6% of the 55.5 million TurboTax customers in Tax Year 2021 exhibited characteristics or behaviors inconsistent with the deception Complaint Counsel allege. (PFF ¶¶674). These include customers who actually used TurboTax to file their federal and state tax returns for free (13.4 million) (PFF ¶¶665), customers who switched from TurboTax to another form of tax preparation (17.6 million, of whom 6.8 million never even started a return with TurboTax) (PFF ¶¶666; *see also* PFF ¶¶667-668), and customers for whom the data showed either familiarity with or preference for paid TurboTax SKUs or services (e.g., customers who used or had been recommended a paid SKU in the two prior years) (23.1 million customers) (PFF ¶¶669; *see also* PFF ¶¶670-673).

857. Mr. Deal did not “do[] an analysis of any subjective views that [the consumers in the 97.6] may have.” (Deal (Intuit) Tr. 1389).

Response to Finding No. 857:

Intuit has no specific response except to note that Mr. Deal's empirical analysis focused on the reliable *objective* evidence of customer behavior in order to assess the characteristics of reasonable consumers in the industry. (Deal (Intuit) Tr. 1493). That analysis examined Intuit's

customer-level data for 55.5 million Intuit consumers in who created or logged into an existing TurboTax account in Tax Year 2021, and ultimately concluded that the customer-level data was even *potentially* consistent with the deception alleged by Complaint Counsel for less than 0.0009% of the 55.5 million individuals he analyzed (or 1 in 100,000 TurboTax users). (PFF ¶¶663, 682; *see also* PFF ¶¶664-680). Anecdotal examples of individual consumers’ subjective beliefs do not affect the reliability of Mr. Deal’s objective analysis of customer behavior across the entire Tax Year 2021 TurboTax customer base. (Deal (Intuit) Tr. 1493).

858. Of the 55.5 million consumers in the TY21 customer base, Mr. Deal first opines that the data of 17.6 million consumers is inconsistent with deception on the sole basis that those consumers did not complete filing their taxes with TurboTax. (Deal (Intuit) Tr. 1400 (Q. ...And the only methodological basis for a consumer being included in the 17.6 million customers is that they either didn’t start a return or started a return and abandoned it at some point before concluding the filing, right? A. I agree.”)).

Response to Finding No. 858:

The Proposed Finding is incomplete and misleading because it misrepresents Mr. Deal’s opinion and his testimony. Mr. Deal identified 17.6 million customers in Tax Year 2021 for whom the data was inconsistent with deception because they either (1) never began a tax return in a TurboTax SKU (6.8 million), or (2) began a tax return but did not complete that return with TurboTax (10.8 million). (PFF ¶666). These customers understood they had a choice not to use TurboTax and, in fact, they exercised that choice. (PFF ¶666).

Further, Mr. Deal observed that the 10.8 million customers who began a return in TurboTax Free Edition but did not complete their taxes using TurboTax likely abandoned TurboTax for any number of reasons. (PFF ¶667). These include customers who begin using a DIY tax-preparation product but due to fear, uncertainty, and doubt (or “FUD”) decide to switch to an assisted tax-preparation method (e.g., a CPA); customers who are testing multiple software

options; or customers who were using TurboTax to “double-check[]” tax returns prepared by their CPA, to name a few. (PFF ¶667).

Mr. Deal also found that in the event these 10.8 million customers abandoned TurboTax Free Edition after being informed they were not eligible to file for free, the data showed they did not invest a significant amount of time using the product before receiving that message—in most cases, fewer than 30 minutes before being told their tax situation was not covered and that they need to switch to a paid SKU. (PFF ¶668). Thus, in the event these customers came to the website under the impression that they would be able to file for free, there is no evidence that it would have taken them any material amount of time to learn otherwise. (PFF ¶668).

859. Mr. Deal excludes those consumers even though they demonstrate behavior consistent with how a deceived consumer might act. (GX743 (Yoeli Expert Report) ¶¶ 102 and 108 (“It is possible that these customers came to TurboTax’s website expecting to file their taxes for free and on discovering that was the case, left TurboTax.”); GX749 (Novemsky Rebuttal Expert Report) ¶ 284 (“Mr. Deal sets these 17.6 million consumers aside even though ... it may be that the only reason they did not ultimately file is because they arrived with the false notion that they could file for free, based on TurboTax advertisements, and switched away from TurboTax either before or after starting their return because they realized that they could not actually file for free with TurboTax.”); *see also* Novemsky (Complaint Counsel) Tr. 1792-1993 (“So the idea that that pattern that somehow rules out deception, again, just defies logic for me. I don’t understand how he’s drawing that conclusion from that assumption or observation.”)).

Response to Finding No. 859:

The Proposed Finding attempts to rebut Mr. Deal’s analysis with the speculation of Dr. Yoeli and Professor Novemsky. The Proposed Finding suggests only that consumers “might” abandon TurboTax if they were deceived (a response that Dr. Yoeli argues against elsewhere in his report), and the underlying evidence cited in the Proposed Finding is similarly speculative, as the offered parentheticals make clear. (*E.g.*, GX743 (Yoeli Expert Report) ¶¶ 102, 108 (“*It is possible* that these customers came to TurboTax’s website expecting to file their taxes for free and on discovering that was the case, left TurboTax.” (emphasis added))).

860. For those 17.6 million consumers, Mr. Deal “do[es]n’t know whether they saw any Intuit ads,” “didn’t look” to test whether the consumer saw any Intuit ads, and doesn’t know whether the consumers “expected TurboTax to be free for them.” (Deal (Intuit) Tr. 1404-1405; *see* RX1395 (Deal (Intuit) Dep. at 104 (Q. “But you don’t know for any given person in that 17.6 million whether they expected TurboTax to be free for them? A. I mean, if you’re asking, have I done any individual inquiry of what’s inside each person’s head and exactly what they saw and what their history was, no, obviously I haven’t done that. I’m using the available data for my analysis.”))).

Response to Finding No. 860:

Intuit has no specific response except to note that Mr. Deal determined these 17.6 million consumers’ data was inconsistent with deception because they either (1) never began a tax return in a TurboTax SKU (6.8 million), or (2) began a tax return but did not complete that return with TurboTax (10.8 million). (PFF ¶666). His analysis recognized these customers understood they had a choice not to use TurboTax and, in fact, they exercised that choice. (PFF ¶666).

Mr. Deal also explained that the 10.8 million customers who began a return in TurboTax Free Edition but did not complete their taxes using TurboTax likely abandoned TurboTax for any number of reasons unrelated to the alleged deception. (PFF ¶667). These might include customers who begin using a DIY tax-preparation product but due to fear, uncertainty, and doubt (or “FUD”) decide to switch to an assisted tax-preparation method (e.g., a CPA); customers who are testing multiple software options; or customers who were using TurboTax to “double-check[]” tax returns prepared by their CPA, to name a few. (PFF ¶667). That conclusion was corroborated by testimony from Intuit’s executives, who explained that customers typically abandon TurboTax because they lose confidence in their ability to file on their own, because they are only using the software to double-check what their outside tax provider told them, and/or because they are comparing different tax-preparation products. (PFF ¶657). None of those reasons for abandonment is specific to TurboTax’s free products—and none indicates deception. (PFF ¶657). Moreover, Intuit presented evidence showing that the abandonment rate for

TurboTax Free Edition is the same for all TurboTax SKUs, demonstrating that consumers were abandoning TurboTax for reasons common to all SKUs, rather than because they felt deceived in a manner specific to Free Edition. (PFF ¶¶655-658, 774).

Complaint Counsel suggest that had Mr. Deal retained these 17.6 million customers in his analysis, his conclusion would have been different. But their own rebuttal expert, Dr. Yoeli, did nothing to analyze the customer data for these consumers, and Complaint Counsel present no evidence to show these customers would evidence any greater rate deception had they been retained in Mr. Deal's own analysis. (PFF ¶¶681).

861. Mr. Deal's analysis does not rule out that any of these 17.6 million consumers were deceived. (Deal (Intuit) Tr. 1401 ("Q. So included in this analysis could be a consumer who saw an ad, arrived at the expectation that TurboTax would be free for them, or arrived at the website expecting TurboTax to be free, created an account, went through the whole filing process, got to the end, learned that TurboTax. . . was not free for them and then they leave. That consumer could not have been deceived according to your analysis, right? A. Again, I think the way you asked the question earlier was that I don't rule out any specific customer perception, but the data would not be consistent with a rational customer being deceived."))).

Response to Finding No. 861:

The Proposed Finding is irrelevant. The burden of proof in this case rests with Complaint Counsel. They put forward a theory of deception and Mr. Deal's analysis determines that for most TurboTax consumers, the data is inconsistent with that theory. Complaint Counsel have not shown that any of these consumers were deceived or were likely to be deceived, or otherwise persuasively rebutted Mr. Deal's actual opinion.

Mr. Deal did not attempt to analyze millions of consumers' subjective impressions in order to "rule out" that any of these 17.6 million customers were deceived. Rather, his analysis relied on objective, customer-level data to show that these 17.6 customers demonstrated behavior inconsistent with the widespread deception alleged by Complaint Counsel. (PFF ¶¶666-668).

862. Mr. Deal assumes that “these customers took advantage of the low switching costs and eventually decided to seek alternative filing options.” Mr. Deal, however, did not survey consumers to determine whether those consumers left TurboTax only after learning that they did not qualify for to file their taxes for free. (*See* RX1027 (Deal Expert Report) ¶ 101).

Response to Finding No. 862:

The Proposed Finding is inaccurate and irrelevant. First, Mr. Deal did not simply “assume” that the 17.6 million consumers who started a tax return using TurboTax in Tax Year 2021 but decided to complete their returns using another form of tax preparation took advantage of the low switching costs in the tax-preparation industry. That 17.6 million customers—nearly one-third of the Tax Year 2021 customer base—changed methods or providers of tax-preparation services is strong empirical evidence supporting Mr. Deal’s opinion that switching costs in the tax-preparation industry are very low. (PFF ¶¶51-55). Customers’ ability to easily switch to a competing form of tax preparation bolsters Mr. Deal’s opinion, corroborated by Intuit’s own executives, that the company has a substantial economic incentive *not* to deceive customers into believing that they can file taxes for free with TurboTax when they cannot, given the ease of punishing such deception. Second, the Proposed Finding concedes that customers may abandon TurboTax for reasons that have nothing to do with whether or not they qualify to file for free or the alleged deception. That too is consistent with Mr. Deal’s analysis. (PFF ¶667). Finally, consumers who went to the TurboTax website, saw that they did not qualify to file for free, and went elsewhere before creating a TurboTax account were clearly not deceived and there was no need to “survey” them for their views about their qualifications.

863. Deception is a function of consumers’ beliefs prior to arriving at the TurboTax website, and thus prior to considering switching. (GX743 (Yoeli Expert Report) ¶ 106).

Response to Finding No. 863:

This Proposed Finding should be rejected because it rests only on Dr. Yoeli's expert report. Dr. Yoeli's opinions in this case should be entitled to little or no weight. Dr. Yoeli did not consider most of the record, he did not review the challenged ads, misapplied the definition of deception, and did "very little new analysis" of his own. (PFF ¶¶929-931).

The Proposed Finding is incorrect. First, the offered evidence does not support the Proposed Finding. Dr. Yoeli's pronouncement in paragraph 106 of his report that "[d]eception is a function of their beliefs prior to arriving, and thus prior to considering switching," is unsupported by any record evidence, legal authority, or academic source. (GX743 (Yoeli Expert Report) ¶106). The statement therefore is just *ipse dixit*, which is not reliable evidence (*See, e.g., Nomo Agroindustrial SA DE CV v. Enza Zaden N. Am., Inc.*, No. CV05-351-TUC-FRZ, 2009 WL 211085, at *4 (D. Ariz. Jan. 29, 2009) ("An expert's testimony may be excluded where it is based on subjective beliefs or unsupported speculation which is no more than unreliable ipse dixit guesswork." (citing *General Electric Co. v. Joiner*, 522 U.S. 136, 146 (1997))), especially in light of Dr. Yoeli's misunderstanding of what constitutes deception. (PFF ¶930).

Second, Dr. Yoeli's unsupported suggestion that the Court may simply ignore the availability of other methods of tax preparation cannot overcome the voluminous evidence offered by Professor Golder and Intuit's executives about how consumers in the tax-preparation industry actually make purchase decisions, which is integral to any analysis of potential deception. (PFF ¶¶504-509).

Third, the Proposed Finding is incorrect that the deception alleged by Complaint Counsel can occur "prior to arriving at the TurboTax website." The challenged ads conveyed that the specific SKU being advertised was free for consumers who qualified, that those qualifications were tied to the complexity of a consumer's tax return, and often that consumers can "see if they

qualify” or “see details” on the TurboTax website. (See PFF ¶¶210-211, 242-244, 260-262, 273-275, 288-290, 297-299). Where the challenged ads did not direct consumers to the TurboTax website, they included links or were themselves links that would take consumers directly to the TurboTax website. (See PFF ¶¶253-254, 269-270, 284-285). Given that the challenged ads pointed or linked to the TurboTax website, even Complaint Counsel concede that the information on that website was integrated into the challenged ads. (CCFF ¶455; *see also* PFF ¶¶328-330). As such, the integrated information from the TurboTax website, which detailed the qualifications of free TurboTax SKUs and all other TurboTax SKUs (*see* PFF ¶¶364-441), must be considered when assessing whether the challenged ads were deceptive.

Finally, the Proposed Finding ignores that Mr. Deal’s analysis of switching costs in the tax-preparation industry was in service of his opinion that Intuit has a substantial incentive not to deceive customers both because such deception is easy for consumers to detect and because consumers can readily punish deception, including by switching to a competitor and sharing their negative experiences. (PFF ¶¶88-96). The Proposed Finding does nothing to undermine that conclusion.

864. Consumers can be deceived irrespective of switching costs. (GX743 (Yoeli Expert Report) ¶ 106).

Response to Finding No. 864:

This Proposed Finding should be rejected because it rests only on Dr. Yoeli’s expert report. Dr. Yoeli’s opinions in this case should be entitled to little or no weight. Dr. Yoeli did not consider most of the record, he did not review the challenged ads, misapplied the definition of deception, and did “very little new analysis” of his own. (PFF ¶¶929-931). Furthermore, this opinion, like each opinion he offers, is by his own admission “not a very strong claim.” (Yoeli (FTC) Tr. 1738; RX1396 (Yoeli (FTC) Dep.) at 60).

The Proposed Finding is irrelevant. Whether consumers “can” be deceived irrespective of switching costs generally, a claim that Dr. Yoeli concedes is “not a very strong claim” (PFF ¶930), says nothing at all about in this case, under Complaint Counsel’s theory of deception, whether the existence of low switching costs makes deception both less likely and against Intuit’s economic interest. As the academic literature makes plain, where switching costs are low, running a deceptive scheme for many years would be harmful to a firm’s business. (RX1027 (Deal Expert Report) ¶¶26, 51-58). Low switching costs also cast doubt on *Complaint Counsel’s* “bait and switch” theory of deception. (PFF ¶¶448-452). Thus, Mr. Deal opined on switching costs not to suggest that there could *never* be deception where switching costs were low, but rather to make the point that in this industry on these facts, low switching costs make deception less likely. (Deal (Intuit) Tr. 1302-1303, 1310-1311). At bottom, Complaint Counsel were required to prove deception and have failed to do so.

865. Mr. Deal admits that, in TY21 “for any customers who may have expected to file their returns for free and would not have been willing to pay for TurboTax products,” half of those customers did not see an upgrade screen informing them that they may not qualify for Free Edition until thirty minutes into their tax filing process. (RX1027 (Deal Expert Report) ¶ 105-107; GX743 (Yoeli Expert Report) ¶ 47).

Response to Finding No. 865:

The Proposed Finding is inaccurate and misleading because it misconstrues Mr. Deal’s report and his testimony. Mr. Deal’s analysis of Intuit’s customer data showed that of those consumers who started in TurboTax Free Edition in Tax Year 2021 *and* did not qualify for Free Edition (not all consumers who may have *expected* to file for free, as the Proposed Finding states), 25 percent were told they did not qualify to use Free Edition within 15 minutes, and half within 30 minutes. (PFF ¶¶450, 668; *see also* Deal (Intuit) Tr. 1337-1338; RX1027 (Deal Expert Report) ¶105-10). The Proposed Finding also is misleading because the phrase “thirty minutes into their tax filing process” ignores that Mr. Deal’s analysis was limited to elapsed time, and as

a result the 30 minutes cited in the Proposed Finding overstated how long customers were actually using the TurboTax product. (PFF ¶¶450, 668). For example, if a consumer stepped away for a ten-minute phone call without closing her browser, those ten minutes would have counted towards the elapsed time. (PFF ¶668). Thus, in the event these customers came to the website under the false impression that they would be able to file for free, there is no evidence that it would have taken them any material amount of time to learn otherwise. (PFF ¶668). The total average time to use Free Edition from start to finish is 28 minutes. (PFF ¶449)

Finally, Complaint Counsel devote this and several other proposed findings (CCFF ¶¶865-868, 873-874) to attacking Mr. Deal's opinion that the amount of time most consumers who do not qualify to use Free Edition spend on the TurboTax website before determining that they do not qualify is immaterial. Now, in this and other proposed findings, they expressly concede that the amount of time is just "a couple of minutes" (CCFF ¶¶873-874), and so insignificant that a consumer would not even remember having spent that time.

866. While Mr. Deal asserts that the 15 minutes and 30 minutes that 25% and 50% (respectively) of consumers spent before hitting an upgrade screen are a "small" amount of time, he cannot rule out that it is a meaningful amount of time to consumers. (GX743 (Yoeli Expert Report) ¶ 47; GX749 (Novemsky Rebuttal Expert Report) ¶ 296 ("Mr. Deal fails to offer any evidence to support the assumption that a time investment of 15 or 30 minutes is sufficiently low that a customer would not be inclined to honor that sunk cost by continuing with TurboTax.")).

Response to Finding No. 866:

The Proposed Finding misplaces the burden of proof in this case. Complaint Counsel bear the burden of proving that the challenged ads were deceptive. *See* 16 C.F.R. §3.43(a). The theory of deception in the complaint is that consumers who start their tax returns in TurboTax Free Edition but do not qualify to use that SKU find out that they need to switch to a paid TurboTax SKU only "after investing time and effort gathering and inputting into TurboTax their sensitive personal and financial information," and therefore feel "locked-in" to TurboTax SKUs.

(PFF ¶448). Mr. Deal is evaluating this theory and the relevant data and finding Complaint Counsel's theory unsupported by the actual data. As the Court heard at trial, consumers do *not* spend significant time and effort preparing their taxes with TurboTax generally, let alone before being informed of any need to switch SKUs. (PFF ¶449). The average TurboTax Free Edition customer currently completes his or her taxes in just 28 minutes, and customers who are told they need to switch are typically told shortly after starting their returns. (PFF ¶¶449-450). Thus, regardless of whether Mr. Deal can "rule out" anything, his testimony helps explain why Complaint Counsel have not proven their theory by a preponderance of the evidence.

Finally, Complaint Counsel devote this and several other proposed findings (CCFF ¶¶865-868, 873-874) to attacking Mr. Deal's opinion that the amount of time most consumers who do not qualify to use Free Edition spend on the TurboTax website before determining that they do not qualify is immaterial. Now, in this and other proposed findings, they expressly concede that the amount of time is just "a couple of minutes" (CCFF ¶¶873-874), and so insignificant that a consumer would not even remember having spent that time.

867. Mr. Deal made a "professional judgment" that the amount of time a consumer spends using TurboTax is not material for the purposes of assessing switching costs until it reaches an hour. Mr. Deal did not survey any consumers and does not have any expertise in consumer psychology to support that conclusion. (Deal (Intuit) Tr. 1406-1407).

Response to Finding No. 867:

The Proposed Finding is incorrect. Complaint Counsel did not dispute Mr. Deal's qualifications as an expert, or the admissibility of his expert opinions. In reaching his opinions in this case, Mr. Deal brought to bear his decades of experience as an economist and his expertise in conducting data analyses similar to the analysis performed for this case. (Deal (Intuit) Tr. 1291-1295). Tellingly, Complaint Counsel cannot point to any evidence in the record suggesting that 15 to 30 minutes is viewed differently than Mr. Deal opines, and neither of Complaint

Counsel's experts were actually willing to opine that this was a significant amount of time to consumers.

Finally, Complaint Counsel devote this and several other proposed findings (CCFF ¶¶865-868, 873-874) to attacking Mr. Deal's opinion that the amount of time most consumers who do not qualify to use Free Edition spend on the TurboTax website before determining that they do not qualify is immaterial. Now, in this and other proposed findings, they expressly concede that the amount of time is just "a couple of minutes" (CCFF ¶¶873-874), and so insignificant that a consumer would not even remember having spent that time.

868. Mr. Deal does not "know how any individual consumer" whose data he analyzed would respond to the length of time they spent on the TurboTax website before hitting an upgrade screen. (Deal (Intuit) Tr. 1408–09).

Response to Finding No. 868:

The Proposed Finding is misleading and irrelevant. The Proposed Finding is misleading because it suggests Mr. Deal needed to know how "individual consumer[s]" subjectively viewed the length of time they spent on the TurboTax website before they encountered an upgrade screen in order to analyze whether Intuit's customer data was consistent with Complaint Counsel's theory of deception. Not so. The duration of time before encountering an upgrade screen was used only in the second phase of Mr. Deal's empirical analysis, in which he sought to focus on the remaining paying TurboTax consumers left after the first phase of his analysis that were most susceptible to the widespread deception Complaint Counsel allege. (PFF ¶¶675-680). In addition to focusing on new Free Edition customers (i.e., those unfamiliar with the product) who found the product through a TurboTax advertisement, Mr. Deal identified consumers who had spent at least 60 minutes of elapsed time (including possible inactive time) using TurboTax before encountering an upgrade screen. (PFF ¶678). His logic in doing so was to identify customers who may have invested sufficient time using the product that they could feel less able

to switch to an alternative method of tax preparation. (PFF ¶¶678). Among those customers most susceptible to Complaint Counsel's alleged deception, Mr. Deal found just 510 customers— less than 0.0009% of the 55.5 million individuals (or 1 in 100,000) included in his analysis—for whom there was evidence of possible deception in the data. (PFF ¶¶679-682). Whether these consumers subjectively believed themselves to be unable to switch to another form of tax preparation in less than 60 minutes before encountering an upgrade screen does not impact Mr. Deal's objective analysis. Having not identified meaningful direct evidence of deception among those customers whose experiences most closely resemble Complaint Counsel's theory of deception, there is no reason to believe that any customer group excluded earlier in Mr. Deal's funnel (e.g., customers who spent less than 60 minutes before encountering an upgrade) would evidence any greater rate of experiences showing deception. (PFF ¶¶681).

Finally, Complaint Counsel devote this and several other proposed findings (CCFF ¶¶865-868, 873-874) to attacking Mr. Deal's opinion that the amount of time most consumers who do not qualify to use Free Edition spend on the TurboTax website before determining that they do not qualify is immaterial. Now, in this and other proposed findings, they expressly concede that the amount of time is just "a couple of minutes" (CCFF ¶¶873-874), and so insignificant that a consumer would not even remember having spent that time.

869. The relevant trial testimony appears below:

Q. Well, you've said, you know, it's your professional judgment that an hour is sort of material, so I'm asking for the consumer for whom they spend 55 minutes before hitting an upgrade screen, do you know that they will behave any differently than someone who hits an upgrade screen at 61 minutes?

A [Mr. Deal]. Not an individual consumer, no.

Q. What about 30 minutes?

A [Mr. Deal]. Again, same answer.

Q. You don't actually know how any individual consumer would respond, right?

A [Mr. Deal]. I think that's – that's accurate. That's not the data I'm looking at.

(Deal (Intuit) Tr. 1408-1409).

Response to Finding No. 869:

Intuit has no specific response except to incorporate its response to Complaint Counsel's Proposed Finding of Fact No. 868 as if set forth herein.

870. For the 17.6 million consumers that Mr. Deal says could not have been deceived because they explored TurboTax but pursued other options: they could have faced high switching costs, they could have been deceived, and, in fact, they behaved in line with consumers who were deceived. (GX743 (Yoeli Expert Report ¶ 108)).

Response to Finding No. 870:

The Proposed Finding is incomplete and misleading because it misstates Mr. Deal's opinion and testimony. Mr. Deal determined the 17.6 million consumers referenced had customer data inconsistent with deception because they either (1) never began a tax return in a TurboTax SKU (6.8 million), or (2) began a tax return but did not complete that return with TurboTax (10.8 million). (PFF ¶666). His analysis recognized these customers understood they had a choice not to use TurboTax and, in fact, they exercised that choice. (PFF ¶666). The Proposed Finding posits, based exclusively on Dr. Yoeli's unsourced say-so, that these customers "could" have faced high switching costs, "could" have been deceived, and behaved in an unidentified manner that Dr. Yoeli believes would be "in line with consumers who were deceived. But Dr. Yoeli concedes that opinions offering only what "could" be true are "not a very strong claim." (PFF ¶930). Merely suggesting (again, with no actual evidence in support) that consumers "could have been deceived" is not a credible rebuttal of Mr. Deal's opinions.

To the extent the Proposed Finding is intended to suggest that a deceived consumer might start a tax return using TurboTax but not complete that return, Mr. Deal explained that customers

may switch away from TurboTax to another form of tax preparation for any number of reasons that have nothing to do with deception. (PFF ¶667). These might include customers who begin using a DIY tax-preparation product but due to fear, uncertainty, and doubt (or “FUD”) decide to switch to an assisted tax-preparation method (e.g., a CPA); customers who are testing multiple software options; or customers who were using TurboTax to “double-check[]” tax returns prepared by their CPA, to name a few. (PFF ¶667). Mr. Deal’s testimony was corroborated by testimony from Intuit’s executives, who explained that customers typically abandon TurboTax because they lose confidence in their ability to file on their own, because they are only using the software to double-check what their outside tax provider told them, and/or because they are comparing different tax-preparation products. (PFF ¶657). None of those reasons for abandonment is specific to TurboTax’s free products—and none indicates deception. (PFF ¶657). Moreover, Intuit presented evidence showing that the abandonment rate for TurboTax Free Edition is the same for all TurboTax SKUs, demonstrating that consumers were abandoning TurboTax for reasons common to all SKUs, rather than because they felt deceived in a manner specific to Free Edition. (PFF ¶¶655-658, 774). In response to these established facts, the Proposed Finding offers only Dr. Yoeli’s conjecture and surmise.

Finally, the Proposed Finding’s suggestion that consumers “could” have faced high switching costs is strongly contradicted by the record. Based on his review of academic literature and Intuit’s internal documents (nearly all of which were ignored by Dr. Yoeli), Mr. Deal concluded that consumers willing to consider digital DIY tax-preparation solutions face very low switching costs. (Deal (Intuit) Tr. 1310-1311; RX1027 (Deal Expert Report) ¶¶15, 51-54, 129). That observation is corroborated by consumers’ actual behavior. Consumers can (and do) easily switch between different tax-preparation products and methods, both within each Tax

Year and also from one year to the next. (PFF ¶¶51-55; *see also* Deal (Intuit) Tr. 1302, 1310-1311; RX1027 (Deal Expert Report) ¶¶15, 51-54, 129). Every year, in fact, approximately 20% of taxpayers use a different tax preparation method than they used the year before. (PFF ¶¶52).

871. Mr. Deal next focuses on 23.1 million consumers in the TY21 customer base who paid to file their taxes and meet one of his criteria. Mr. Deal does not foreclose that some of these consumers may have been deceived. (RX1027 (Deal Expert Report) ¶ 111 (explaining that the evidence “*suggests*” the consumers were not deceived) (emphasis added)); Deal (Intuit) Tr. 1432-1433 (“Q. Okay. So it’s your -- is it your opinion that in this last slice of the -- of the pie, these 23.1 million people who paid to file, that no one in this bucket was deceived? A. No.”); Deal (Intuit) Tr. 1438 (For these people in these buckets, are you saying none of them were deceived? A: No.”); *see also* GX749 (Novemsky Rebuttal Expert Report) ¶¶ 285-287; Novemsky (Complaint Counsel) Tr. 1790-1792).

Response to Finding No. 871:

Intuit has no specific response except to note that Mr. Deal determined these 23.1 million consumers fell into one of three overlapping categories that are inconsistent with Complaint Counsel’s theory of deception, which together can be summarized as having sufficient experience with the TurboTax suite of products and/or their own personal tax situations to have not been deceived into believing that TurboTax would be free for them. (PFF ¶¶669-673). These consumers either (1) reasonably understood from their previous experience with TurboTax that TurboTax in fact was unlikely to be free for them (22.1 million) (PFF ¶¶670-671); (2) exhibited a preference for paid add-on features or functionalities inconsistent with a reasonable expectation of filing their tax return for free (7.3 million) (PFF ¶672); and/or (3) qualified to use TurboTax Free Edition but chose not to use it in order to claim optional complex deductions or credits on Schedule A or Schedule 3 (but did not attach any other schedules) (4 million) (PFF ¶673). Mr. Deal’s opinion that such customers could not have been deceived was corroborated by Professor Novemsky, who testified, consumers who “used TurboTax in the last three years ... probably have a good sense of whether [they] have to pay or not because [they] either paid [for TurboTax]

or [they] got it for free.” (PFF ¶¶671; *see also* Novemsky (FTC) Tr. 380; Deal (Intuit) Tr. 1348-1349).

872. The most significant portion of these 23.1 million customers are the 22.1 million customers who Mr. Deal identifies as having “awareness of Turbo Tax paid products.” Mr. Deal argues that because these customers had a prior interaction with a Turbo Tax paid product, they could not have been deceived. “That’s a tall order.” (GX743 (Yoeli Expert Report) ¶ 113).

Response to Finding No. 872:

The Proposed Finding is irrelevant. Dr. Yoeli’s unsourced commentary that it would be a “tall order” is not evidence supporting the Proposed Finding (or evidence of anything at all), and indeed is directly contradicted by the testimony of Complaint Counsel’s other expert, Professor Novemsky. As Professor Novemsky testified, consumers who “used TurboTax in the last three years ... probably have a good sense of whether [they] have to pay or not because [they] either paid [for TurboTax] or [they] got it for free.” (PFF ¶¶671; *see also* Novemsky (FTC) Tr. 380; Deal (Intuit) Tr. 1348-1349).

873. Mr. Deal’s analysis would include as a consumer for whom deception was unlikely in TY21, for example, any consumer who in TY19 started their tax filing process, got a couple minutes into the process, and abandoned after hitting an upgrade screen in TY19. (Deal (Intuit) Tr. 1438-1439; *see* GX743 (Yoeli Expert Report) ¶ 113 (“Deal assumes that, for instance, a customer who saw an upgrade screen in 2019 could not have been deceived because two years later, they would remember this upgrade screen, and, making the connection, would conclude that their taxes in 2021 would not qualify as simple.”)).

Response to Finding No. 873:

Intuit has no specific response except to note that the hypothetical customer posited in the Proposed Finding may have had other characteristics inconsistent with Complaint Counsel’s theory of deception under Mr. Deal’s analysis—for example, such a consumer may also have exhibited a preference for add-on features inconsistent with an expectation of filing for free. (PFF ¶¶669-672; Deal (Intuit) Tr. 1352 (“a lot of overlap among these categories”). In addition, the suggestion in the Proposed Finding that the hypothetical customer would not recall their

experience using TurboTax is directly contradicted by the testimony of Professor Novemsky, who explained that customers who used TurboTax in the last three years were likely to have a good sense for whether they would have to pay or not. (PFF ¶¶671). Finally, Complaint Counsel devote this and several other proposed findings (CCFF ¶¶865-868, 873-874) to attacking Mr. Deal's opinion that the amount of time most consumers who do not qualify to use Free Edition spend on the TurboTax website before determining that they do not qualify is immaterial. Now, in this and other proposed findings, they expressly concede that the amount of time is just "a couple of minutes" (CCFF ¶¶873-874), and so insignificant that a consumer would not even remember having spent that time.

874. Mr. Deal, however, has no way to know whether that consumer would remember having spent a couple of minutes on the TurboTax website two years prior. (Deal (Intuit) Tr. 1439-1440 ("Q. Sure. A. Yeah, I'm not – I'm not opining on what any individual consumer remembers. I'm opining on what a reasonable consumer, whether the data would be consistent with or not consistent with, so the data in the last couple years, but not any individual. Q. Right, because you don't know what any one of these millions of consumers remembers, right? A. Correct."))

Response to Finding No. 874:

The Proposed Finding illustrates the internal inconsistencies in Complaint Counsel's theory of deception. Complaint Counsel devote this and several other proposed findings (CCFF ¶¶865-868, 873-874) to attacking Mr. Deal's opinion that the amount of time most consumers who do not qualify to use Free Edition spend on the TurboTax website before determining that they do not qualify is immaterial. Now, in this and other proposed findings, they expressly concede that the amount of time is just "a couple of minutes" (CCFF ¶¶873-874), and so insignificant that a consumer would not even remember having spent that time. Complaint Counsel's admission on the time it takes on TurboTax in this Proposed Finding is accurate, but the speculation that consumers would "not remember" this is inaccurate, and the focus on individual hypotheticals is non-scientific and misses the point of Mr. Deal's analysis.

Mr. Deal relied on objective customer data to ascertain that a *reasonable consumer* who had either used a paid TurboTax SKU or been recommended to use a paid TurboTax SKU in at least one of the last two years would know that TurboTax was not free for everyone and could not have reasonably believed they could file for free with TurboTax in Tax Year 2021. (PFF ¶¶670-671). These consumers would understand at a minimum that they would need to determine whether they qualified for a free TurboTax SKU in a given year. (PFF ¶671). Notably, Dr. Novemsky adopted a similar (but less conservative) position, testifying that consumers who “used TurboTax in the last three years ... probably have a good sense of whether [they] have to pay or not because [they] either paid [for TurboTax] or [they] got it for free.” (PFF ¶671; *see also* Novemsky (FTC) Tr. 380; Deal (Intuit) Tr. 1348-1349).

875. Mr. Deal did not conduct any consumer surveys to test whether consumers would remember their prior, brief experience using TurboTax. (Deal (Intuit) Tr. 1439–40 (“Q. And you didn’t conduct any surveys ...to determine what people remembered about their past interactions on the TurboTax website, right? A. Correct.”)).

Response to Finding No. 875:

This is yet another Proposed Finding that boils down to the unremarkable proposition that Mr. Deal did not perform a survey. Again, surveys exist to form extrapolations from random samples of larger populations. Well-designed consumer surveys have their place, but Mr. Deal was able to evaluate the data for the entire population of TY21 TurboTax user base (PFF ¶¶663-664, 681-682), there was thus not a need to perform a survey (RX1395 (Deal (Intuit) Dep.) at 145-146). In this specific case, Complaint Counsel are advocating for a survey of consumer memory (or literally, memory of their memory)—i.e., a memory test. Memory tests are not reliable surveys. (PFF ¶¶536, 603; Hauser (Intuit) Tr. 945-946, 948; R1017 (Hauser Expert Report) ¶¶56, 58-59, 61). It is far more informative to look at the objective data and make

assessments based on that data then ask people what they remember. Thus, the critique offered through this Proposed Finding is unpersuasive.

876. Mr. Deal also doesn't know whether a change in a consumer's tax filing status between TY19 and TY21 could change their expectation about whether TurboTax would be free for them. (Deal (Intuit) Tr. 1442-1443).

Response to Finding No. 876:

The Proposed Finding is irrelevant. An individual's tax filing status is either single, married filing jointly, or married filing separately. (See RX1027 (Deal Expert Report) App'x D at D-30; Rubin (Intuit) Tr. 1594-1595; Deal (Intuit) Tr. 1442). Regardless of the individual's filing status, they can file for free using TurboTax Free Edition if they have a simple tax return, or can use any TurboTax SKU to file for free if they are an active-duty member of the military. (PFF ¶¶67-69, 151-154).

More broadly, individuals' tax returns become more complex over time. (PFF ¶¶83, 85, 859, 868). It is unlikely—and Complaint Counsel do not point to a single example—that a consumer's taxes became simpler over time. Thus, to the extent what Complaint Counsel are really talking about here is changes in the complexity of an individual's return, as opposed to their "filing status" it is exceedingly unlikely that a change in complexity would cause a consumer to believe that they were somehow more likely to qualify to use a free product. Further, in the speculative hypothetical being posited in what is supposed to be a finding *of fact*, this consumer necessarily would have been aware that TurboTax Free Edition's qualifications were tied to the complexity of their return (otherwise he would have no reason to believe a change in complexity impacted their ability to file for free) and thus also was quite unlikely to have been deceived. Precisely so that he could avoid hypothetical speculation and individual anecdote, Mr. Deal focused his analysis on objective customer data, from which he determined that *reasonable consumers* who had either used a paid TurboTax SKU or been recommended use

a paid TurboTax SKU in at least one of the last two years were on notice that TurboTax was not free for everyone and could not have reasonably believed they could file for free with TurboTax in Tax Year 2021. (PFF ¶¶670-671). At minimum, Mr. Deal explained, these customers would understand that they would need to determine whether they qualified for a free TurboTax SKU in a given year and thus likely could not have been deceived in the manner alleged. (PFF ¶671).

877. Mr. Deal did not analyze the Intuit data that he had to determine whether, for any of the consumers that he excluded because of their past use of TurboTax, those consumers had experienced a change in tax filing status between TY19 or TY20 and TY21. (Deal (Intuit) Tr. 1444).

Response to Finding No. 877:

The Proposed Finding is irrelevant. An individual's tax filing status is either single, married filing jointly, or married filing separately. (See RX1027 (Deal Expert Report) at D-30 Rubin (Intuit) Tr. 1594-1595; Deal (Intuit) Tr. 1442). Regardless of the individual's filing status, they can file for free using TurboTax Free Edition if they have a simple tax return, or can use any TurboTax SKU to file for free if they are an active-duty member of the military. (PFF ¶¶67-69, 151-154). There was thus no reason for Mr. Deal to perform the analysis suggested in this Proposed Finding.

More broadly, individuals' tax returns become more complex over time. (PFF ¶¶83, 85, 859, 868). It is unlikely—and Complaint Counsel do not point to a single example—that a consumer's taxes became simpler over time. Thus, to the extent what Complaint Counsel are really talking about here is changes in the complexity of an individual's return, as opposed to their "filing status" it is exceedingly unlikely that a change in complexity would cause a consumer to believe that they were somehow more likely to qualify to use a free product. And so again, there would have been no reason to perform the data analysis posited here in the Proposed Finding.

878. Tax regulations, Intuit's policies, and consumers tax situations are not static. A consumer who believed these might have changed—and Intuit's ads may well have prompted them to believe this—could have expected Turbo Tax to be free for them in a given year, even if it hadn't been in past years. (GX743 (Yoeli Expert Report) ¶ 114).

Response to Finding No. 878:

This Proposed Finding should be rejected because it rests only on Dr. Yoeli's expert report. Dr. Yoeli's opinions in this case should be entitled to little or no weight. Dr. Yoeli did not consider most of the record, he did not review the challenged ads, misapplied the definition of deception, and did "very little new analysis" of his own. (PFF ¶¶929-931). Further, this opinion, like each opinion he offers, is by his own admission "not a very strong claim." (Yoeli (FTC) Tr. 1738; RX1396 (Yoeli (FTC) Dep.) at 60).

The Proposed Finding itself lacks support because it relies solely on speculation by Dr. Yoeli about the challenged advertisements and consumer impressions about those advertisements. However, Dr. Yoeli cannot offer any reliable opinion on the subject of Intuit's ads because, as he himself admits, he did not review any of the challenged ads in forming his opinions in this case. (PFF ¶930). Moreover, Dr. Yoeli again offers only hypotheticals about what consumers "might" believe and that their expectations "could" have changed, which as he himself admits is "not a very strong claim." (PFF ¶930).

The unsupported speculation offered here would be unpersuasive even if it could be considered: even if tax regulations or consumers' tax situations had changed, reasonable consumers who had either used a paid TurboTax SKU or been recommended use a paid TurboTax SKU in at least one of the last two years were on notice that TurboTax was not free for everyone and could not have reasonably believed they could file for free with TurboTax in Tax Year 2021. (PFF ¶¶670-671). At minimum, Mr. Deal explained, these customers would

understand that they would need to determine whether they qualified for a free TurboTax SKU in a given year. (PFF ¶671).

879. The perception survey shows very directly that a substantial number of consumers who paid to file with TurboTax do have the misimpression that they could file for free with TurboTax in the current tax year based on TurboTax advertising and the TurboTax website. Consumers may be under this misimpression because their tax situation changed from prior years, they correctly believe that the criteria for filing for free with TurboTax can vary from year to year, or simply that TurboTax would not be repeating “Free, Free, Free” if their product was not currently free for them. (GX749 (Novemsky Rebuttal Expert Report) ¶ 287).

Response to Finding No. 879:

The Proposed Finding is incorrect and unsupported because it is based entirely on Professor Novemsky’s scientifically invalid and unreliable survey and other baseless assertions from Professor Novemsky. As initial matter, Professor Novemsky’s survey cannot reliably assess the threshold question of whether any consumer misimpression exists, so the survey necessarily cannot reliably assess the source of any supposed misimpression. (PFF ¶589; *see also* PFF¶¶550-552, 566-588). Among many other flaws, Professor Novemsky’s questions primed participants to guess that they could file for free—which respondents confirmed by saying that they believed they could file for free because “[b]ecause this survey is suggesting that I can.” (PFF ¶576; *see also* PFF ¶¶567-575, 577).

In addition, the Proposed Finding draws a causal conclusion that the supposed misimpression was “based on TurboTax advertising and the TurboTax website,” but Professor Novemsky’s survey was not designed to assess causality. (PFF ¶530). As Professor Novemsky testified when evaluating a survey as an expert in another case, it is “impossible” to “draw any causal inference” without “an experimental design that includes a control group and a test group.” (PFF ¶532). Absent a control group, Professor Novemsky stated under oath, one cannot test what “an ad caused consumers to understand or not understand.” (PFF ¶532). Here,

however, Professor Novemsky admits that he did not use a test-control design. (PFF ¶533).

Indeed, although Professor Novemsky purports to draw a causal conclusion about TurboTax's marketing, he did not show participants any TurboTax advertisements or the TurboTax website. (PFF ¶534).

On top of that fundamental design problem, Professor Novemsky's survey led survey participants to indicate that TurboTax's advertising and website was driving their impression. To identify the source(s) of consumers' supposed misimpression, Professor Novemsky relied on one multiple-choice question, for which two of the five substantive answer choices conformed to Complaint Counsel's allegations, increasing the likelihood that participants would respond in a manner consistent with those allegations. (PFF ¶593). Making matters worse, by the time participants reached TAT255, they had already been primed (consciously or subconsciously) to select the two TurboTax-related answer choices, because the survey had already mentioned "TurboTax" twelve times. (PFF ¶594). If Professor Novemsky had used a control a control group, he could have measured the magnitude of this effect and removed it from his results. (PFF ¶595). But he did not do so.

Any one of these flaws is sufficient on its own to render Professor Novemsky's "source" conclusion unreliable. (PFF ¶607). But the flaws likely compound one another. (PFF ¶607). When presented with an unreliable memory test and a list of answer choices that emphasized TurboTax, it is highly unlikely that the participants in Professor Novemsky's survey would provide accurate responses about the sources of their impressions. Thus, Professor Novemsky's conclusion about the existence source of any consumer misimpression is meaningless.

As for Professor Novemsky's remaining assertions about why consumers may be under a misimpression, those are just baseless postulating. Indeed, the phrasing of the finding—which

uses the word “may”—concedes its speculative nature. As Complaint Counsel’s other expert (Dr. Yoeli) admitted, this kind of statement is “not a very strong claim.” (PFF ¶¶930).

It bears emphasis, however, that the Proposed Finding is incorrect in asserting that “the criteria for filing for free with TurboTax can vary from year to year.” As explained in detail above (Responses to CCF ¶¶13, 17-18), Intuit has always aligned its use of “simple tax return” with the federal government’s definition: returns filed using the most basic form for an individual income-tax return, without any schedules. (PFF ¶¶119-125). While Intuit has extended eligibility for TurboTax Free Edition beyond “simple tax returns” in certain years in response to unprecedented events, such as the COVID-19 pandemic, those changes did not alter the definition of simple tax returns. (PFF ¶¶148-149). Intuit expanded eligibility for free TurboTax SKUs when it was “the right thing” to do for customers and, in the process, forwent substantial short-term revenue in doing so. (PFF ¶146). That is not evidence of deception, it is evidence of compassion.

880. Circumstances surrounding a specific consumer’s experiences, such as their tax filing status, when they saw ads, and what ads they saw when they went to the TurboTax website, all could influence that consumer’s expectation about whether TurboTax was free for them. Mr. Deal, however, did not “consider[] any of those subjective components” in his data analysis. (Deal (Intuit) Tr. 1460 (“Q. So isn’t it fair to say that a consumer’s specific circumstance around their tax filing status, when they saw ads, what ads they saw when they went to the TurboTax website, all could influence their expectation about whether TurboTax was free for them? A. Certainly there’s a subjective view of that, yes. Q. You haven’t considered any of those subjective components, right? A. I’m modeling what a rational consumer would know.”)).

Response to Finding No. 880:

The Proposed Finding is irrelevant and misleading. At the outset, the Proposed Finding is misleading because the parenthetical of Mr. Deal’s testimony omits half of his response. As Mr. Deal explained in response to Complaint Counsel’s question, his analysis sought to “model[] what a rational consumer would know from the data I have about consumer behavior.” (Deal

(Intuit) Tr. 1460). The Proposed Finding is irrelevant because rather than focus on whether “[c]ircumstances surrounding a specific consumer’s experiences” “could” have impacted individual consumers’ subjective expectations about whether they could file for free using TurboTax (which Complaint Counsel’s experts similarly did not undertake), Mr. Deal focused his analysis on the Intuit’s *objective* customer data to assess the behavior of reasonable consumers in Tax Year 2021.

881. Finally, Mr. Deal is left with 1.3 million consumers who paid to file their Taxes with TurboTax, but do not fall into one of the categories described above. For these consumers, like the other tens of millions of customers whose data Mr. Deal analyzes, he cannot opine that none were deceived. (*See Deal (Intuit) Tr. 1461-1462*).

Response to Finding No. 881:

The Proposed Finding is incomplete and irrelevant. First, it is incomplete because the “categories described above” does not include the 13.4 million customers identified by Mr. Deal in Intuit’s Tax Year 2021 customer who filed their federal and state tax returns for free. (PFF ¶665). By definition, those 13.4 million customers could not have been deceived because, to the extent they had an expectation about filing their tax returns for free, their expectations were met. (PFF ¶665). Second, the Proposed Finding is irrelevant. The burden of proof in this case rests with Complaint Counsel. They put forward a theory of deception and Mr. Deal’s analysis determines that for most TurboTax consumers, the data is inconsistent with that theory. Complaint Counsel have not shown that any of these consumers were deceived or were likely to be deceived, or otherwise persuasively rebutted Mr. Deal’s actual opinion.

882. Mr. Deal draws conclusions from customers past behavior going back as early as TY14 – to determine if the consumer could have been deceived in TY21, and removes from his analysis consumers who, according to Mr. Deal, “demonstrated awareness of alternatives to TurboTax products.” Specifically, Mr. Deal concludes that there is allegedly not evidence of deception for ██████ customers who logged into Turbo Tax accounts, but either did not start a return or abandoned a partial or fully prepared return at least once between TY14 and TY20; more than ██████ customers who filed their taxes using TurboTax at least once in TY14-19 and “skipped” at least one year of filing on TurboTax

before returning in TY21; and [REDACTED] who used the IRS free file program. This analysis, however, confuses how switching costs work, makes assumptions about what consumers remember, presumes that the consumers expectation around the free product or their tax filing status is stagnant, and omits the effect of sunk costs. (*Compare* RX1027 (Deal Expert Report) ¶ 145-148; *with* GX743 (Yoeli Expert Report) ¶ 119-121).

Response to Finding No. 882:

To begin, because the Proposed Finding rests only on Dr. Yoeli's expert report, it should be rejected. Dr. Yoeli's opinions in this case should be entitled to little or no weight. Dr. Yoeli did not consider most of the record, he did not review the challenged ads, misapplied the definition of deception, and did "little analysis" of his own. (PFF ¶¶929-931). Furthermore, this opinion, like each opinion he offers, is by his own admission "not a very strong claim." (Yoeli (FTC) Tr. 1738; RX1396 (Yoeli (FTC) Dep.) at 60).

The Proposed Finding is inaccurate, incomplete, and misleading because it misconstrues Mr. Deal's opinions and testimony. The Proposed Finding purports to criticize the second phase of Mr. Deal's empirical analysis. In that phase of his analysis, Mr. Deal considered the 1.3 million paying TurboTax customers who could have been deceived in the manner alleged by Complaint Counsel and sought to identify whether there was any direct evidence of deception among the group that most closely aligned to Complaint Counsel's allegations. To identify that group of customers, Mr. Deal focused on *new* Free Edition customers (i.e., those unfamiliar with the product), who found TurboTax *through a TurboTax advertisement*, and who *spent sufficient time using the product that they could feel less able to switch* (at least 60 minutes) before being told they were not eligible for Free Edition, and who paid to use TurboTax. (PFF ¶¶676-678). When Mr. Deal examined the data on these customers for direct evidence of deception (e.g., complaints, low product recommendation scores, or low customer ratings), he found just 510 customers who even potentially viewed themselves to have been deceived. (PFF ¶¶679-680). In

sum, Mr. Deal did not identify meaningful evidence of deception among those customers whose experiences most closely resemble Complaint Counsel's theory of deception. (PFF ¶681).

The Proposed Finding offers no rebuttal to that core finding. Instead, the Proposed Finding criticizes Mr. Deal for not including in the core group he identified as being most susceptible to the deception alleged by Complaint Counsel those customers who had prior experience with a TurboTax product. Mr. Deal's decision to focus on truly *new* Free Edition customers was sound. He explained that customers who had prior experience with TurboTax (including free TurboTax SKUs and the software Intuit donated to the IRS Free File Program) and who had also used other methods of tax preparation in prior tax years had demonstrated an awareness of other filing options and that switching costs were low. (Deal (Intuit) Tr. 1361-1362; RX1027 (Deal Expert Report) ¶¶145-147). Reasonable customers in such a position, he explained, would have been aware when using TurboTax in Tax Year 2021 that they could have abandoned their tax returns had they found TurboTax products unsatisfactory or inconsistent with an expectation that using them would be free. (Deal (Intuit) Tr. 1361-1362; RX1027 (Deal Expert Report) ¶¶145-147). That opinion was corroborated by the testimony of Professor Novemsky, who testified that consumers who "used TurboTax in the last three years ... probably have a good sense of whether [they] have to pay or not because [they] either paid [for TurboTax] or [they] got it for free." (PFF ¶671; *see also* Novemsky (FTC) Tr. 380; Deal (Intuit) Tr. 1348-1349).

883. Mr. Deal's analysis excludes even those consumers whose past experience filing with TurboTax was exclusively related to the use of Free Edition. (Deal (Intuit) Tr. 1463-64 ("Q. So anyone who has experience with TurboTax is removed from your analysis, right? A. I agree. Q. And that's true regardless of whether they filed with Free Edition, right? A. I agree.")).

Response to Finding No. 883:

The Proposed Finding is inaccurate and misleading because it misconstrues Mr. Deal's opinions and testimony. The Proposed Finding improperly attempts to use testimony offered by Mr. Deal at trial describing the second phase of his empirical analysis—during which he sought to identify whether there was any direct evidence of deception among the group that most closely aligned to Complaint Counsel's allegations—to misconstrue the methodology applied in the first phase of his analysis. (Deal (Intuit) Tr. 1463-1464; *see also* PFF ¶¶676-678). The Proposed Finding is incorrect that customers who used Free Edition were “excluded” from the first phase of Mr. Deal's analysis. No consumers were “excluded” from Mr. Deal's analysis—he analyzed the data for all 55.5 million TurboTax customers in Tax Year 2021. And while Mr. Deal did determine that 22.1 million TurboTax customers in that population were on notice from their previous experience with TurboTax that TurboTax in face was unlikely to be free for them, that conclusion was limited to customers who used or were recommended to use *paid* TurboTax products. (PFF ¶670). Mr. Deal concluded that these consumers' past experiences with TurboTax paid products indicate that they could not have reasonably believed they could file for free with TurboTax in Tax Year 2021. (PFF ¶671). These consumers would understand at a minimum that they would need to determine whether they qualified for a free TurboTax SKU in a given year. (PFF ¶671). Professor Novemsky corroborated that step in Mr. Deal's analysis, testifying that consumers who “used TurboTax in the last three years ... probably have a good sense of whether [they] have to pay or not because [they] either paid [for TurboTax] or [they] got it for free.” (PFF ¶671; *see also* Novemsky (FTC) Tr. 380; Deal (Intuit) Tr. 1348-1349).

To the extent the Proposed Finding is offered as an attack on Mr. Deal's decision to consider Free Edition usage in the second phase of his analysis, that decision too was sound. In the second phase of his analysis, Mr. Deal considered the remaining paying TurboTax customers

who could have been deceived in the manner alleged by Complaint Counsel and sought to identify whether there was any direct evidence of deception among the group that most closely aligned to Complaint Counsel's allegations. To identify that group of customers, Mr. Deal focused on *new* Free Edition customers (i.e., those unfamiliar with the product), who found TurboTax *through a TurboTax advertisement*, and who *spent sufficient time using the product that they could feel less able to switch* (at least 60 minutes) before being told they were not eligible for Free Edition, and who paid to use TurboTax. (PFF ¶¶676-678). Mr. Deal explained his decision to focus on truly *new* Free Edition customers by noting that customers who had prior experience with TurboTax (including free TurboTax SKUs and the software Intuit donated to the IRS Free File Program) and who had also used other methods of tax preparation in prior tax years had demonstrated an awareness of other filing options and that switching costs were low. (Deal (Intuit) Tr. 1361-1362; RX1027 (Deal Expert Report) ¶¶145-147). Reasonable customers in such a position, he explained, would have been aware when using TurboTax in Tax Year 2021 that they could have abandoned their tax returns had they found TurboTax products unsatisfactory or inconsistent with an expectation that using them would be free. (Deal (Intuit) Tr. 1361-1362; RX1027 (Deal Expert Report) ¶¶145-147). There is no reason to believe (and Complaint Counsel offer no evidence to prove) that these customers would evidence any greater rate of unfavorable experiences showing deception than those included in Mr. Deal's analysis. (PFF ¶681).

884. Mr. Deal also removes from his count of potentially deceived customers 776,000 consumers who he claims arrived at the Turbo Tax website from some means other than directly from a clickable Intuit advisement (such as a banner ad or email, *e.g.*). (RX1027 (Deal Expert Report) ¶ 150; *see* Deal (Intuit) Tr. 1462 (“I don’t have information as to whether they arrived via a TurboTax ad.”)).

Response to Finding No. 884:

The Proposed Finding is inaccurate and misleading because it misconstrues Mr. Deal's opinions and testimony. Mr. Deal did not "remove[]" consumers who arrived at the TurboTax website from some means other than directly from a clickable TurboTax ad at any point in his analysis. The Proposed Finding attempts to sow confusion by improperly conflating the two phases of Mr. Deal's analysis. In the first phase of his analysis, Mr. Deal analyzed Intuit's customer data for all 55.5 million TurboTax customers in Tax Year 2021, irrespective of whether the consumers viewed a TurboTax ad or how they came to the TurboTax website. (PFF ¶¶663-664). Based on that analysis, Mr. Deal concluded that 97.6% of Intuit's Tax Year 2021 customer base did not exhibit characteristics of being deceived in the manner alleged by Complaint Counsel. (PFF ¶¶674, 902).

The second phase of Mr. Deal's analysis was designed to identify direct evidence of deception among the group of paying TurboTax customers that most closely aligned to Complaint Counsel's allegations. (PFF ¶¶675-678). Mr. Deal's decision to focus that inquiry on customers who could be demonstrably shown to have viewed a TurboTax advertisement was sound. Mr. Deal explained at trial that Complaint Counsel's theory of deception rests on an assumption that consumers arrive at the TurboTax website through (and because of) advertisements that suggest filing with TurboTax is free for them. (Deal (Intuit) Tr. 1359-1361; RX1027 (Deal Expert Report) ¶¶149-151). In order to test whether that theory was consistent with the actual behavior of Intuit's customers, Mr. Deal focused his second-phase analysis on those customers for whom the available data indicated they had viewed a TurboTax ad. (Deal (Intuit) Tr. 1359-1361; RX1027 (Deal Expert Report) ¶¶149-151). The Proposed Finding suggests that Mr. Deal's second-phase analysis was unreliable because it did not focus on consumers who *may* have viewed a TurboTax advertisement that was not reflected in the data.

But having identified no meaningful direct evidence of deception among those customers whose experiences most closely resemble Complaint Counsel's theory of deception (i.e., those who definitely *did* view a TurboTax ad), there is no reason to believe (and Complaint Counsel offer no evidence to prove) that customers who may have viewed a TurboTax ad not reflected in the data (or who did not view a TurboTax ad at all) would evidence any greater rate of unfavorable experiences showing deception than those included in Mr. Deal's analysis. (PFF ¶681).

885. This analysis ignores, for example, consumers who saw a TurboTax advertisement on television and went directly to TurboTax's website. (GX743 (Yoeli Expert Report) ¶ 124; Deal (Intuit) Tr. 1463 ("Q. ...[Y]ou don't know if they saw, for example, a TV ad and then went to the TurboTax website and started, right? A. I agree.")).

Response to Finding No. 885:

The Proposed Finding is inaccurate and misleading because it misconstrues Mr. Deal's opinions and testimony. Mr. Deal did not "ignore[]" consumers who saw a TurboTax advertisement on television and went directly to TurboTax's website at any point in his analysis. The Proposed Finding attempts to sow confusion by improperly conflating the two phases of Mr. Deal's analysis. In the first phase of his analysis, Mr. Deal analyzed Intuit's customer data for all 55.5 million TurboTax customers in Tax Year 2021, irrespective of whether or not the consumers viewed a TurboTax ad or how they came to the TurboTax website. (PFF ¶¶663-664). Based on that analysis, Mr. Deal concluded that 97.6% of Intuit's Tax Year 2021 customer base did not exhibit characteristics of being deceived in the manner alleged by Complaint Counsel. (PFF ¶¶674, 902).

The second phase of Mr. Deal's analysis was designed to identify direct evidence of deception among the group of paying TurboTax customers that most closely aligned to Complaint Counsel's allegations. (PFF ¶¶675-678). Mr. Deal's decision to focus that inquiry on customers who could be demonstrably shown to have viewed a TurboTax advertisement was

sound. Mr. Deal explained at trial that Complaint Counsel's theory of deception rests on an assumption that consumers arrive at the TurboTax website through (and because of) advertisements that suggest filing with TurboTax is free for them. (Deal (Intuit) Tr. 1359-1361; RX1027 (Deal Expert Report) ¶¶149-151). In order to test whether that theory was consistent with the actual behavior of Intuit's customers, Mr. Deal focused his second-phase analysis on those customers for whom the available data indicated they had viewed a TurboTax ad. (Deal (Intuit) Tr. 1359-1361; RX1027 (Deal Expert Report) ¶¶149-151). The Proposed Finding suggests that Mr. Deal's second-phase analysis was unreliable because it did not focus on consumers who may have viewed a TurboTax advertisement on television and went directly to the TurboTax website. But as Mr. Deal explained, there was no way to identify such customers in the available data. (Deal (Intuit) Tr. 1462-1463). And, having identified no meaningful direct evidence of deception among those customers whose experiences most closely resemble Complaint Counsel's theory of deception (*i.e.*, those who definitely *did* view a TurboTax ad), there is no reason to believe (and Complaint Counsel offer no evidence to prove) that customers who *may* have viewed a TurboTax television ad would evidence any greater rate of unfavorable experiences showing deception than those included in Mr. Deal's analysis. (PFF ¶681).

886. Using these two criteria, Mr. Deal eliminates all but 135,000 of the 1.3 million consumers, finding that these are the only set that are both new to TurboTax and arrived at the website via a clickable link. Mr. Deal then further excludes from the 135,000 remaining consumers any customers who saw the first upgrade screen an hour or more into their tax filing process. Mr. Deal, however, provides no rationale for using a cut off of time to hit a first upgrade screen at one hour. (*Compare* RX1027 (Deal Expert Report) ¶ 151-152; *with* GX743 (Yoeli Expert Report) ¶¶ 126-128; *see* Deal (Intuit) Tr. 1466 (“Q. ... The only analysis that gets you from 134,000 -- roughly 134,000 consumers to the 43,000 consumers is looking at the amount of time that they spent before they hit the first upgrade screen, right? A. I agree with that.”)).

Response to Finding No. 886:

The Proposed Finding is inaccurate, incomplete, and misleading because it misconstrues Mr. Deal's opinions and testimony. The Proposed Finding purports to criticize the second phase of Mr. Deal's empirical analysis. In that phase of his analysis, Mr. Deal considered the 1.3 million paying TurboTax customers who could have been deceived in the manner alleged by Complaint Counsel and sought to identify whether there was any direct evidence of deception among the group that most closely aligned to Complaint Counsel's allegations. To identify that group of customers, Mr. Deal focused on *new* Free Edition customers (i.e., those unfamiliar with the product), who found TurboTax *through a TurboTax advertisement*, and who *spent sufficient time using the product that they could feel less able to switch* (at least 60 minutes) before being told they were not eligible for Free Edition, and who paid to use TurboTax. (PFF ¶¶676-678). When Mr. Deal examined the data on these customers for direct evidence of deception (e.g., complaints, low product recommendation scores, or low customer ratings), he found just 510 customers who even potentially viewed themselves to have been deceived. (PFF ¶¶679-680). In sum, Mr. Deal did not identify meaningful direct evidence of deception among those customers who experiences most closely resemble Complaint Counsel's theory of deception. (PFF ¶681).

The Proposed Finding offers no rebuttal to that core finding. Instead, the Proposed Finding contends that Mr. Deal provided "no rationale for using a cut off time to hit a first upgrade screen at one hour" in identifying core group most susceptible to the deception alleged by Complaint Counsel. That is incorrect. As Mr. Deal explained in his report and at trial, Mr. Deal focused his analysis on customers who had spent at least 60 minutes of elapsed time (including possible inactive time) using TurboTax before countering an upgrade screen because, consistent with his understanding of Complaint Counsel's allegations of deception, these customers may have invested sufficient time using the product that they could feel less able to

switch to an alternative method of tax preparation. (PFF ¶¶678). There is no reason to believe (and Complaint Counsel offer no evidence to prove) that customers in the 1.3 million included in Mr. Deal's second-phase analysis who spent less than 60 minutes before encountering an upgrade screen would evidence any greater rate of unfavorable experiences showing deception than those included in Mr. Deal's analysis. (PFF ¶¶681).

887. 60 minutes is not a talisman for deception. (GX743 (Yoeli Expert Report) ¶ 128).

Response to Finding No. 887:

Intuit has no specific response other than to note that the Proposed Finding is incomprehensible. It is entirely unclear what is being addressed or what it means to be a "talisman for deception." No one is arguing that "60 minutes" of some unspecified something is a talisman for anything.

The only conceivable thing the Proposed Finding could possibly be addressing is Mr. Deal's rationale for including a 60-minute threshold when identifying the group of consumers most susceptible to the deception alleged by Complaint Counsel in the second phase of his empirical analysis. If that is what Complaint Counsel meant to do, in response, Intuit incorporates its reply to the same criticism in Complaint Counsel's Proposed Finding Nos. 867-869, and 886, above, as if fully set forth herein. (*See Responses to CCF ¶¶867-969, 886*).

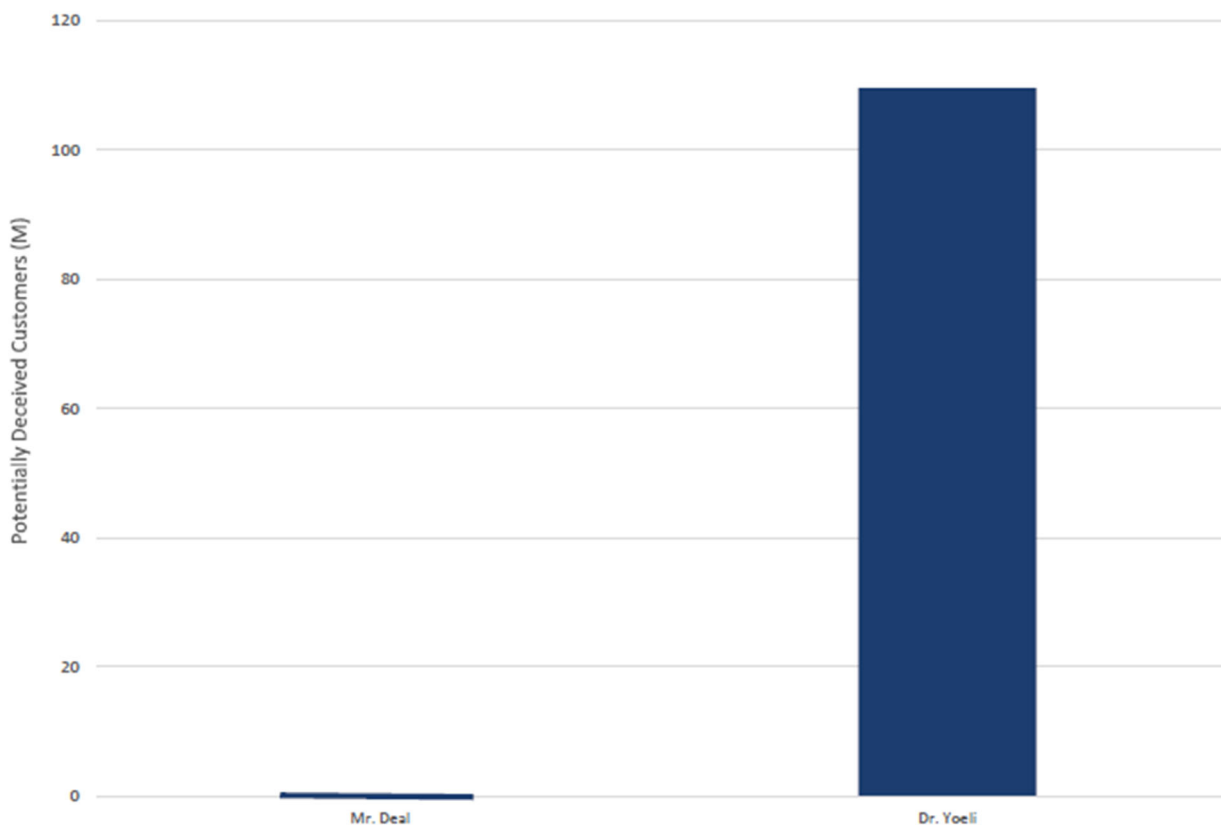
888. Mr. Deal offers no empirical evidence that 60 minutes is a significant amount of time to consumers. (*See generally* RX1027 (Deal Expert Report at ¶¶ 151-153); *see also* Deal (Intuit) Tr. 1406-1407).

Response to Finding No. 888:

Intuit incorporates its reply to the same criticism in Complaint Counsel's Proposed Finding No. 886, above, as if fully set forth herein. (*See Response to CCF ¶886*).

889. Mr. Deal's estimate of the number of potentially deceived consumers is vastly smaller than that of Dr. Yoeli's (conservative) estimate, as depicted below.

TY 2021—Mr. Deal vs. Dr. Yoeli’s Potentially Deceived Customers



(GX743 (Yoeli Expert Report) ¶134 & fig. 6).

Response to Finding No. 889:

To begin, because the Proposed Finding rests only on Dr. Yoeli’s expert report, it should be rejected. Dr. Yoeli’s opinions in this case should be entitled to little or no weight. Dr. Yoeli did not consider most of the record, he did not review the challenged ads, misapplied the definition of deception, and did “little analysis” of his own. (PFF ¶¶929-931). Furthermore, this opinion, like each opinion he offers, is by his own admission “not a very strong claim.” (Yoeli (FTC) Tr. 1738; RX1396 (Yoeli (FTC) Dep.) at 60).

The Proposed Finding is misleading because it seeks to compare Mr. Deal’s data analysis and assessment of consumers whose data is inconsistent with Complaint Counsel’s theory of deception, with Yoeli’s guesswork that individuals “potentially” may have been deceived. These

are apples and oranges. Mr. Deal has done a comprehensive statistical analysis and opines with a reasonable degree of scientific certainty that deception for these consumers is unlikely. (PFF ¶¶663-682). Dr. Yoeli just disagrees. It is telling that Complaint Counsel do not bother to explain in their Proposed Finding how Dr. Yoeli reached his “estimate” of the number of potentially deceived consumers. That is because Dr. Yoeli undertook no actual analysis in arriving at his figure—he simply took the total number of consumers he believed (wrongly) had visited the TurboTax website in Tax Year 2021 and subtracted the 13.4 million consumers who filed for free using TurboTax. (GX743 (Yoeli Expert Report) ¶134). That is neither credible nor reliable expert analysis for several reasons.

First, the starting point for Dr. Yoeli’s estimate does not even represent the total number of unique visitors to the TurboTax website, as he seems to believe. (GX743 (Yoeli Expert Report) at 33-36, fig. 4, table 1 n.1; *see also* RX52 (Intuit) at 27 (explaining [REDACTED] relied upon by Dr. Yoeli is [REDACTED])).

Second, Dr. Yoeli’s estimate far exceeds the total number of consumers who prepared and filed their taxes online in Tax Year 2021 across the entire industry. (PFF ¶50).

Third, Dr. Yoeli’s estimate is twice the number of actual TurboTax customers in Tax Year 2021. (RX1027 (Deal Expert Report) fig. 9).

Fourth, Dr. Yoeli’s estimate would include more than two-thirds of the total United States individual tax base in Tax Year 2021. (PFF ¶43).

And finally, Dr. Yoeli’s estimate far exceeds even what Professor Novemsky would estimate to be the potentially deceived pool of consumers.

Individually any of these facts would make Dr. Yoeli’s purported “estimate” unreliable. Taken together, they render Dr. Yoeli’s position fantastical.

Even if the Court were inclined to accept Dr. Yoeli's "estimate" of potentially deceived customers (it should not, for the reasons explained), Dr. Yoeli conceded that based on his presumption that at least 100 million consumers could have been deceived, Intuit's complaint rate would be so low that he "can't keep track of the zeros," and well below the complaint rate in other FTC consumer-protection cases and thus there is no basis to support his opinion that 100 million+ consumers were deceived. (PFF ¶¶645).

D. Intuit Expert Rebecca Kirk Fair

890. Rebecca Kirk Fair submitted an expert report on Intuit's behalf and testified during a trial deposition. (RX1016-A (Kirk Fair Expert Report); RX1555 (Kirk Fair (Intuit) Dep.)).

Response to Finding No. 890:

Intuit has no specific response.

891. Ms. Kirk Fair does not have a degree in psychology. (RX1016-A (Kirk Fair Expert Report) Appendix A; RX1555 (Kirk Fair (Intuit) Dep.) at 6-7).

Response to Finding No. 891:

The Proposed Finding is irrelevant. This is not a case about psychology, it is about advertising and marketing and Ms. Kirk Fair was more than qualified to offer the opinions in her report and that he testified to at trial. (See PFF ¶¶747-748). Ms. Kirk Fair holds a Master of Business Administration degree in finance and applied economics from the MIT Sloan School of Management, and her education focused on the economics of consumer behavior, survey methodologies, finance, and statistics. (Kirk Fair (Intuit) Tr. at 6-7; RX1016-A (Kirk Fair Expert Report) ¶¶1-3, Appendix A). Further, Ms. Kirk Fair has over 25 years of experience with surveys, and has expertise designing, conducting, and evaluating consumer surveys. (Kirk Fair (Intuit) Tr. at 7-9; RX1016-A (Kirk Fair Expert Report) ¶¶1-3, Appendix A). She has also served as an expert witness—including on behalf of the FTC—in matters relating to consumer perception that involve consumer surveys. (Kirk Fair (Intuit) Tr. at 7-9; RX1016-A (Kirk Fair

Expert Report) ¶¶2-3, Appendix B). In addition, she has written numerous articles on survey design and has spoken on the use of surveys in litigation to the American Bar Association and the Canadian Bar Association. (RX1016-A (Kirk Fair Expert Report) ¶¶2-3, Appendix A).

892. Ms. Kirk Fair's survey was not designed to assess deception resulting from TurboTax marketing, the main issue addressed by Professor Novemsky's survey and report. (GX749 (Novemsky Rebuttal Expert Report) ¶ 257); *see also* RX1016-A (Kirk Fair Expert Report) ¶ 19 ("The purpose of my Disclosure Survey was to assess whether and to what extent the information presented to prospective TurboTax customers through the software's upgrade screens affects their selection of various tax preparation solutions.")).

Response to Finding No. 892:

The Proposed Finding is inaccurate. Ms. Kirk Fair's survey assessed whether consumers upgrade to paid TurboTax SKUs because of the allegedly deceptive advertising. (PFF ¶747; RX1016-A (Kirk Fair Expert Report) ¶¶16, 19 ("Of particular interest was understanding how respondents who see the allegedly deceptive advertisements for TurboTax Free Edition and begin preparing their taxes using TurboTax's Free Edition respond to information contained in these upgrade screens.")). Her survey showed respondents a challenged TurboTax Free Edition display ad which stated "Free Guaranteed" and "\$0 Fed \$0 State \$ To File," asked them to start their return with TurboTax Free Edition, showed them a TurboTax upgrade screen informing them they would need to upgrade to a paid SKU, then asked questions about which tax-preparation product they would use. (PFF ¶¶750-754; RX1016-A (Kirk Fair Expert Report) ¶20). The survey results demonstrated that consumers upgrade to paid TurboTax SKUs for reasons other than allegedly deceptive advertisements for free TurboTax SKUs and do not feel locked into upgrading. (PFF ¶¶755-758; RX-1016-A (Kirk Fair Expert Report) ¶16, 27-30; RX1555 (Kirk Fair (Intuit) Trial Dep.) at 15). In particular, the survey showed that respondents upgrade to paid TurboTax SKUs primarily because of their particular "tax situation," their trust in the TurboTax brand, and the additional features provided by paid SKUs. (RX1555 (Kirk Fair

(Intuit) Trial Dep.) at 46-47, 54-55; RX1016-A (Kirk Fair Expert Report) ¶36, fig. 4). As a result, Ms. Kirk Fair reliably concluded from her survey that “consumers choose to upgrade to [paid] TurboTax products for reasons other than the allegedly deceptive free advertising and the presentation of information related to TurboTax upgrade options.” (RX1555 (Kirk Fair (Intuit) Trial Dep.) at 15; RX1016-A (Kirk Fair Expert Report) ¶¶16, 27-30).

Further, the Proposed Finding is misleading to the extent it suggests that Professor Novemsky’s survey provides reliable evidence of deception. As explained, Professor Novemsky’s survey is fatally flawed for several reasons and does not provide reliable evidence of deception or anything else. (PFF ¶¶528-622; *see also* Responses to CCFF ¶¶467-545).

893. Ms. Kirk Fair’s survey contained a number of methodological and design flaws that mean that the inferences Ms. Kirk Fair makes about potentially misled consumers are baseless and cannot be supported by the results of her survey. (GX749 (Novemsky Rebuttal Expert Report) ¶ 259).

Response to Finding No. 893:

The Proposed Finding identifies no such flaws and is incorrect. Ms. Kirk Fair’s survey was reliable and the conclusions she drew about potentially misled consumers were supported by the results of her survey. (PFF ¶¶904-911; *see also* PFF ¶¶746-760). Ms. Kirk Fair’s survey adhered to best practices for survey design, including following generally accepted survey guidelines set forth by the Federal Judicial Center in the “Reference Guide on Survey Research” and the “Manual for Complex Litigation,” which are “critical references for designing and conducting valid and reliable studies used in litigation.” (RX1555 (Kirk Fair (Intuit) Trial Dep.) at 16-18; RX1016-A (Kirk Fair Expert Report) ¶18; *see also* RX709 (Intuit), RX714 (Intuit)). Ms. Kirk Fair’s survey also comported with academic literature concerning the proper way to test consumer reaction to upgrade screens. (RX1555 (Kirk Fair (Intuit) Trial Dep.) at 18-20; RX1016-A (Kirk Fair Expert Report) ¶18, Appendix D). For instance, Ms. Kirk Fair used a

randomized test-control survey design that showed different groups of respondents different upgrade screens and she then compared results between the groups, which allowed her to isolate any causal impact from different upgrade screens. (RX1555 (Kirk Fair (Intuit) Trial Dep.) at 12, 17-20; RX1016-A (Kirk Fair Expert Report) ¶7). Her survey was also double-blind, meaning that neither respondents nor her team knew the purpose of her survey, which prevented biased responses and biased coding of responses. (RX1555 (Kirk Fair (Intuit) Trial Dep.) at 17, 37-38). Further, Ms. Kirk Fair's survey included several other measures to avoid survey bias, including: (1) conducting a thorough pretest; (2) presenting clear questions and answer choices; (3) asking balanced questions; (4) rotating answer options; (5) using open- and closed-ended questions; and (6) using blind coding procedures to evaluate open-ended answer options. (RX1555 (Kirk Fair (Intuit) Trial Dep.) at 17-18; RX1016-A (Kirk Fair Expert Report) ¶18, Appendix D). Moreover, to the extent that Complaint Counsel have specific critiques of Ms. Kirk Fair's survey, those critiques are unfounded and do not support an inference that her survey or opinions were unreliable or baseless. (*See* Response to Finding CCFF ¶¶894-904).

Finally, the cited exhibit does not support to the Proposed Finding. Professor Novemsky offered no basis for his opinion and therefore it is unreliable and unhelpful *ipse dixit*. (*See* GX749 (Novemsky Rebuttal Report) ¶259).

894. One design flaw of Ms. Kirk Fair's survey is that she included in her survey sample consumers who are and are not eligible for Free Edition and did not ask any questions to determine whether the respondents in her survey were or were not qualified for Free Edition, (RX1016-A (Kirk Fair Expert Report) ¶ 19 Appendix C ¶ 8), making it impossible to evaluate the results of her survey separately for the group of potentially misled consumers. (GX749 (Novemsky Rebuttal Expert Report) ¶ 260).

Response to Finding No. 894:

The Proposed Finding lacks context and is incorrect to the extent it suggests that Ms. Kirk Fair's survey was flawed because it included respondents both eligible and ineligible for

free TurboTax SKUs. Complaint Counsel apparently take issue with Ms. Kirk Fair including respondents who could file for free. But by design, Ms. Kirk Fair's survey included all consumers—both those who could and could not file for free—because the purpose of her survey was to “test[] the effect of upgrade screens on consumer choice to pay for TurboTax products,” which included the effect on consumers who might see an upgrade screen in the future even if they qualified for free TurboTax SKUs at present. (RX1393 (Kirk Fair (Intuit) Dep.) at 43, 61; *see also* RX1555 (Kirk Fair (Intuit) Trial Dep.) at 24). As Ms. Kirk Fair testified, it was “important to capture all of those people [both consumers who can and cannot file for free], in part, because in the future you may not be able to file for free, even if in 2020 you did file for free.” (RX1555 (Kirk Fair (Intuit) Trial Dep.) at 24-25; *see also* RX1393 (Kirk Fair (Intuit) Dep.) at 61 (testifying that it “wouldn't be appropriate [to exclude consumers who qualified for TurboTax Free Edition] given what I'm trying to understand, which would include for the future those consumers who were eligible currently to file for free who may encounter these types of upgrade screens next year if their tax situation changes”)).

Further, the fact that Ms. Kirk Fair included respondents who could and could not file for free did not affect her results or conclusions. (*See* RX1393 (Kirk Fair (Intuit) Dep.) at 43 (“[T]he results don't vary based on whether in prior years you've paid or haven't paid.”); RX1016-A (Kirk Fair Expert Report) ¶29). Ms. Kirk Fair conducted a sensitivity analysis to test whether respondents who had filed for free using TurboTax in the prior two years answered her survey questions differently than those who had not. (RX1016-A (Kirk Fair Expert Report) ¶29; RX1555 (Kirk Fair (Intuit) Trial Dep.) at 43). She found that there was no statistically significant difference in their selection of paid TurboTax products and the IRS Free File Program after seeing an upgrade screen—most decided to upgrade to a TurboTax paid product, just as the

entire survey population did. (RX1016-A (Kirk Fair Expert Report) ¶29 & fig. 2; RX1555 (Kirk Fair (Intuit) Trial Dep.) at 43-44; RX1393 (Kirk Fair (Intuit) Tr.). As a result, her conclusions hold for consumers who were not eligible for free TurboTax SKUs. (See RX1555 (Kirk Fair (Intuit) Trial Dep.) at 59-60).

895. Ms. Kirk Fair's survey also provides no insight into whether respondents believe they could file their taxes for free using TurboTax online software. (GX749 (Novemsky Rebuttal Expert Report) ¶ 261).

Response to Finding No. 895:

The Proposed Finding is incorrect because Ms. Kirk Fair's survey did provide insight into whether respondents believed they could file for free with TurboTax online software. Survey responses showed that respondents understood that whether they qualified for free TurboTax SKUs depended on the complexity of their tax returns. Several respondents indicated in their open-ended survey responses that they knew they would not qualify for free TurboTax SKUs given their tax situations. (RX1016-A (Kirk Fair Expert Report) ¶36; RX1393 (Kirk Fair (Intuit) Dep.) at 56 (“[T]here are some respondents who indicate, I’m pretty sure I wouldn’t be able to file for free.”)). For instance, respondents stated:

- "I have complicated taxes because of my investments and I am used to paying for tax software programs.”;
- “I would already have started some other way [than TurboTax Free Edition], as I know I have more complex taxes than the average person.”;
- “I completely understand that my tax filing is more complicated and might require upgrade.”;

- “I have a few other issues (like student loan interest) that make [my tax return] more complicated than a simple return ... the next [SKU] up is the one that normally makes the most sense for me.”;
- “I’m a homeowner and I itemize my deductions [and would therefore use a paid SKU].”;
- “I have been using TurboTax Deluxe for many years now so I know that it is best suited to my tax situation.”

(RX732 (Intuit); RX1016-A (Kirk Fair Expert Report) ¶36).

Further, the Proposed Finding does not support an inference that Ms. Kirk Fair’s survey is flawed because it did not ask respondents whether they believed they could file for free.

Although her survey sheds light on consumer understanding about eligibility for free TurboTax SKUs, her survey was designed to test consumer reaction to TurboTax upgrade screens after starting in TurboTax Free Edition, and therefore respondents’ preexisting beliefs about eligibility were irrelevant to the survey purpose. Indeed, as Ms. Kirk Fair testified, it would have been inappropriate to ask respondents whether they believed they could file their taxes for free using TurboTax because doing so could introduce bias into their responses by causing them to focus on their preexisting beliefs rather than the survey directions. (RX1555 (Kirk Fair (Intuit) Trial Dep.) at 25).

896. Ms. Kirk Fair’s survey also fails to replicate the real-world environment in which consumers would be moving through the TurboTax software, and particularly does not replicate the time and effort that taxpayers may experience when using TurboTax to file their taxes. (GX749 (Novemsky Rebuttal Expert Report) ¶ 263).

Response to Finding No. 896:

The Proposed Finding is incorrect to the extent it suggests that Ms. Kirk Fair’s survey is flawed because consumers in the real world may have spent more time reviewing the TurboTax

website and inputting tax information before encountering an upgrade screen than respondents did in her survey. Indeed, many consumers encounter upgrade screens minutes after starting their returns, just as respondents could have in Ms. Kirk Fair's survey. (RX1027 (Deal Expert Report) ¶106 & fig. 12). Moreover, Ms. Kirk Fair's survey accurately simulated Complaint Counsel's theory that consumers are deceived through the process of seeing ads for free TurboTax SKUs, visiting the TurboTax website, starting their return in Free Edition, and encountering an upgrade screen informing them they need to upgrade to a paid SKU. (RX1016-A (Kirk Fair Expert Report) ¶20; RX1555 (Kirk Fair (Intuit) Trial Dep.) at 28; RX1393 (Kirk Fair (Intuit) Dep.) at 55). That respondents in her survey could have moved through this process relatively quickly only reinforces Ms. Kirk Fair's conclusion that consumers are not induced into upgrading through TurboTax upgrade screens and do not feel locked in. (See RX1555 (Kirk Fair (Intuit) Trial Dep.) at 50; RX1393 (Kirk Fair (Intuit) Dep.) at 53-54). If consumers in the real world felt locked in to upgrading after expending time and effort inputting their tax information, then consumers who did not expend as much time and effort—such as respondents in Ms. Kirk Fair's survey—would be less likely to upgrade. (See RX1555 (Kirk Fair (Intuit) Trial Dep.) at 50; RX1393 (Kirk Fair (Intuit) Dep.) at 53-54). But Ms. Kirk Fair's survey demonstrates that such consumers still upgrade to paid SKUs at a high rate—i.e., over 40% of the time—which is inconsistent with Complaint Counsel's theory that consumers only upgrade because they feel locked-in. (RX1016-A (Kirk Fair Expert Report) ¶24 & fig. 1; RX1555 (Kirk Fair (Intuit) Trial Dep.) at 50; RX1393 (Kirk Fair (Intuit) Dep.) at 53-54). And her survey further shows that consumers upgrade primarily because of their tax situation and trust for TurboTax products, not because they felt locked in after starting with a free SKU. (Kirk Fair Tr. at 49-50).

Further, the Proposed Finding is incorrect to the extent it suggests that consumers who do not qualify for free TurboTax SKUs invest significant time and effort gathering and inputting tax information before encountering upgrade screens. (PFF ¶¶448-450). In general, consumers do not spend significant time and effort preparing their taxes with TurboTax; for example, the average TurboTax Free Edition customer currently *completes* his taxes—i.e., gathers and enters tax information and files their return—in just 28 minutes. (PFF ¶¶449). And customers who need to upgrade are told so as soon as they input information indicating they do not qualify for free SKUs. (PFF ¶444). As mentioned, many consumers encounter upgrade screens minutes after starting their returns (RX1027 (Deal Expert Report) ¶106 & fig. 12), and the average time in Free Edition from start to finish is only 28 minutes (PFF ¶449). These facts are inconsistent with Complaint Counsel’s insinuation that taxpayers expend significant time and effort filing their taxes with TurboTax.

897. Once the main questionnaire in the Kirk Fair Disclosure Survey begins, there are only five screens before the respondents reach the upgrade screen and are asked to answer questions, (RX1016-A (Kirk Fair Expert Report) Appendix D.2) with four of them show an image for at least 10-seconds (RX1016-A (Kirk Fair Expert Report) Appendix C ¶ 12), so a respondent could proceed to answering survey questions as quickly as about 40 seconds, when in reality, consumers [REDACTED] (RX749 (Novemsky Rebuttal Expert Report) ¶ 263; RX55 (Intuit) at INTUIT-FTC-PART3-000601463).

Response to Finding No. 897:

The Proposed Finding is incorrect to the extent it suggests that Ms. Kirk Fair’s survey is flawed because consumers in the real world may have spent more time reviewing the TurboTax website and inputting tax information before encountering an upgrade screen than respondents did in her survey. Indeed, many consumers encounter upgrade screens minutes after starting their returns, just as respondents could have in Ms. Kirk Fair’s survey. (RX1027 (Deal Expert Report) ¶106 & fig. 12). Moreover, Ms. Kirk Fair’s survey accurately simulated Complaint

Counsel's theory that consumers are deceived through the process of seeing ads for free TurboTax SKUs, visiting the TurboTax website, starting their return in Free Edition, and encountering an upgrade screen informing them they need to upgrade to a paid SKU. (RX1016-A (Kirk Fair Expert Report) ¶20; RX1555 (Kirk Fair (Intuit) Trial Dep.) at 28; RX1393 (Kirk Fair (Intuit) Dep.) at 55). Ms. Kirk Fair explained that requiring respondents to view each piece of information for at least 10 seconds "help[ed] to ensure that they spend enough time on each." (RX1555 (Kirk Fair (Intuit) Trial Dep.) at 27). That respondents in her survey could have moved through this process relatively quickly only reinforces Ms. Kirk Fair's conclusion that consumers are not induced into upgrading through TurboTax upgrade screens and do not feel locked in. (See RX1555 (Kirk Fair (Intuit) Trial Dep.) at 50; RX1393 (Kirk Fair (Intuit) Dep.) at 53-54). If consumers in the real world felt locked in to upgrading after expending time and effort inputting their tax information, then consumers who did not expend as much time and effort—such as respondents in Ms. Kirk Fair's survey—would be less likely to upgrade. (See RX1555 (Kirk Fair (Intuit) Trial Dep.) at 50; RX1393 (Kirk Fair (Intuit) Dep.) at 53-54). But Ms. Kirk Fair's survey demonstrates that such consumers still upgrade to paid SKUs at a high rate—i.e., over 40% of the time—which is inconsistent with Complaint Counsel's theory that consumers only upgrade because they feel locked-in. (RX1016-A (Kirk Fair Expert Report) ¶24 & fig. 1; RX1555 (Kirk Fair (Intuit) Trial Dep.) at 50; RX1393 (Kirk Fair (Intuit) Dep.) at 53-54). And her survey further shows that consumers upgrade primarily because of their tax situation and trust for TurboTax products, not because they felt locked in after starting with a free SKU. (Kirk Fair Tr. at 49-50).

Further, the Proposed Finding is incorrect to the extent it suggests that consumers who do not qualify for free TurboTax SKUs invest significant time and effort gathering and inputting tax

information before encountering upgrade screens. (PFF ¶¶448-450). In general, consumers do not spend significant time and effort preparing their taxes with TurboTax; for example, the average TurboTax Free Edition customer currently *completes* his taxes—i.e., gathers and enters tax information and files their return—in just 28 minutes. (PFF ¶¶449). And customers who need to upgrade are told so as soon as they input information indicating they do not qualify for free SKUs. (PFF ¶444). As mentioned, many consumers encounter upgrade screens minutes after starting their returns (RX1027 (Deal Expert Report) ¶106 & fig. 12), and the average time in Free Edition from start to finish is only 28 minutes (PFF ¶449). These facts are inconsistent with Complaint Counsel’s insinuation that taxpayers expend significant time and effort filing their taxes with TurboTax.

898. Ms. Kirk Fair claims that her survey results instead reflect a world where respondents “appear to understand that they have a choice to upgrade and pay for that upgrade, continue pursuing the free option, or to pursue other tax filing solutions, and they are willing to do research to understand their best options” (RX1016-A (Kirk Fair Expert Report) ¶ 17), but the existence of a subset of respondents like those Ms. Kirk Fair describes is irrelevant to the question of whether consumers were deceived about whether they could file for free before encountering the hard stop, and does not address whether or not a significant number of consumers continue to upgrade to TurboTax paid products because they feel they do not have a good alternative given the investment they made in the TurboTax website. (GX749 (Novemsky Rebuttal Expert Report) ¶ 268).

Response to Finding No. 898:

The Proposed Finding is incorrect because Ms. Kirk Fair’s survey provides reliable evidence that consumers do not feel locked-in to upgrading to paid TurboTax SKUs. (PFF ¶¶755-758). Ms. Kirk Fair’s survey simulated the events Complaint Counsel allege lead consumers to feel locked in to upgrading, namely viewing a challenged ad for TurboTax Free Edition, visiting the TurboTax website, starting their return in Free Edition, and encountering one of three different upgrade screens informing them they need to upgrade to a paid SKU—including one that informed respondents they could still file for free using the IRS Free File

Program instead. (RX1016-A (Kirk Fair Expert Report) ¶20; RX1555 (Kirk Fair (Intuit) Trial Dep.) at 28; RX1393 (Kirk Fair (Intuit) Dep.) at 55). If Complaint Counsel were correct that consumers upgrade because they feel locked in, 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 [the IRS Free File Program].” (PFF ¶755). But Ms. Kirk Fair’s survey results showed no statistically significant difference between the responses of the three different upgrade screen groups; indeed, most respondents still decided to upgrade to a paid TurboTax product. (PFF ¶756). Her results also showed that respondents among the three upgrade screen groups switched to non-TurboTax products at similar rates, further demonstrating that they did not feel locked in to TurboTax. (PFF ¶756). Ms. Kirk Fair therefore concluded that consumers did not feel locked in to continuing their return with a paid TurboTax SKU. (PFF ¶756).

Further, her survey respondents’ open-ended responses describing their thought processes upon encountering an upgrade screen provided additional evidence that consumers do not feel locked in to upgrading. The majority of respondents who chose to upgrade to a paid TurboTax SKU after seeing an upgrade screen (47%) indicated that they did so because of their particular tax situation, not because they felt they had no other option. (RX1016-A (Kirk Fair Expert Report) ¶36, fig. 4, ex. 6). Any many respondents (35%) also indicated they did so because of their preference for and/or trust of TurboTax products. (RX1016-A (Kirk Fair Expert Report) ¶36, fig. 4, ex. 6). Very few respondents indicated that they decided to upgrade because they had “no other choice.” (RX1555 (Kirk Fair (Intuit) Trial Dep.) at 36; RX1016-A (Kirk Fair Expert Report) ¶36, fig. 4, ex. 6). Moreover, the open-ended responses indicated that respondents were willing to consider alternatives to TurboTax after seeing an upgrade screen, and would conduct

additional research, such as looking at product reviews, talking to family and friends, and making price comparisons. (PFF ¶758). As a result, Ms. Kirk Fair concluded that consumers do not upgrade to paid TurboTax SKUs because “they have no other option or because they entered all of their data that they think they have no other option.” (RX1555 (Kirk Fair (Intuit) Trial Dep.) at 56; RX1016-A (Kirk Fair Expert Report) ¶36, fig. 4, ex. 6).

899. Ms. Kirk Fair does not address the psychological factors that may prevent consumers from switching to a different tax preparation service after starting to use TurboTax. (GX749 (Novemsky Rebuttal Expert Report) ¶ 269).

Response to Finding No. 899:

This Proposed Finding is incorrect. The survey tested actual responses from consumers. Any “psychological factors” (whatever that means) at play would have appeared in the data. (See RX1555 (Kirk Fair (Intuit) Trial Dep.) at 61 (testifying that it is “unclear what [Professor Novemsky] meant” by “psychological forces”). Ms. Kirk Fair explained at trial, in uncontested testimony (Ms. Kirk Fair was not even cross-examined), that her survey accounts for factors like varied consumer experiences, varied consumer impressions of language in the survey stimuli, varied consumer exposure to communications from TurboTax and others in the tax-preparation industry, and consumer complaints through a test-control survey design. (RX1555 (Kirk Fair (Intuit) Trial Dep.) at 61-62 (testifying that “my survey does, through large sample sizes and appropriate statistical analysis and the use of a test and control design, take into account psychological forces”).

900. For example, status quo bias, the psychological tendency to maintain one’s current or previous decision when faced with alternatives, may lead consumers to stay with TurboTax once they begun using it. (See GX749 (Novemsky Rebuttal Expert Report) ¶¶ 205, 269).

Response to Finding No. 900:

It is not clear what this is supposed to be an example of or what it is responding to, but on its terms the Proposed Finding is incorrect because the evidence does not establish that status quo bias meaningfully affects consumers in the tax-preparation industry in selecting their tax-preparation method. Ms. Kirk Fair's survey contradicts Complaint Counsel's assertion that consumers feel locked in to upgrading as a result of status quo bias. Her survey definitively shows that consumers do not feel locked in to TurboTax, but rather can (and do) switch to other tax-preparation providers upon encountering upgrade screens. In particular, Ms. Kirk Fair's survey shows that consumers choose to upgrade to paid TurboTax SKUs primarily because of their specific tax situation and their preference for and trust in the TurboTax brand, not because of status quo bias. (PFF ¶759). Moreover, respondents in Ms. Kirk Fair's survey demonstrated a willingness to consider alternatives and to identify and use the appropriate product for their specific situation upon encounter an upgrade screen, which is likewise inconsistent with status quo bias. (PFF ¶758). For instance, meaningful shares of respondents in Ms. Kirk Fair's survey indicated that upon encountering an upgrade screen, they would switch from TurboTax to different tax-preparation product, such as a competitor product, the IRS Free File Program, a self-filed paper filing, or an accountant supported paper filing. (RX1016 (Kirk Fair Expert Report) ¶32; *see also* RX1393 (Kirk Fair (Intuit) Dep.) at 85; PFF ¶758). Additionally, many respondents also indicated that upon encountering an upgrade screen, they would conduct additional research, such as looking at product reviews for TurboTax paid products, talking to family and friends, and making price comparisons. (PFF ¶758). These results are inconsistent with consumers feeling locked in to TurboTax as a result of status quo bias.

Finally, other evidence beyond Ms. Kirk Fair's survey reinforces that consumers can (and do) easily switch between different tax-preparation products and methods, both within each Tax

Year and also from one year to the next. (PFF ¶¶51-55; *see also* Deal (Intuit) Tr. 1302, 1310-1311; RX1027 (Deal Expert Report) ¶¶15, 51-54, 129). For instance, every year, approximately 20% of taxpayers use a different tax preparation method than they used the year before. (PFF ¶52). That rate of switching among methods and providers of tax-preparation services corroborates Ms. Kirk Fair's conclusion that consumers do not feel locked in to TurboTax, whether as a result of status quo bias or any other reason.

901. Consumers also encounter costs, like the cost of switching and loss aversion, and transaction costs, which may stop them from using a different tax preparation provider. (GX749 (Novemsky Rebuttal Expert Report) ¶¶ 205, 213-215).

Response to Finding No. 901:

The Proposed Finding is incorrect because Ms. Kirk Fair's survey contradicts Complaint Counsel's assertion that consumers feel locked in to upgrading as a result of switching costs, transaction costs, or loss aversion. Her survey definitively shows that consumers do not feel locked in to TurboTax, but rather can (and do) switch to other tax-preparation providers upon encountering upgrade screens. In particular, Ms. Kirk Fair's survey shows that consumers choose to upgrade to paid TurboTax SKUs primarily because of their specific tax situation and their preference for and trust in the TurboTax brand, not because of switching costs. (PFF ¶759). Moreover, respondents in Ms. Kirk Fair's survey demonstrated a willingness to consider alternatives and to identify and use the appropriate product for their specific situation upon encounter an upgrade screen, which is likewise inconsistent with switching costs. (PFF ¶758). For instance, meaningful shares of respondents in Ms. Kirk Fair's survey indicated that upon encountering an upgrade screen, they would switch from TurboTax to different tax-preparation product, such as a competitor product, the IRS Free File Program, a self-filed paper filing, or an accountant supported paper filing. (RX1016 (Kirk Fair Expert Report) ¶32; *see also* RX1393 (Kirk Fair (Intuit) Dep.) at 85; PFF ¶758). Additionally, many respondents also indicated that

upon encountering an upgrade screen, they would conduct additional research, such as looking at product reviews for TurboTax paid products, talking to family and friends, and making price comparisons. (PFF ¶758). These results are inconsistent with consumers feeling locked in to TurboTax as a result of switching costs.

Further, other evidence beyond Ms. Kirk Fair's survey reinforces that consumers can (and do) easily switch between different tax-preparation products and methods, both within each Tax Year and also from one year to the next. (PFF ¶¶51-55; *see also* Deal (Intuit) Tr. 1302, 1310-1311; RX1027 (Deal Expert Report) ¶¶15, 51-54, 129). For instance, every year, approximately 20% of taxpayers use a different tax preparation method than they used the year before. (PFF ¶52). That rate of switching among methods and providers of tax-preparation services corroborates Ms. Kirk Fair's conclusion that consumers do not feel locked in to TurboTax, whether as a result of switching costs, transaction costs, or loss aversion.

902. Ms. Kirk Fair states that if consumers had been deceived by Intuit's ads as alleged, she would expect to see substantial, statistically significant differences in respondent choices upon learning about an additional free option at the point of the hard stop (RX1016-A (Kirk Fair Expert Report) ¶ 16), these conclusions do not in fact follow from the evidence she cites, because the fact that consumers upgrade when faced with a hard stop at similar rates whether or not they are told about the IRS Free File Program does not mean that they did not arrive at the site expecting to file for free and still desiring to file for free when they encounter the upgrade screen. (GX749 (Novemsky Rebuttal Expert Report) ¶ 271).

Response to Finding No. 902:

The Proposed Finding is incorrect. Ms. Kirk Fair's survey provides reliable evidence that consumers do not feel locked-in to upgrading to paid TurboTax SKUs as a result of viewing challenged ads. (PFF ¶¶755-758). Ms. Kirk Fair's survey simulated the events Complaint Counsel allege lead consumers to feel locked in to upgrading, namely viewing a challenged ad for TurboTax Free Edition, visiting the TurboTax website, starting their return in Free Edition, and encountering one of three different upgrade screens informing them they need to upgrade to

a paid SKU—including one that informed respondents they could still file for free using the IRS Free File Program instead. (RX1016-A (Kirk Fair Expert Report) ¶20; RX1555 (Kirk Fair (Intuit) Trial Dep.) at 28; RX1393 (Kirk Fair (Intuit) Dep.) at 55, 83 (“I included a banner ad ... to reinforce the at-issue concept that TurboTax’s advertising campaign encouraged people to believe they can file for free.”)). If Complaint Counsel were correct that consumers upgrade because they feel locked in after starting their return believing they could file for free as a result of viewing a challenged ad—as Ms. Kirk Fair’s survey simulated—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 [the IRS Free File Program].” (PFF ¶755). That is because consumers would be frustrated with TurboTax after believing they could file for free and then being told they need to upgrade, and consequently would seek out alternatives to TurboTax, such as other free products the IRS Free File Program. (See RX1555 (Kirk Fair (Intuit) Trial Dep.) at 32-33, 41; RX1016-A (Kirk Fair Expert Report) ¶29). But Ms. Kirk Fair’s survey results showed no statistically significant difference between the responses of the three different upgrade screen groups; indeed, most respondents still decided to upgrade to a paid TurboTax product. (PFF ¶756). Her results also showed that respondents among the three upgrade screen groups switched to non-TurboTax products at similar rates, further demonstrating that they did not feel locked in to TurboTax. (PFF ¶756). Ms. Kirk Fair therefore concluded that consumers did not feel locked in to continuing their return with a paid TurboTax SKU after believing they could file for free after viewing a challenged ad. (PFF ¶756). As she explained, her survey results are “inconsistent with TurboTax’s advertising trapping people into an upgrade.” (RX1393 (Kirk Fair (Intuit) Dep.) at 83).

Further, her survey respondents' open-ended responses describing their thought processes upon encountering an upgrade screen provided additional evidence that consumers do not feel locked in to upgrading after believing they could file for free as a result of viewing a challenged ad. The majority of respondents who chose to upgrade to a paid TurboTax SKU after seeing an upgrade screen (47%) indicated that they did so because of their particular tax situation, not because they felt they had no other option. (RX1016-A (Kirk Fair Expert Report) ¶36, fig. 4, ex. 6). Any many respondents (35%) also indicated they did so because of their preference for and/or trust of TurboTax products. (RX1016-A (Kirk Fair Expert Report) ¶36, fig. 4, ex. 6). Very few respondents indicated that they decided to upgrade because they had "no other choice." (RX1555 (Kirk Fair (Intuit) Trial Dep.) at 36; RX1016-A (Kirk Fair Expert Report) ¶36, fig. 4, ex. 6). Moreover, the open-ended responses indicated that respondents were willing to consider alternatives to TurboTax after seeing an upgrade screen, and would conduct additional research, such as looking at product reviews, talking to family and friends, and making price comparisons. (PFF ¶758). As a result, Ms. Kirk Fair concluded that consumers do not upgrade to paid TurboTax SKUs because "they have no other option or because they entered all of their data that they think they have no other option." (RX1555 (Kirk Fair (Intuit) Trial Dep.) at 56; RX1016-A (Kirk Fair Expert Report) ¶36, fig. 4, ex. 6). These results are likewise inconsistent with consumers feeling locked in after believing they could file for after viewing a challenged ad.

903. While Ms. Kirk Fair claims to be evaluating whether "TurboTax upgrade screens induce customers to upgrade to a Paid TurboTax product" by comparing upgrade rates across different versions of the upgrade screen, (RX1016-A (Kirk Fair Expert Report) ¶ 24), to draw conclusions about the impact of the upgrade screen, she would have had to include a version of her survey in which respondents *did not* encounter an upgrade screen, which she did not do. (GX749 (Novemsky Rebuttal Expert Report) ¶ 274)

Response to Finding No. 903:

The Proposed Finding is incorrect and reflects a misunderstanding of both Ms. Kirk Fair's survey and test-control survey design. Ms. Kirk Fair did not include a version of her survey where respondents did not encounter an upgrade screen because that was not relevant to her survey's purpose. Her survey tested consumer reaction to the information provided in upgrade screens by showing respondents one of three different upgrade screens—each with varying levels of information about alternatives to free TurboTax SKUs—and comparing the results between those three groups. (PFF ¶¶747-754). Such a survey design is a prototypical example of a test-control experimental study. (PFF ¶747; RX1555 (Kirk Fair (Intuit) Trial Dep.) at 17-20). As Ms. Kirk Fair testified, her “Representative Screen” group—which was shown an upgrade screen that mimicked TurboTax's actual upgrade screen—served as her “test” group, and her “Enhanced Information” and “Reduced Information” groups—which were respectively shown more and less information about alternatives to upgrading—served as her “control” groups. (RX1555 (Kirk Fair (Intuit) Trial Dep.) at 19-20, 31-32; *see also* PFF ¶¶750-753). By comparing results between those three groups, she was able to draw reliable causal conclusions about the effects the different upgrade screens had on respondents' decision-making about tax-preparation products. (RX1555 (Kirk Fair (Intuit) Trial Dep.) at 17-20). Including a version where respondents saw no upgrade screen whatsoever would not have provided a meaningful comparison.

904. The TurboTax upgrade screens likely induced upgrading in that customers who chose to use TurboTax Free Edition undoubtedly would have continued using Free Edition had they not encountered an upgrade screen. (GX749 (Novemsky Rebuttal Expert Report) ¶ 274).

Response to Finding No. 904:

The Proposed Finding is incomprehensible. Intuit therefore has no specific response.

V. Investigation and Litigation History

A. This Matter

905. The Commission voted to issue the Complaint in this matter on March 28, 2022. (Compl. pg. 27).

Response to Finding No. 905:

The Proposed Finding is misleading because the Commission did not vote on the final complaint in this matter. Complaint Counsel previously informed Intuit’s counsel that after the Commissioner vote to issue a complaint against Intuit, the secretary’s office continued making changes to the complaint because the voted-on complaint contained numerous errors. Thus, whatever the commissioners voted on was not the final complaint here, and the action may not proceed. *See* 5 U.S.C. §706 (agency action “without observance of procedure required by law” shall be held unlawful and set aside). However, because Intuit was denied discovery to substantiate Complaint Counsel’s representation and support its argument that the operative complaint is invalid (*see* Order Denying Respondent’s Motion for Discovery Pursuant to Rule 3.36 at 2, 7 (Nov. 7, 2022); Order Denying Respondent’s Motion to Compel Production of Documents at 4 (Oct. 20, 2022)), Intuit has not advanced this argument in its post-trial papers. Nonetheless, Intuit preserves the argument that the Commissioners did not vote out the final complaint.

Intuit otherwise has no specific response except to note that the Commission voted to issue a complaint in this matter, as well as a complaint for a temporary restraining order and preliminary injunctive relief in the Northern District of California, nearly three years after the FTC initiated its investigation, nearly nine months after sending Intuit a draft complaint, and after Intuit voluntarily discontinued the “free, free, free” ads about which the FTC expressed concern. (PFF ¶¶1, 7-9). Intuit further notes that Judge Charles R. Breyer subsequently denied

the FTC's request for a temporary restraining order and preliminary injunction and observed that the challenged ads "don't say [TurboTax Free Edition] is free for everybody and nobody thinks it is free to everybody," but instead the ads include disclosures stating "TurboTax free edition, for simple returns only," which "tells [consumers] that it is limited to simple tax returns." (PFF ¶¶12-15).

906. The Complaint in this matter was the culmination of a detailed investigation into Intuit's acts and practices by Bureau of Consumer Protection staff along with several state Attorneys General's offices beginning in May 2019. (*See* GX312 (Complaint Counsel) ¶¶ 3-9, 12-18, 20-26 & App.).

Response to Finding No. 906:

The Proposed Finding is inaccurate. The FTC investigation was wholly separate from a different investigation performed by state attorneys general. Intuit cannot comment on whether the investigation was "detailed," but will note that when Intuit attempted to engage with Complaint Counsel on the merits, they were told that doing so would be "unproductive." (PFF ¶¶3-4; RX391 (Intuit) ¶9).

Intuit further notes that Judge Charles R. Breyer subsequently denied the FTC's request for a temporary restraining order and preliminary injunction, observing that the challenged ads "don't say [TurboTax Free Edition] is free for everybody and nobody thinks it is free to everybody," but instead include disclosures stating "TurboTax free edition, for simple returns only," which "tells [consumers] that it is limited to simple tax returns." (PFF ¶¶12-15). Intuit also notes that in May 2022 Intuit entered into a binding Consent Order with the state attorneys of all 50 states and the District of Columbia, entered as a final judgment and permanent injunction in Los Angeles County Superior Court (Case No. 19STCV15644) on June 25, 2022. (PFF ¶806; RX261 (Intuit); RX399 (Intuit)). Although Intuit did not admit any liability as part

of the Consent Order, it imposes restrictions on Intuit's advertising for free TurboTax SKUs going forward. (PFF ¶¶805-828).

907. Complaint Counsel and Intuit executed a tolling agreement as of January 6, 2022, which was subsequently extended by agreement of the parties. (GX312 (Complaint Counsel) ¶ 28(b)).

Response to Finding No. 907:

Intuit has no specific response except to note that it executed the tolling agreement at Complaint Counsel's demand. (GX312 (FTC) ¶28(b)). The fact that Complaint Counsel requested the tolling agreement suggests that there is an applicable statute of limitations governing this proceeding, otherwise there would have been no need for a tolling agreement.

908. The Complaint in this matter was issued after Bureau of Consumer Protection staff along with several state Attorneys General's offices engaged in lengthy compromise negotiations with Intuit. (*See* GX312 (Complaint Counsel) ¶¶ 27–32 & App.).

Response to Finding No. 908:

The proposed finding is incomplete and misleading. Intuit cooperated fully with the FTC's investigation and produced hundreds of thousands of documents, dozens of written interrogatory responses, and testimony from multiple corporate representatives between 2019 and 2020. (PFF ¶2; RX391 (Intuit) ¶5). Intuit also submitted five white papers to the Bureau of Consumer Protection during that period. (RX391 (Intuit) ¶8). Then, between the end of 2020 and mid-2021, Intuit heard nothing from the FTC. (RX391 (Intuit) ¶9). Finally, toward the end of June 2021, the Bureau of Consumer Protection circulated a draft complaint to Intuit, but refused to discuss the merits of its allegations. (PFF ¶¶3-4; RX391 (Intuit) ¶9). Intuit nonetheless endeavored to resolve the FTC's concerns in good faith, but within a few months the Bureau of Consumer Protection refused to engage in any further discussions to attempt to resolve their investigation unless Intuit committed to pay an exorbitant amount in monetary relief—which was unwarranted and which the FTC lacks the authority to obtain in court. (RX391

(Intuit) ¶10). Complaint Counsel then waited another nine months before the complaint in this proceeding was issued. Unlike the attorney generals of all fifty states and the District of Columbia, who engaged in good faith negotiations with Intuit that ultimately resulted in a binding Consent Order, the Bureau of Consumer Protection showed remarkably little interest in resolving this case without litigation.

A substantial delay in negotiations occurred after an FTC official leaked the FTC's monetary demand and the amount of that demand to the press and Intuit sought assurances that it could negotiate with the FTC in confidence. (*See* RX104 (Intuit)).

909. Throughout the course of the investigation and settlement negotiations that led to the issuance of this Complaint, Intuit continued making “free” claims in its advertising for TurboTax. (*See* GX Summary 001 (Complaint Counsel) at ‘Ads w-Program Count’ (summarizing TV ad dissemination data produced by Intuit for TV ads that made free claims principally in calendar years 2021 and 2022); GX Summary 002 (Complaint Counsel) at ‘Summary-Online_Ads’ (summarizing Online ad dissemination data produced by Intuit for online ads that made free claims in TY 2020 and 2021 (calendar years 2021 and 2022))).

Response to Finding No. 909:

The Proposed Finding is irrelevant in suggesting that it was improper for Intuit to continue to advertise free TurboTax SKUs during the course of the investigation. The initiation of an investigation is not evidence of anything. *See, e.g., In re Overstock Sec. Litig.*, No. 2:19-CV-709-DAK-DAO, 2021 WL 4267920, at *15 (D. Utah Sept. 20, 2021) (noting that the SEC's related “initiation of an investigation” against the Defendant was “irrelevant to the issues before the court”). That Intuit continued running ads that it did not believe were deceptive in the face of those baseless allegations says nothing about whether the advertisements at issue in this case are deceptive. Complaint Counsel do not even challenge any Tax Year 2022 ads or argue that those ads are deceptive. And the overwhelming evidence shows that the challenged ads from Tax Year 2021 were not deceptive.

910. Throughout the course of the investigation and settlement negotiations that led to the issuance of this Complaint, Intuit continued airing ads in its “Free, free, free” campaign until just after its meeting with FTC Chair Lina Khan on March 24, 2022. (See GX Summary 001 (Complaint Counsel) at ‘Ads w-Program Count’ (summarizing TV ad dissemination data produced by Intuit for TV ads that made free claims principally in calendar years 2021 and 2022); GX Summary 002 (Complaint Counsel) at ‘Summary-Online_Ads’ (summarizing Online ad dissemination data produced by Intuit for online ads that made free claims in TY 2020 and 2021 (calendar years 2021 and 2022)); GX438 (Intuit) ¶ 16 (Cathleen Ryan, Intuit’s Senior Vice President of Marketing, declared in part: “After our general counsel Kerry McLean and outside counsel met with FTC Chair Lina Khan to discuss the FTC’s concerns regarding Intuit’s advertising, at approximately 7 p.m. PST on Thursday, March 24, 2022, Intuit decided to discontinue all current video advertising campaigns for TurboTax Free Edition for the remainder of the Tax Year 2021 tax season. Upon making the decision, Intuit began the process of removing any such advertisements from all media it purchases or otherwise controls.”)).

Response to Finding No. 910:

The Proposed Finding is irrelevant. That Intuit continued running ads that it did not believe were deceptive in the face of those baseless allegations says nothing about whether the advertisements at issue in this case are deceptive. That a federal judge agreed with Intuit and decided that there was no reason for Intuit to stop running the challenged ads confirms that Intuit’s actions were appropriate. When Complaint Counsel challenged these purportedly deceptive ads in federal court, under the very same theory that they are advancing in this proceeding, relying on the same evidence, the court denied their motion for a preliminary injunction. (See PFF ¶¶12-16). At the hearing, the court repeatedly expressed that he was unpersuaded by Complaint Counsel’s theory of deception. For example, he recognized that TurboTax Free Edition ads “don’t say it is free to everybody and nobody thinks it is free to everybody.” (RX73 (Intuit) at 17). He also recognized that Intuit’s ads include disclosures. (RX73 (Intuit) at 16-17). In response to Complaint Counsel’s argument that Intuit’s ads “omitted” disclosures (RX73 (Intuit) at 39), Judge Breyer observed the disclosure “is right there; isn’t it? I mean, it is right under the word ‘free, free, free’ or ‘zero, zero, zero,’ it says ‘TurboTax free edition, for simple tax returns only.’” (RX73 (Intuit) at 40). Similarly, Judge Breyer noted

that one 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.” (RX73 (Intuit) at 36-37).

The Proposed Finding is also incomplete and misleading because it ignores that the meeting with Chair Khan was the first time anyone at the Commission had expressed specific concerns over advertisements that were then running. (RX73 (Intuit) at 25:16-19; RX338 (Intuit) at 2). As noted, Complaint Counsel had refused to discuss the merits of its allegations in late 2021, before ads for Tax Year 2021 had begun airing. (PFF ¶¶3-4; RX391 (Intuit) ¶9). In response to Chair Khan’s expressed concerns, Intuit voluntarily decided to stop airing the “free, free, free” ads, even though doing so “was extremely disruptive,” requiring Intuit to “work[] across multiple agencies and across hundreds of contacts across [Intuit’s] media partners.” (PFF ¶8).

911. At the same time the Commission voted to issue this Complaint, it also authorized Bureau of Consumer Protection staff to seek a Temporary Restraining Order and Preliminary Injunction in the United States District Court for the Northern District of California. (*See* Complaint, *FTC v. Intuit Inc.*, No. 22-cv-01973-CRB (Mar. 28, 2022), ECF No. 1; Plaintiff’s Emergency Motion for Temporary Restraining Order and Preliminary Injunction, *FTC v. Intuit Inc.*, No. 22-cv-01973-CRB (Mar. 28, 2022), ECF No. 6).

Response to Finding No. 911:

The Proposed Finding is incomplete and misleading because the Commission did not vote on the final complaint in this matter. Complaint Counsel previously informed Intuit’s counsel that after the Commissioner vote to issue a complaint against Intuit, the secretary’s office continued making changes to the complaint because it contained numerous errors. Thus, whatever the commissioners voted on was not the final complaint here, and the action may not proceed. *See* 5 U.S.C. §706 (agency action “without observance of procedure required by law” shall be held unlawful and set aside). However, because Intuit was denied discovery to substantiate Complaint Counsel’s representation and support its argument that the operative

complaint is invalid (*see* Order Denying Respondent’s Motion for Discovery Pursuant to Rule 3.36 at 2, 7 (Nov. 7, 2022); Order Denying Respondent’s Motion to Compel Production of Documents at 4 (Oct. 20, 2022)), Intuit has not advanced this argument in its post-trial papers. Nonetheless, Intuit preserves the argument that the Commissioners did not vote out the final complaint.

Intuit otherwise has no specific response except to note that the Commission voted to issue a complaint in this matter, as well as a complaint for a temporary restraining order and preliminary injunctive relief in the Northern District of California, nearly three years after the FTC initiated its investigation, nearly nine months after sending Intuit a draft complaint, and after Intuit voluntarily discontinued the “free, free, free” ads about which the FTC expressed concern. (PFF ¶¶1, 7-9). Intuit further notes that Judge Charles R. Breyer subsequently denied the FTC’s request for a temporary restraining order and preliminary injunction and observed that the challenged ads “don’t say [TurboTax Free Edition] is free for everybody and nobody thinks it is free to everybody,” but instead the ads include disclosures stating “TurboTax free edition, for simple returns only,” which “tells [consumers] that it is limited to simple tax returns.” (PFF ¶¶12-15).

912. On April 22, 2022, Judge Charles R. Breyer of the United States District Court for the Northern District of California denied the FTC’s request for a TRO, stating:

The Court denies the FTC’s motion for emergency relief for three reasons. First, Tax Day, which was April 18, 2022, has passed. Most taxpayers have already filed their taxes. Intuit represented in its briefing and at oral argument that its advertising is largely done for this tax season. *See* Opp. (dkt. 45) at vi. Any prospective harm is therefore attenuated. Second, even before Tax Day, Intuit had removed several of the most plausibly deceptive advertisements—that is, three videos that repeated the word “free” a dozen or more times over 30 seconds before a very brief disclaimer. *See* Shiller decl. (dkt. 7-13, GX 301) ¶¶ 16-31 (describing these ads); Ryan decl. (dkt. 45-3) ¶¶ 16-26 (noting their removal). Third, to the extent other advertisements might violate the FTC Act, the Court notes that the FTC has brought an administrative proceeding

against Intuit, with a hearing set for September 14, 2022. See 15 U.S.C. § 45(b); *AMG Cap. Mgmt., LLC v. Fed. Trade Comm'n*, 141 S. Ct. 1341, 1346 (2021) (detailing the administrative process). An Administrative Law Judge (ALJ) with expertise in these matters will hear (and likely rule) before Intuit resumes its advertising campaign in the lead-up to Tax Day 2023.

(Order Denying Motion for Emergency Relief, *FTC v. Intuit Inc.*, No. 22-cv-01973-CRB (Apr. 22, 2022), ECF No. 66).

Response to Finding No. 912:

This proposed finding is incomplete because it ignores that Judge Breyer's views on the merits of Complaint Counsel's theory of deception. At the hearing, Judge Breyer repeatedly noted that the allegedly deceptive ads in fact disclose Free Edition's qualifications. (PFF ¶15; RX73 (Intuit) at 36 (“[L]ooking at this one as an example ... it says ‘TurboTax free edition, for simple tax returns only.’”); RX73 (Intuit) at 37 (“[T]his ad ... tells me that it is limited to simple tax returns.”); RX73 (Intuit) at 40 (“I mean, it is right there; isn't it? I mean, it is right under the word ‘free, free, free’ or ‘zero, zero, zero,’ it says ‘TurboTax free edition, for simple returns only.’”)).

913. On May 4, 2022, Intuit filed a Motion to Withdraw Matter from Adjudication pursuant to Commission Rule 3.26(c). (Motion to Withdraw Matter from Adjudication, *In re Intuit Inc.*, D09408 (F.T.C. May 4, 2022)).

Response to Finding No. 913:

Intuit has no specific response.

914. By operation of Rule 3.26(c), on May 6, 2022, the Commission issued an Order Withdrawing Matter from Adjudication Pursuant to Rule 3.26(c) of the Commission Rules of Practice. (Order Withdrawing Matter from Adjudication Pursuant to Rule 3.26(c) of the Commission Rules of Practice, *In re Intuit Inc.*, D09408 (F.T.C. May 4, 2022)).

Response to Finding No. 914:

Intuit has no specific response.

915. On August 19, 2022, the Commission issued an Order Returning the Matter to Adjudication and Setting a New Evidentiary Hearing Date, stating: “The Commission has

deliberated and determined that the public interest warrants further litigation.” (Order Returning the Matter to Adjudication and Setting a New Evidentiary Hearing Date, *In re Intuit Inc.*, D09408 (F.T.C. May 4, 2022)).

Response to Finding No. 915:

Intuit has no specific response.

916. On January 31, 2023, the Commission, acting on Complaint Counsel’s Motion for Summary Decision, issued an Opinion and Order Denying Summary Decision, stating in part:

To summarize, although we find that Complaint Counsel have presented a strong case for summary decision with respect to at least some of the video ads, we are denying summary decision at this time. Deferring the ruling until after trial will allow the Commission to have the benefit of a full factual record, including any relevant and admissible extrinsic evidence, and will facilitate a cohesive decision that addresses all of the relevant ads at once. Our denial of summary decision, however, should not be taken as an indication that the evidence presented is necessarily insufficient and that liability cannot attach unless Complaint Counsel produce additional evidence of deception at trial. Evidence that may not be sufficient for liability when the Commission must resolve all ambiguities and draw all justifiable inferences in Respondent’s favor may nevertheless be sufficient to support a liability finding when Respondent is not entitled to such deference.

(Opinion and Order Denying Summary Decision, *In re Intuit Inc.*, D09408 (F.T.C. May 4, 2022) at 16).

Response to Finding No. 916:

Intuit has no specific response other than to note that the Proposed Finding’s citation of dicta from 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.” Opinion and Order Denying Summary Decision at 8 (Jan. 31, 2023). 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,” Opinion and Order Denying Summary Decision at 8 (Jan. 31, 2023). The Commission also recognized that “some of [Intuit’s] evidence

arguably might provide insights concerning consumers' knowledge and expectations concerning 'free' claims in Intuit's ads." Opinion and Order Denying Summary Decision at 12 (Jan. 31, 2023). The evidence offered by Intuit does just that; it shows that reasonable consumers understand that free offers are qualified, even if those qualifications are not provided. (PFF ¶¶471-484). Finally, the Commission's order suggested that, with respect to the phrase "simple tax returns," Intuit "ha[d] not put forward ... evidence regarding common usage of language." Op. and Order Denying Summ. Decision at 12 (Jan. 31, 2023). The record developed at trial makes clear, however, that the phrase "simple tax returns" was an industry-standard term and that reasonable consumers understood that term. (See PFF ¶¶130-145, 635, 869).

B. Related Matters

917. On May 6, 2019, the People of the State of California, by and through the Los Angeles City Attorney, filed a Complaint for Injunctive Relief, Restitution, and Civil Penalties for Violations of the Unfair Competition Law (Bus. & Prof. Code §§ 17200 et seq.) ("L.A. City Complaint") against Intuit (GX873 (Complaint Counsel) (publicly available from Cal. Super. Ct. L.A. Cnty.) at CC-00015738).

Response to Finding No. 917:

The Proposed Finding is irrelevant because the L.A. City Complaint and its unproven allegations are not evidence of anything. See, e.g., *Wright v. Farouk Systems, Inc.*, 701 F.3d 907, 911 n.8 (11th Cir. 2012) ("[P]leadings are only allegations, and allegations are not evidence of the truth of what is alleged."). The L.A. City Complaint was resolved "without ... adjudication of any fact or law" and "without [Intuit] admitting any liability regarding of the allegations" through a Consent Order entered on June 25, 2022. (RX261 (Intuit); see also PFF ¶¶806-808). Its allegations are just that—unsubstantiated and unproven allegations, not facts or evidence—and thus cannot be used to support any findings or inferences in this proceeding. See *Foster v. Berwind Corp.*, 1991 WL 83090, at *1 (E.D. Pa. May 14, 1991) ("[E]xamining and admitting

evidence of accusations made [in related cases] are dispositive of nothing and would confuse the complex issues already present.”).

In any event, the L.A. City Complaint’s allegations do not bear on Complaint Counsel’s theory of deception in this case. The L.A. City Complaint focused exclusively on Intuit’s participation in the IRS Free File Program, not on ads for free TurboTax SKUs (*see* GX873 (FTC) ¶¶77-79), which are distinct from the software that Intuit donated to the IRS Free File Program (*see* Rubin (Intuit) Tr. 1519-1521; GX86 (Intuit) at 1; (Ryan (Intuit) Tr. 709-710)). Indeed, the complaint did not challenge any of the TurboTax ads at issue in this proceeding, but rather took issue with certain actions by Intuit that allegedly “violate[d] the terms and spirit of the IRS Free File Agreement ... to the detriment of low-income taxpayers.” (GX873 (Complaint Counsel) ¶¶77-79).

918. Among other averments, the L.A. City Complaint alleged Intuit engaged in unfair, fraudulent, and deceptive business acts and practices by: “advertising ‘FREE Guaranteed’ tax filing services when in fact only a small percentage of consumers are able to complete their tax returns for free on the TurboTax Main Website.” (GX873 (Complaint Counsel) (publicly available from Cal. Super. Ct. L.A. Cnty.) ¶ 79(c)).

Response to Finding No. 918:

The Proposed Finding is irrelevant because the L.A. City Complaint and its unproven allegations are not evidence of anything. *See, e.g., Wright v. Farouk Systems, Inc.*, 701 F.3d 907, 911 n.8 (11th Cir. 2012) (“[P]leadings are only allegations, and allegations are not evidence of the truth of what is alleged.”). The L.A. City Complaint was resolved “without ... adjudication of any fact or law” and “without [Intuit] admitting any liability regarding of the allegations” through a Consent Order entered on June 25, 2022. (RX261 (Intuit); *see also* PFF ¶¶806-808). Its allegations are just that—unsubstantiated and unproven allegations, not facts or evidence—and thus cannot be used to support any findings or inferences in this proceeding. *See Foster v. Berwind Corp.*, 1991 WL 83090, at *1 (E.D. Pa. May 14, 1991) (“[E]xamining and admitting

evidence of accusations made [in related cases] are dispositive of nothing and would confuse the complex issues already present.”).

In any event, the L.A. City Complaint’s allegations do not bear on Complaint Counsel’s theory of deception in this case. The L.A. City Complaint focused exclusively on Intuit’s participation in the IRS Free File Program, not on ads for free TurboTax SKUs (*see* GX873 (FTC) ¶¶77-79), which are distinct from the software that Intuit donated to the IRS Free File Program (*see* Rubin (Intuit) Tr. 1519-1521; GX86 (Intuit) at 1; (Ryan (Intuit) Tr. 709-710)). Indeed, the complaint did not challenge any of the TurboTax ads at issue in this proceeding, but rather took issue with certain actions by Intuit that allegedly “violate[d] the terms and spirit of the IRS Free File Agreement ... to the detriment of low-income taxpayers.” (GX873 (FTC) ¶¶77-79). As such, the quoted allegations related to “advertising ‘FREE Guaranteed’” were included only because they were purported to be inconsistent with the IRS Free File Program. (*See* GX873 (FTC) ¶79).

919. On September 6, 2019, the People of the State of California, by and through the Santa Clara County Counsel, filed a Complaint for Violations of California False Advertising Law, Seeking Restitution, Civil Penalties, and Injunctive Relief (“Santa Clara County Complaint”) against Intuit. (GX874 (Complaint Counsel) (publicly available from Cal. Super. Ct. Santa Clara Cnty.) at CC-00015763).

Response to Finding No. 919:

The Proposed Finding is irrelevant because the Santa Clara County Complaint and its unproven allegations are not evidence. *See, e.g., Wright v. Farouk Systems, Inc.*, 701 F.3d 907, 911 n.8 (11th Cir. 2012) (“[P]leadings are only allegations, and allegations are not evidence of the truth of what is alleged.”). The Santa Clara County Complaint was resolved “without ... adjudication of any fact or law” and “without [Intuit] admitting any liability regarding of the allegations” through a Consent Order entered on June 25, 2022. (RX261 (Intuit); *see also* PFF ¶¶806-808). Its allegations are just that—unsubstantiated and unproven allegations, not facts or

evidence—and thus cannot be used to support any findings or inferences in this proceeding. *See Foster v. Berwind Corp.*, 1991 WL 83090, at *1 (E.D. Pa. May 14, 1991) (“[E]xamining and admitting evidence of accusations made [in related cases] are dispositive of nothing and would confuse the complex issues already present.”).

920. Among other averments, the Santa Clara County Complaint alleged: “Intuit deliberately implemented a scheme to draw taxpayers to TurboTax’s revenue-producing URL with false representations that they could file their taxes for free using TurboTax and then to charge taxpayers significant sums to file through additional false and misleading statements.” (GX874 (Complaint Counsel) (publicly available from Cal. Super. Ct. Santa Clara Cnty.) ¶ 74).

Response to Finding No. 920:

The Proposed Finding is irrelevant because the Santa Clara County Complaint and its unproven allegations are not evidence of anything. *See, e.g., Wright v. Farouk Systems, Inc.*, 701 F.3d 907, 911 n.8 (11th Cir. 2012) (“[P]leadings are only allegations, and allegations are not evidence of the truth of what is alleged.”). The Santa Clara County Complaint was resolved “without ... adjudication of any fact or law” and “without [Intuit] admitting any liability regarding of the allegations” through a Consent Order entered on June 25, 2022. (RX261 (Intuit); *see also* PFF ¶¶806-808). Its allegations are just that—unsubstantiated and unproven allegations, not facts or evidence—and thus cannot be used to support any findings or inferences in this proceeding. *See Foster v. Berwind Corp.*, 1991 WL 83090, at *1 (E.D. Pa. May 14, 1991) (“[E]xamining and admitting evidence of accusations made [in related cases] are dispositive of nothing and would confuse the complex issues already present.”).

In any event, the allegations are refuted by the record in this proceeding. As explained at length in Intuit’s post-trial brief and proposed findings, the challenged ads were not false or misleading. It is uncontested that TurboTax’s free SKUs are in fact free, and that consumers cannot pay to use them under any circumstances. (*See* PFF ¶¶67, 69, 109-112). And the

challenged ads conveyed that the specific SKU being advertised was free for consumers who qualified, that those qualifications were tied to the complexity of a consumer's tax return, and often that consumers can "see if they qualify" or "see details" on the TurboTax website. (See PFF ¶¶210-211, 242-244, 260-262, 273-275, 288-290, 297-299). Where the challenged ads did not direct consumers to the TurboTax website, they included links or were themselves links that would take consumers directly to the TurboTax website. (See PFF ¶¶253-254, 269-270, 284-285). Given that the challenged ads pointed or linked to the TurboTax website, even Complaint Counsel concede that the information on that website was integrated into the challenged ads. (CCFF ¶455; *see also* PFF ¶¶328-330). That integrated information detailed the qualifications of free TurboTax SKUs and all other TurboTax SKUs. (See PFF ¶¶364-441). Further, even without disclosures, reasonable consumers understand that free tax-preparation offers are qualified, and that their ability to qualify for that offering depends on the complexity of their tax returns. (PFF ¶¶470-527).

921. The Santa Clara County Complaint further alleged: "Intuit made and disseminated myriad statements that are likely to deceive members of the public on its website and in advertisements." (GX874 (Complaint Counsel) (publicly available from Cal. Super. Ct. Santa Clara Cnty.) ¶ 75).

Response to Finding No. 921:

The Proposed Finding is irrelevant because the Santa Clara County Complaint and its unproven (and conclusory) allegations are not evidence of anything. *See, e.g., Wright v. Farouk Systems, Inc.*, 701 F.3d 907, 911 n.8 (11th Cir. 2012) ("[P]leadings are only allegations, and allegations are not evidence of the truth of what is alleged."). The Santa Clara County Complaint was resolved "without ... adjudication of any fact or law" and "without [Intuit] admitting any liability regarding of the allegations" through a Consent Order entered on June 25, 2022. (RX261 (Intuit); *see also* PFF ¶¶806-808). Its allegations are just that—unsubstantiated

and unproven allegations, not facts or evidence—and thus cannot be used to support any findings or inferences in this proceeding. *See Foster v. Berwind Corp.*, 1991 WL 83090, at *1 (E.D. Pa. May 14, 1991) (“[E]xamining and admitting evidence of accusations made [in related cases] are dispositive of nothing and would confuse the complex issues already present.”).

In any event, the allegations are refuted by the record in this proceeding. As explained at length in Intuit’s post-trial brief and proposed findings, the challenged ads were not false or misleading. It is uncontested that TurboTax’s free SKUs are in fact free, and that consumers cannot pay to use them under any circumstances. (*See* PFF ¶¶67, 69, 109-112). And the challenged ads conveyed that the specific SKU being advertised was free for consumers who qualified, that those qualifications were tied to the complexity of a consumer’s tax return, and often that consumers can “see if they qualify” or “see details” on the TurboTax website. (*See* PFF ¶¶210-211, 242-244, 260-262, 273-275, 288-290, 297-299). Where the challenged ads did not direct consumers to the TurboTax website, they included links or were themselves links that would take consumers directly to the TurboTax website. (*See* PFF ¶¶253-254, 269-270, 284-285). Given that the challenged ads pointed or linked to the TurboTax website, even Complaint Counsel concede that the information on that website was integrated into the challenged ads. (CCFF ¶455; *see also* PFF ¶¶328-330). That integrated information detailed the qualifications of free TurboTax SKUs and all other TurboTax SKUs. (*See* PFF ¶¶364-441). Further, even without disclosures, reasonable consumers understand that free tax-preparation offers are qualified, and that their ability to qualify for that offering depends on the complexity of their tax returns. (PFF ¶¶470-527).

922. The Santa Clara County Complaint further alleged “Examples of Intuit’s false or misleading statements include ... Falsely representing in numerous television advertisements that if taxpayers used TurboTax Free Edition they would be able to file for free, including in an ad campaign using the tagline: ‘Free, free free free,’” and “Falsely

representing in extensive online advertisements that if taxpayers used the TurboTax Free Edition they would be able to file for free.” (GX874 (Complaint Counsel) (publicly available from Cal. Super. Ct. Santa Clara Cnty.) ¶ 75(a)).

Response to Finding No. 922:

The Proposed Finding is irrelevant because the Santa Clara County Complaint and its unproven allegations are not evidence of anything. *See, e.g., Wright v. Farouk Systems, Inc.*, 701 F.3d 907, 911 n.8 (11th Cir. 2012) (“[P]leadings are only allegations, and allegations are not evidence of the truth of what is alleged.”). The Santa Clara County Complaint was resolved “without ... adjudication of any fact or law” and “without [Intuit] admitting any liability regarding of the allegations” through a Consent Order entered on June 25, 2022. (RX261 (Intuit); *see also* PFF ¶¶806-808). Its allegations are just that—unsubstantiated and unproven allegations, not facts or evidence—and thus cannot be used to support any findings or inferences in this proceeding. *See Foster v. Berwind Corp.*, 1991 WL 83090, at *1 (E.D. Pa. May 14, 1991) (“[E]xamining and admitting evidence of accusations made [in related cases] are dispositive of nothing and would confuse the complex issues already present.”).

In any event, the allegations are refuted by the record in this proceeding. As explained at length in Intuit’s post-trial brief and proposed findings, the challenged ads were not false or misleading. It is uncontested that TurboTax’s free SKUs are in fact free, and that consumers cannot pay to use them under any circumstances. (*See* PFF ¶¶67, 69, 109-112).

923. On September 13, 2019, a Consolidated Class Action Complaint was filed against Intuit in the matter captioned *In re Intuit Free File Litigation*, in the United States District Court for the Northern District of California (“Consolidated Class Action Complaint”). (GX875 (Complaint Counsel) (publicly available from N.D. Cal.) at CC-00015807).

Response to Finding No. 923:

It is a fact of life that Fortune 500 companies like Intuit are sued all the time for all sorts of reasons. It is somewhat shocking that the federal government is attempting to use the

existence of these allegations as *evidence* of wrongdoing. No matter, the Proposed Finding is irrelevant because the class action complaint and its unproven allegations are not evidence of anything. *See, e.g., Wright v. Farouk Systems, Inc.*, 701 F.3d 907, 911 n.8 (11th Cir. 2012) (“[P]leadings are only allegations, and allegations are not evidence of the truth of what is alleged.”). The class action complaint was voluntarily dismissed by the plaintiffs before any decision on its merits, with no admission of liability by Intuit. *See* Notice of Voluntary Dismissal, ECF No. 110, *In re Intuit Free File Litig.*, No. 3:19-cv-02546-CRB (N.D. Cal. Jan. 2, 2020). Its allegations are just that—unsubstantiated and unproven allegations, not facts or evidence—and thus cannot be used to support any findings or inferences in this proceeding. *See Foster v. Berwind Corp.*, 1991 WL 83090, at *1 (E.D. Pa. May 14, 1991) (“[E]xamining and admitting evidence of accusations made [in related cases] are dispositive of nothing and would confuse the complex issues already present.”).

The Proposed Finding is also irrelevant because the allegations in the putative class action lawsuit are unrelated to Complaint Counsel’s claim. The class action complaint focused exclusively on Intuit’s participation in the IRS Free File Program and allegedly deceptive conduct in relation to that Program. (*See* GX875 (FTC) ¶¶1-6, 59-60). Those allegations have no relevance to Complaint Counsel’s arguments concerning the advertising for commercial free TurboTax SKUs separate from the IRS Free File Program. The Proposed Finding instead appears to be nothing more than an attempt to distract from Complaint Counsel’s own failure before Judge Breyer in the U.S. District Court for the Northern District of California. When Complaint Counsel challenged the ads at issue in this case in federal court, under the very same theory that they are advancing in this proceeding, relying on the same evidence, the court denied their motion for a preliminary injunction. (*See* PFF ¶¶12-16). At the hearing, the court

repeatedly noted that the allegedly deceptive ads in fact disclosed Free Edition’s qualifications. (See, e.g., RX73 at 36 (“[L]ooking at this one as an example ... it says ‘TurboTax free edition, for simple tax returns only.’”), 37:8-9 (“[T]his ad ... tells me that it is limited to simple tax returns.”), 40:3-6 (“I mean, it is right there; isn’t it? I mean, it is right under the word ‘free, free, free’ or ‘zero, zero, zero,’ it says ‘TurboTax free edition, for simple returns only.’”)). Complaint Counsel cannot paper over their failure to prove their case by pointing to unproven allegations in other proceedings.

924. Among other averments, the Consolidated Class Action Complaint alleged that: “Intuit implemented a pervasive, nationwide marketing and advertising campaign during the 2018 tax filing season promoting its offering of ‘free’ tax filing services, even though the vast majority of users would actually be charged to file their returns.” (GX875 (Complaint Counsel) (publicly available from N.D. Cal.) ¶ 83; see also GX875 (Complaint Counsel) (publicly available from N.D. Cal.) ¶¶ 83–94).

Response to Finding No. 924:

The Proposed Finding is irrelevant because the class action complaint and its unproven allegations are not evidence of anything. See, e.g., *Wright v. Farouk Systems, Inc.*, 701 F.3d 907, 911 n.8 (11th Cir. 2012) (“[P]leadings are only allegations, and allegations are not evidence of the truth of what is alleged.”). The class action complaint was voluntarily dismissed by the plaintiffs before any decision on its merits, with no admission of liability by Intuit. See Notice of Voluntary Dismissal, ECF No. 110, *In re Intuit Free File Litig.*, No. 3:19-cv-02546-CRB (N.D. Cal. Jan. 2, 2020). Its allegations are just that—unsubstantiated and unproven allegations, not facts or evidence—and thus cannot be used to support any findings or inferences in this proceeding. See *Foster v. Berwind Corp.*, 1991 WL 83090, at *1 (E.D. Pa. May 14, 1991) (“[E]xamining and admitting evidence of accusations made [in related cases] are dispositive of nothing and would confuse the complex issues already present.”).

The Proposed Finding is also irrelevant because the allegations in the putative class action lawsuit are unrelated to Complaint Counsel's claim. The class action complaint focused exclusively on Intuit's participation in the IRS Free File Program and allegedly deceptive conduct in relation to that Program. (*See* GX875 (FTC) ¶¶1-6, 59-60). Those allegations have no relevance to Complaint Counsel's arguments concerning the advertising for commercial free TurboTax SKUs separate from the IRS Free File Program. The Proposed Finding instead appears to be nothing more than an attempt to distract from Complaint Counsel's own failure before Judge Breyer in the U.S. District Court for the Northern District of California. When Complaint Counsel challenged the ads at issue in this case in federal court, under the very same theory that they are advancing in this proceeding, relying on the same evidence, the court denied their motion for a preliminary injunction. (*See* PFF ¶¶12-16). At the hearing, the court repeatedly noted that the allegedly deceptive ads in fact disclosed Free Edition's qualifications. (*See, e.g.*, RX73 at 36 (“[L]ooking at this one as an example ... it says ‘TurboTax free edition, for simple tax returns only.’”); RX73 at 37:8-9 (“[T]his ad ... tells me that it is limited to simple tax returns.”); RX73 at 40:3-6 (“I mean, it is right there; isn't it? I mean, it is right under the word ‘free, free, free’ or ‘zero, zero, zero,’ it says ‘TurboTax free edition, for simple returns only.’”)). Complaint Counsel cannot paper over their failure to prove their case by pointing to unproven allegations in other proceedings.

In any event, the allegations are refuted by the record in this proceeding. As explained at length in Intuit's post-trial brief and proposed findings, the challenged ads were not false or misleading. It is uncontested that TurboTax's free SKUs are in fact free, and that consumers cannot pay to use them under any circumstances. (*See* PFF ¶¶67, 69, 109-112). And the challenged ads conveyed that the specific SKU being advertised was free for consumers who

qualified, that those qualifications were tied to the complexity of a consumer's tax return, and often that consumers can "see if they qualify" or "see details" on the TurboTax website. (See PFF ¶¶210-211, 242-244, 260-262, 273-275, 288-290, 297-299). Where the challenged ads did not direct consumers to the TurboTax website, they included links or were themselves links that would take consumers directly to the TurboTax website. (See PFF ¶¶253-254, 269-270, 284-285). Given that the challenged ads pointed or linked to the TurboTax website, even Complaint Counsel concede that the information on that website was integrated into the challenged ads. (CCFF ¶455; *see also* PFF ¶¶328-330). That integrated information detailed the qualifications of free TurboTax SKUs and all other TurboTax SKUs. (See PFF ¶¶364-441). Further, even without disclosures, reasonable consumers understand that free tax-preparation offers are qualified, and that their ability to qualify for that offering depends on the complexity of their tax returns. (PFF ¶¶470-527).

925. Count II of the Consolidated Class Action Complaint alleged fraudulent business acts and practices and deceptive advertising in violation of California Business & Professions Code § 17200, *et seq.*; specifically, the Complaint plead that:

Intuit's deceptive advertising and fraudulent conduct included affirmative misrepresentations, active concealment of material facts, and partial representations paired with suppression of material facts. Intuit's conduct violative of the fraudulent prong includes at least the following acts and omissions: ... In a pervasive nationwide advertising campaign, Intuit falsely advertised its TurboTax commercial website as being free, causing confusion and deceiving Class members, eligible for free tax filing, into paying Intuit for tax-filing services.

(GX875 (Complaint Counsel) (publicly available from N.D. Cal.) ¶ 134; *see also* GX875 (Complaint Counsel) (publicly available from N.D. Cal.) ¶¶ 129-39).

Response to Finding No. 925:

The Proposed Finding is irrelevant because the class action complaint and its unproven allegations are not evidence of anything. *See, e.g., Wright v. Farouk Systems, Inc.*, 701 F.3d 907, 911 n.8 (11th Cir. 2012) ("[P]leadings are only allegations, and allegations are not evidence of

the truth of what is alleged.”). The class action complaint was voluntary dismissed by the plaintiffs before any decision on its merits, with no admission of liability by Intuit. *See* Notice of Voluntary Dismissal, ECF No. 110, *In re Intuit Free File Litig.*, No. 3:19-cv-02546-CRB (N.D. Cal. Jan. 2, 2020). Its allegations are just that—unsubstantiated and unproven allegations, not facts or evidence—and thus cannot be used to support any findings or inferences in this proceeding. *See Foster v. Berwind Corp.*, 1991 WL 83090, at *1 (E.D. Pa. May 14, 1991) (“[E]xamining and admitting evidence of accusations made [in related cases] are dispositive of nothing and would confuse the complex issues already present.”).

Moreover, the Proposed Finding is incomplete and misleading because it mischaracterizes the class action complaint’s allegations in an effort to make them appear related to Complaint Counsel’s claim. Like the rest of the complaint, Count II in the class action complaint and the allegations included in that count were focused on Intuit’s allegedly deceptive conduct related to its participation in the IRS Free File Program. The paragraph that Complaint Counsel selectively quote, for example, makes clear that TurboTax advertising was alleged to be deceptive because Intuit marketed its commercial free product while allegedly “concealing and diverting consumers” from the software that it donated to the IRS Free File Program. (GX875 (FTC) ¶134(b); *see also* GX875 (FTC) ¶134(c)-(h) (alleging that TurboTax’s advertising was deceptive because it failed to account for the TurboTax software donated to the IRS Free File Program); GX875 (FTC) ¶137 (alleging that representations that TurboTax Free Edition were free were deceptive because they failed to reference the TurboTax software donated to the IRS Free File Program); GX875 (FTC) ¶139 (seeking injunctive relief related only to the IRS Free File Program)).

In any event, even if the allegations did relate to advertisements for free TurboTax offers on their own, those allegations are refuted by the record in this proceeding. As explained at length in Intuit's post-trial brief and proposed findings, the challenged ads were not false or misleading. It is uncontested that TurboTax's free SKUs are in fact free, and that consumers cannot pay to use them under any circumstances. (See PFF ¶¶67, 69, 109-112). And the challenged ads conveyed that the specific SKU being advertised was free for consumers who qualified, that those qualifications were tied to the complexity of a consumer's tax return, and often that consumers can "see if they qualify" or "see details" on the TurboTax website. (See PFF ¶¶210-211, 242-244, 260-262, 273-275, 288-290, 297-299). Where the challenged ads did not direct consumers to the TurboTax website, they included links or were themselves links that would take consumers directly to the TurboTax website. (See PFF ¶¶253-254, 269-270, 284-285). Given that the challenged ads pointed or linked to the TurboTax website, even Complaint Counsel concede that the information on that website was integrated into the challenged ads. (CCFF ¶455; *see also* PFF ¶¶328-330). That integrated information detailed the qualifications of free TurboTax SKUs and all other TurboTax SKUs. (See PFF ¶¶364-441). Further, even without disclosures, reasonable consumers understand that free tax-preparation offers are qualified, and that their ability to qualify for that offering depends on the complexity of their tax returns. (PFF ¶¶470-527).

926. Between October 1, 2019 and October 23, 2020, approximately 127,000 current and former Intuit customers filed demands for individual arbitration against Intuit with the American Arbitration Association (AAA) through counsel with the firm Keller Lenkner LLC. (GX876 (Complaint Counsel) (publicly available from N.D. Cal.) ¶ 5).

Response to Finding No. 926:

The Proposed Finding is irrelevant because the arbitration demands and their unproven, boilerplate allegations are not evidence of anything. *See, e.g., Wright v. Farouk Systems, Inc.*,

701 F.3d 907, 911 n.8 (11th Cir. 2012) (“[P]leadings are only allegations, and allegations are not evidence of the truth of what is alleged.”). The allegations in the arbitration demands are just that—unsubstantiated and unproven allegations, not facts or evidence—and thus cannot be used to support any findings or inferences in this proceeding. *See Foster v. Berwind Corp.*, 1991 WL 83090, at *1 (E.D. Pa. May 14, 1991) (“[E]xamining and admitting evidence of accusations made [in related cases] are dispositive of nothing and would confuse the complex issues already present.”); *see also, e.g., Arlio v. Lively*, 474 F.3d 46, 53 (2d Cir. 2007) (noting, in finding that admission of evidence from prior arbitration was improper, that “[a]dmitting evidence about previous cases ‘inevitably result[s] in trying those cases’ ... and ‘[t]he merits of the ... other cases would become inextricably intertwined with the case at bar”)).

The Proposed Finding is also incomplete and misleading because it ignores that the arbitration claims referenced were orchestrated by a single plaintiff’s firm, Keller Lenkner, whose business strategy has been described by the U.S. Chamber of Commerce as “a dangerous abuse of the arbitration process, subverting it into a tool to extract blackmail settlements from businesses.” (U.S. Chamber of Commerce, Institute for Legal Reform, *Mass Arbitration Shakedown: Coercing Unjustified Settlements* 30 (2023), <https://instituteforlegalreform.com/wp-content/uploads/2023/02/Mass-Arbitration-Shakedown-digital.pdf>¹⁰). Keller Lenkner’s goal in filing mass arbitration claims, such as the claims filed against Intuit, is not to actually litigate those claims, but to use the fees associated with those claims to force companies to pay massive

¹⁰ Intuit requests that the Court take judicial notice of the U.S. Chamber of Commerce’s “Mass Arbitration Shakedown: Coercing Unjustified Settlements” report pursuant to Commission Rule 3.43(f). (*See* 16 C.F.R. § 3.43(f)). It is appropriate to take judicial notice of content on websites. (*See In re California Naturel, Inc.*, 2016 WL 7228668, at *5 n.2 (F.T.C. Dec. 5, 2016) (“[W]e take official notice of the content of [respondent’s] website.”); *O’Toole v. Northrop Grumman Corp.*, 499 F.3d 1218, 1225 (10th Cir. 2007) (“It is not uncommon for courts to take judicial notice of factual information found on the world wide web.”)).

settlement amounts to the firm. (See U.S. Chamber of Commerce, Institute for Legal Reform, *Mass Arbitration Shakedown: Coercing Unjustified Settlements* 18-20 (2023), <https://institutelegalreform.com/wp-content/uploads/2023/02/Mass-Arbitration-Shakedown-digital.pdf>). As part of that strategy, Keller Lenkner solicits potential clients using social media and other mass outreach without conducting significant (if any) research into the merits of the claims. (See U.S. Chamber of Commerce, Institute for Legal Reform, *Mass Arbitration Shakedown: Coercing Unjustified Settlements* 21, 35-36 (2023), <https://institutelegalreform.com/wp-content/uploads/2023/02/Mass-Arbitration-Shakedown-digital.pdf>). Once it has amassed what it considers a sufficiently large list of clients, it approaches the target company and threatens to file the thousands if not hundreds of thousands of arbitration claims, each of which come with a high arbitration fee that must be paid by the company regardless of the merits of the claims. (See U.S. Chamber of Commerce, *Institute for Legal Reform, Mass Arbitration Shakedown: Coercing Unjustified Settlements* 18-20 (2023), <https://institutelegalreform.com/wp-content/uploads/2023/02/Mass-Arbitration-Shakedown-digital.pdf>). If a company refuses to pay Keller Lenkner not to file those claims, Keller Lenkner then files successive waves of arbitration demands to force the company to pay the arbitration fees and ultimately force a settlement (see U.S. Chamber of Commerce, Institute for Legal Reform, *Mass Arbitration Shakedown: Coercing Unjustified Settlements* 18-20 (2023), <https://institutelegalreform.com/wp-content/uploads/2023/02/Mass-Arbitration-Shakedown-digital.pdf>).

The fact that Keller Lenkner's business strategy relies heavily on filing frivolous arbitration claims has not gone unnoticed by decision-makers, including in the arbitration proceedings brought against Intuit. For example, in finding one claimant's set of claims against

Intuit to be patently frivolous, the arbitrator noted Keller Lenkner's [REDACTED]
[REDACTED] across the individual arbitration claims it was
bringing and faulted Keller Lenkner for filing claims that were obviously frivolous. (RX383
(Intuit) at -2137-2138). Another arbitrator, in finding one particular set of claims against Intuit to
be frivolous, pointed out that [REDACTED]
[REDACTED]
[REDACTED], because the firm's [REDACTED]
[REDACTED] (RX383
(Intuit) at -0987-0988). As that same arbitrator concluded, [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] (RX383 (Intuit) at -0987-0988).

The Proposed Finding is also incomplete because it fails to mention that Intuit prevailed
in over 80% of the arbitrations that were decided, and that in many of those cases the arbitrator
explicitly rejected the same theory of deception articulated by Complaint Counsel. (RX392
(Intuit) ¶15). For example, one arbitrator noted that [REDACTED]

[REDACTED]
[REDACTED] (RX67 (Intuit) at 12). Another concluded that [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED] (RX69 (Intuit) at 4). Yet another
found that [REDACTED]

[REDACTED] (RX383 (Intuit) at -1163). In multiple instances, the arbitrator found the claims brought to be patently frivolous because the representations made in the arbitration demands were either directly contradicted by the evidence or the claimant introduced no evidence to support them, and awarded attorneys' fees to Intuit. (*E.g.*, RX383 (Intuit) at -0982; RX383 (Intuit) at -1140; RX383 (Intuit) at -1656; RX383 (Intuit) at -2136).

927. Each arbitration claimant alleged “that while Intuit created a free tax filing service for low- and middle income taxpayers, it also steered these consumers away from the free option and toward its paid products.” (GX876 (Complaint Counsel) (publicly available from N.D. Cal.) ¶ 23).

Response to Finding No. 927:

The Proposed Finding accurately captures the boilerplate and threadbare allegations in the arbitration demands but it is irrelevant because the arbitration demands and their unproven allegations are not evidence of anything. *See, e.g., Wright v. Farouk Systems, Inc.*, 701 F.3d 907, 911 n.8 (11th Cir. 2012) (“[P]leadings are only allegations, and allegations are not evidence of the truth of what is alleged.”). The allegations in the arbitration demands are just that—unsubstantiated and unproven allegations, not facts or evidence—and thus cannot be used to support any findings or inferences in this proceeding. *See Foster v. Berwind Corp.*, 1991 WL 83090, at *1 (E.D. Pa. May 14, 1991) (“[E]xamining and admitting evidence of accusations made [in related cases] are dispositive of nothing and would confuse the complex issues already present.”); *see also, e.g., Arlio v. Lively*, 474 F.3d 46, 53 (2d Cir. 2007) (noting, in finding that

admission of evidence from prior arbitration was improper, that “[a]dmitting evidence about previous cases ‘inevitably result[s] in trying those cases’ ... and ‘[t]he merits of the ... other cases would become inextricably intertwined with the case at bar”)).

The Proposed Finding is also incomplete and misleading because it ignores that the arbitration claims referenced were orchestrated by a single plaintiff’s firm, Keller Lenkner, whose business strategy has been described by the U.S. Chamber of Commerce as “a dangerous abuse of the arbitration process, subverting it into a tool to extract blackmail settlements from businesses.” (U.S. Chamber of Commerce, Institute for Legal Reform, *Mass Arbitration Shakedown: Coercing Unjustified Settlements* 30 (2023), <https://instituteforlegalreform.com/wp-content/uploads/2023/02/Mass-Arbitration-Shakedown-digital.pdf>). Keller Lenkner’s goal in filing mass arbitration claims, such as the claims filed against Intuit, is not to actually litigate those claims, but to use the fees associated with those claims to force companies to pay massive settlement amounts to the firm. (See U.S. Chamber of Commerce, Institute for Legal Reform, *Mass Arbitration Shakedown: Coercing Unjustified Settlements* 18-20 (2023), <https://instituteforlegalreform.com/wp-content/uploads/2023/02/Mass-Arbitration-Shakedown-digital.pdf>). As part of that strategy, Keller Lenkner solicits potential clients using social media and other mass outreach without conducting significant (if any) research into the merits of the claims. (See U.S. Chamber of Commerce, Institute for Legal Reform, *Mass Arbitration Shakedown: Coercing Unjustified Settlements* 21, 35-36 (2023), <https://instituteforlegalreform.com/wp-content/uploads/2023/02/Mass-Arbitration-Shakedown-digital.pdf>). Once it has amassed what it considers a sufficiently large list of clients, it approaches the target company and threatens to file the thousands if not hundreds of thousands of arbitration claims, each of which come with a high arbitration fee that must be paid by the

company regardless of the merits of the claims. (See U.S. Chamber of Commerce, Institute for Legal Reform, *Mass Arbitration Shakedown: Coercing Unjustified Settlements* 18-20 (2023), <https://institutelegalreform.com/wp-content/uploads/2023/02/Mass-Arbitration-Shakedown-digital.pdf>). If a company refuses to pay Keller Lenkner not to file those claims, Keller Lenkner then files successive waves of arbitration demands to force the company to pay the arbitration fees and ultimately force a settlement (see U.S. Chamber of Commerce, Institute for Legal Reform, *Mass Arbitration Shakedown: Coercing Unjustified Settlements* 18-20 (2023), <https://institutelegalreform.com/wp-content/uploads/2023/02/Mass-Arbitration-Shakedown-digital.pdf>).

The fact that Keller Lenkner's business strategy relies heavily on filing frivolous arbitration claims has not gone unnoticed by decision-makers, including in the arbitration proceedings brought against Intuit. For example, in finding one claimant's set of claims against Intuit to be patently frivolous, the arbitrator noted Keller Lenkner's [REDACTED] [REDACTED] across the individual arbitration claims it was bringing and faulted Keller Lenkner for filing claims that were obviously frivolous. (RX383 (Intuit) at -2137-2138). Another arbitrator, in finding one particular set of claims against Intuit to be frivolous, pointed out that [REDACTED] [REDACTED] [REDACTED], because the firm's [REDACTED] [REDACTED] (RX383 (Intuit) at -0987-0988). As that same arbitrator concluded, [REDACTED] [REDACTED]

[REDACTED]

[REDACTED] (RX383 (Intuit) at -0987-0988).

The Proposed Finding is also incomplete because it fails to mention that Intuit prevailed in over 80% of the arbitrations that were decided, and that in many of those cases the arbitrator explicitly rejected the same theory of deception articulated by Complaint Counsel. (RX392 (Intuit) ¶15). For example, one arbitrator noted that [REDACTED]

[REDACTED]

[REDACTED] (RX67 (Intuit) at 12). Another concluded that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (RX69 (Intuit) at 4). Yet another found that [REDACTED]

[REDACTED]

[REDACTED] (RX383 (Intuit) at -1163). In multiple instances, the arbitrator found the claims brought to be patently frivolous because the representations made in the arbitration demands were either directly contradicted by the evidence or the claimant introduced no evidence to support them, and awarded attorneys' fees to Intuit. (*E.g.*, RX383 (Intuit) at -0982; RX383 (Intuit) at -1140; RX383 (Intuit) at -1656; RX383 (Intuit) at -2136).

928. These consumers further alleged they “were lured to Intuit’s website with promises of its Free Edition, only to learn later that they were ineligible for that free product and would have to pay to use TurboTax.” (GX876 (Complaint Counsel) (publicly available from N.D. Cal.) ¶ 23).

Response to Finding No. 928:

As shocking as it is that the federal government would seek to use the *allegations* in a private class action as evidence of wrongdoing against a defendant, it is doubly so that the federal government is pointing to allegations made as part of a mass arbitration scheme the U.S. Chambers of Commerce has called “a dangerous abuse of the arbitration process, subverting it into a tool to extract blackmail settlements from businesses.” (U.S. Chamber of Commerce, Institute for Legal Reform, *Mass Arbitration Shakedown: Coercing Unjustified Settlements* 30 (2023), <https://instituteforlegalreform.com/wp-content/uploads/2023/02/Mass-Arbitration-Shakedown-digital.pdf>). That should tell the Court just how weak Complaint Counsel’s case is on the merits. Intuit successfully defended itself on the *merits* of the arbitrations and stands behind its advertisements in this case too. There is plenty of evidence in the record and Intuit believes that evidence is where the case should be decided.

929. On March 5, 2021, Judge Charles R. Breyer of the United States District Court for the Northern District of California denied a Motion for Preliminary Approval of Class Action Settlement in the *In re Intuit Free File Litigation*, Case No. 19-cv-02546 (N.D. Cal. Mar. 5, 2021). (GX877 (Complaint Counsel) (publicly available from N.D. Cal.).

Response to Finding No. 929:

The Proposed Finding is irrelevant because the class action complaint and a proposed settlement never entered into are not evidence of anything. *See, e.g., Wright v. Farouk Systems, Inc.*, 701 F.3d 907, 911 n.8 (11th Cir. 2012) (“[P]leadings are only allegations, and allegations are not evidence of the truth of what is alleged.”). Ultimately, the class action complaint was voluntarily dismissed by the plaintiffs before any decision on its merits, with no admission of liability by Intuit. *See* Notice of Voluntary Dismissal, ECF No. 110, *In re Intuit Free File Litig.*,

No. 3:19-cv-02546-CRB (N.D. Cal. Jan. 2, 2020). Its allegations are just that—unsubstantiated and unproven allegations, not facts or evidence—and thus cannot be used to support any findings or inferences in this proceeding. *See Foster v. Berwind Corp.*, 1991 WL 83090, at *1 (E.D. Pa. May 14, 1991) (“[E]xamining and admitting evidence of accusations made [in related cases] are dispositive of nothing and would confuse the complex issues already present.”).

The Proposed Finding is also irrelevant because the allegations in the putative class action lawsuit are unrelated to Complaint Counsel’s claim. The class action complaint focused exclusively on Intuit’s participation in the IRS Free File Program and allegedly deceptive conduct in relation to that Program. (*See* GX875 (FTC) ¶¶1-6, 59-60). Those allegations have no relevance to Complaint Counsel’s arguments concerning the advertising for commercial free TurboTax SKUs separate from the IRS Free File Program. The Proposed Finding instead appears to be nothing more than an attempt to distract from Complaint Counsel’s own failure before Judge Breyer in the U.S. District Court for the Northern District of California. When Complaint Counsel challenged the ads at issue in this case in federal court, under the very same theory that they are advancing in this proceeding, relying on the same evidence, the court denied their motion for a preliminary injunction. (*See* PFF ¶¶12-16). At the hearing, the court repeatedly noted that the allegedly deceptive ads in fact disclosed Free Edition’s qualifications. (*See, e.g.*, RX73 at 36 (“[L]ooking at this one as an example ... it says ‘TurboTax free edition, for simple tax returns only.’”); RX73 at 37:8-9 (“[T]his ad ... tells me that it is limited to simple tax returns.”); RX73 at 40:3-6 (“I mean, it is right there; isn’t it? I mean, it is right under the word ‘free, free, free’ or ‘zero, zero, zero,’ it says ‘TurboTax free edition, for simple returns only.’”)). Complaint Counsel cannot paper over their failure to prove their case by pointing to unproven allegations in other proceedings.

The Proposed Finding is also irrelevant because, even if the lawsuit and its allegations were somehow relevant, the fact that the court denied a Motion for Preliminary Approval of Class Action Settlement has no bearing on whether the challenged ads in this case were deceptive or any other issue relevant to this proceeding.

930. Among other reasons, Judge Breyer denied preliminary class settlement because “the proposed settlement provides class members with inadequate compensation.” (GX877 (Complaint Counsel) (publicly available from N.D. Cal.) at CC-00016018).

Response to Finding No. 930:

The Proposed Finding is irrelevant. In addition to all of the reasons noted in response to multiple other findings (*see* Responses to CCFF ¶¶923-925, 929), the court’s assessment of the appropriate amount of compensation for the class members was wholly unrelated to the merits of the claim. (GX877 (FTC) at 7-8). Instead, given the settlement posture, the court merely assumed that the plaintiffs would succeed on the merits. (GX877 (FTC) at 7-8). That decision thus says nothing about any issues in this proceeding. Indeed, at the time of the proposed settlement, Intuit had not even answered the Complaint, let alone put on the full defense it has here. But when the very same Judge was presented with Complaint Counsel’s theory of deception in this case, he denied their motion for a preliminary injunction and observed that “nobody” believes the theory. (RX73 (Intuit) at 17:3-5).

931. Judge Breyer noted that, because the plaintiffs had not provided an estimate of Intuit’s potential exposure in the matter, “[t]he Court is left to do a back-of-the-envelope calculation: for a projected class of 19 million people, who paid an average of \$100 per-year for at least one year, a conservative estimate of Intuit’s potential liability is \$1.9 billion.” (GX877 (Complaint Counsel) (publicly available from N.D. Cal.) at CC-00016030).

Response to Finding No. 931:

The Proposed Finding highlights the irrelevancy of this Proposed Finding and all the other proposed findings on this topic. Judge Breyer denied a proposed settlement in a different

case in part because of procedural issues with the plaintiffs' submission for *preliminary* approval. That says nothing about any issue in this case. If the Proposed Finding is intended to shock the Court by reference to the dollar figure of "potential" liability, Intuit is confident that the Court is not so easily swayed.

932. Judge Breyer further noted:

Strangely, the proposed settlement provides for the same award regardless whether a class member paid fees for more than one year. Plaintiffs' argument that "eligible free-filers who paid a TurboTax fee in more than one year . . . arguably should have known they would be charged in the subsequent year," Mot. for Preliminary Approval at 14, hardly resolves the matter. Plaintiffs have characterized this action as "a bait-and-switch case." Hearing Tr. at 32. A person induced into paying for services that the person initially expected to get for free, and who continues to pay for those services annually, can trace the cumulative harm suffered back to the initial deception. Without that deception, the person would have known they could file for free from the start, and presumably would have done so each year.

(GX877 (Complaint Counsel) (publicly available from N.D. Cal.) at CC-00016032).

Response to Finding No. 932:

The Proposed Finding is irrelevant because the class action complaint and its unproven allegations are not evidence of anything. *See, e.g., Wright v. Farouk Systems, Inc.*, 701 F.3d 907, 911 n.8 (11th Cir. 2012) ("[P]leadings are only allegations, and allegations are not evidence of the truth of what is alleged."). The class action complaint was voluntarily dismissed by the plaintiffs before any decision on its merits, with no admission of liability by Intuit. *See* Notice of Voluntary Dismissal, ECF No. 110, *In re Intuit Free File Litig.*, No. 3:19-cv-02546-CRB (N.D. Cal. Jan. 2, 2020). Its allegations are just that—unsubstantiated and unproven allegations, not facts or evidence—and thus cannot be used to support any findings or inferences in this proceeding. *See Foster v. Berwind Corp.*, 1991 WL 83090, at *1 (E.D. Pa. May 14, 1991) ("[E]xamining and admitting evidence of accusations made [in related cases] are dispositive of nothing and would confuse the complex issues already present.").

The Proposed Finding instead appears to be nothing more than an attempt to distract from Complaint Counsel's own failure before Judge Breyer in the U.S. District Court for the Northern District of California when presented with the facts *of this case*. When Complaint Counsel challenged the ads at issue in this case in federal court, under the very same theory that they are advancing in this proceeding, relying on the same evidence, the court denied their motion for a preliminary injunction. (*See* PFF ¶¶12-16). At the hearing, the court repeatedly noted that the allegedly deceptive ads in fact disclosed Free Edition's qualifications. (*See, e.g.*, RX73 at 36 (“[L]ooking at this one as an example ... it says ‘TurboTax free edition, for simple tax returns only.’”); RX73 at 37:8-9 (“[T]his ad ... tells me that it is limited to simple tax returns.”); RX73 at 40:3-6 (“I mean, it is right there; isn’t it? I mean, it is right under the word ‘free, free, free’ or ‘zero, zero, zero,’ it says ‘TurboTax free edition, for simple returns only.’”)). Complaint Counsel cannot paper over their failure to prove their case by pointing to unproven allegations in other proceedings.

Furthermore, the court's assessment of the appropriate amount of compensation for the class members was wholly unrelated to the merits of the claim. (GX877 (FTC) at 7-8). Instead, given the settlement posture, the court merely assumed that the plaintiffs would succeed on the merits. (GX877 (FTC) at 7-8). That decision thus says nothing about any issues in this proceeding. But when the very same Judge was presented with Complaint Counsel's theory of deception here, he denied their motion for a preliminary injunction and observed that “nobody” believes the theory. (RX73 (Intuit) at 17:3-5).

933. Throughout the course of the litigations and arbitrations instigated by the L.A. City Complaint, the Santa Clara County Complaint, the Consolidated Class Action Complaint, and the demands for individual arbitration against Intuit discussed above, Intuit continued making “free” claims in its advertising for TurboTax. (*See* GX Summary 001 (Complaint Counsel) at ‘Ads w-Program Count’ (summarizing TV ad dissemination data produced by Intuit for TV ads that made free claims principally in calendar years 2021 and 2022); GX

Summary 002 (Complaint Counsel) at ‘Summary-Online_Ads’ (summarizing Online ad dissemination data produced by Intuit for online ads that made free claims in TY 2020 and 2021 (calendar years 2021 and 2022)).

Response to Finding No. 933:

The Proposed Finding is irrelevant because the Los Angeles City Attorney Complaint, Santa Clara County Complaint, Class Action Complaint, and arbitration demands’ unproven allegations are not evidence of anything. *See, e.g., Wright v. Farouk Systems, Inc.*, 701 F.3d 907, 911 n.8 (11th Cir. 2012) (“[P]leadings are only allegations, and allegations are not evidence of the truth of what is alleged.”). Thus, they cannot be used to support any findings or inferences in this proceeding. *See Foster v. Berwind Corp.*, 1991 WL 83090, at *1 (E.D. Pa. May 14, 1991) (“[E]xamining and admitting evidence of accusations made [in related cases] are dispositive of nothing and would confuse the complex issues already present.”); *see also, e.g., Arlio v. Lively*, 474 F.3d 46, 53 (2d Cir. 2007) (noting, in finding that admission of evidence from prior arbitration was improper, that “[a]dmitting evidence about previous cases ‘inevitably result[s] in trying those cases’ ... and ‘[t]he merits of the ... other cases would become inextricably intertwined with the case at bar”).

That Intuit continued running ads that it did not believe were deceptive in the face of those baseless allegations says nothing about whether the advertisements at issue in this case are deceptive. Indeed, *none* of the court cases referenced in the Proposed Finding were successful. And the demands for arbitration likewise say nothing about whether the challenged ads are deceptive, particularly because Intuit prevailed in over 80 percent of those adjudicated. (RX392 (Intuit) ¶15). Often, the arbitrator explicitly rejected the very same theory of deception articulated by Complaint Counsel here. For example, one arbitrator noted that [REDACTED]

[REDACTED] (RX67 (Intuit) at 12). Another concluded that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (RX69 (Intuit) at 4). Yet another found that [REDACTED]

[REDACTED]

[REDACTED] (RX383 (Intuit) at

-1163). In multiple instances, the arbitrator found the claims brought to be patently frivolous because the representations made in the arbitration demands were either directly contradicted by the evidence or the claimant introduced no evidence to support them, and awarded attorneys' fees to Intuit. (E.g., RX383 (Intuit) at -0982; RX383 (Intuit) at -1140; RX383 (Intuit) at -1656; RX383 (Intuit) at -2136).

To the extent this Proposed Finding is intended to suggest that a cease and desist order is somehow necessary, it cannot carry the weight Complaint Counsel intend because the evidence shows that Intuit consistently made improvements to its ads over time on its own accord (PFF ¶¶353-363), never sought to deceive anyone (PFF ¶¶768-777), and that it is against Intuit's interest to deceive consumers (PFF ¶¶94-96) . Moreover, the entirety of the conduct detailed in the Proposed Finding predates the Consent Order entered into with the states. (PFF ¶806; RX261 (Intuit); RX399 (Intuit)).

934. Throughout the course of the litigations and arbitrations instigated by the L.A. City Complaint, the Santa Clara County Complaint, the Consolidated Class Action Complaint, and the demands for individual arbitration against Intuit discussed above, Intuit continued airing ads in its “Free, free, free” campaign until just after its meeting with FTC Chair Lina Khan on March 24, 2022. (See GX Summary 001 (Complaint Counsel) at ‘Ads w-Program Count’ (summarizing TV ad dissemination data produced by Intuit for TV ads that made free claims principally in calendar years 2021 and 2022); GX Summary 002 (Complaint Counsel) at ‘Summary-Online_Ads’ (summarizing Online ad dissemination data produced by Intuit for online ads that made free claims in TY 2020 and 2021 (calendar years 2021 and 2022); GX438 (Intuit) ¶ 16 (Cathleen Ryan, Intuit’s Senior Vice President of Marketing, declared in part: “After our general counsel Kerry McLean and outside counsel met with FTC Chair Lina Khan to discuss the FTC’s concerns regarding Intuit’s advertising, at approximately 7 p.m. PST on Thursday, March 24, 2022, Intuit decided to discontinue all current video advertising campaigns for TurboTax Free Edition for the remainder of the Tax Year 2021 tax season. Upon making the decision, Intuit began the process of removing any such advertisements from all media it purchases or otherwise controls.”)).

Response to Finding No. 934:

The Proposed Finding is irrelevant because the Los Angeles City Attorney Complaint, Santa Clara County Complaint, Class Action Complaint, and arbitration demands’ unproven allegations are not evidence of anything. See, e.g., *Wright v. Farouk Systems, Inc.*, 701 F.3d 907, 911 n.8 (11th Cir. 2012) (“[P]leadings are only allegations, and allegations are not evidence of the truth of what is alleged.”). Thus, they cannot be used to support any findings or inferences in this proceeding. See *Foster v. Berwind Corp.*, 1991 WL 83090, at *1 (E.D. Pa. May 14, 1991) (“[E]xamining and admitting evidence of accusations made [in related cases] are dispositive of nothing and would confuse the complex issues already present.”); see also, e.g., *Arlio v. Lively*, 474 F.3d 46, 53 (2d Cir. 2007) (noting, in finding that admission of evidence from prior arbitration was improper, that “[a]dmitting evidence about previous cases ‘inevitably result[s] in trying those cases’ ... and ‘[t]he merits of the ... other cases would become inextricably intertwined with the case at bar”).

That Intuit continued running ads that it did not believe were deceptive in the face of those baseless allegations says nothing about whether the advertisements at issue in this case are

deceptive. Indeed, *none* of the court cases referenced in the Proposed Finding were successful.

And the demands for arbitration likewise say nothing about whether the challenged ads are deceptive, particularly because Intuit prevailed in over 80 percent of those adjudicated. (RX392 (Intuit) ¶15). Often, the arbitrator explicitly rejected the very same theory of deception articulated by Complaint Counsel here. For example, one arbitrator noted that [REDACTED]

[REDACTED]

[REDACTED] (RX67 (Intuit) at 12). Another concluded that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (RX69 (Intuit) at 4). Yet another found that [REDACTED]

[REDACTED]

[REDACTED] (RX383 (Intuit) at

-1163). In multiple instances, the arbitrator found the claims brought to be patently frivolous because the representations made in the arbitration demands were either directly contradicted by the evidence or the claimant introduced no evidence to support them, and awarded attorneys' fees to Intuit. (*E.g.*, RX383 (Intuit) at -0982; RX383 (Intuit) at -1140; RX383 (Intuit) at -1656; RX383 (Intuit) at -2136).

By contrast, when Complaint Counsel sought to enjoin the advertisements they challenge here in federal court, the court observed that “nobody” believed Complaint Counsel’s theory of deception and denied Complaint Counsel’s motion. (RX73 (Intuit) at 17:3-5; RX74 (Intuit)).

To the extent this Proposed Finding is intended to suggest that a cease and desist order is somehow necessary, it cannot carry the weight Complaint Counsel intend because the evidence shows that Intuit consistently made improvements to its ads over time on its own accord, (PFF ¶¶353-363), never sought to deceive anyone, (PFF ¶¶768-777), and it is against Intuit’s interest to deceive consumers, (PFF ¶¶94-96). Moreover, the entirety of the conduct detailed in the Proposed Finding predates the Consent Order entered into with the states. (PFF ¶806; RX261 (Intuit); RX399 (Intuit)).

935. On April 28, 2022, Intuit entered into a settlement agreement with the attorneys general of each state and the District of Columbia “to resolve an investigation of the Attorneys General into Intuit’s marketing, advertising, promotion, and sale of certain online tax preparation products and whether Intuit’s conduct constituted deceptive or unfair business acts or practices in violation of the States’ consumer protection laws.” (RX76 (Intuit) at INTUIT-FTC-PART3-000614655).

Response to Finding No. 935:

The Proposed Finding is incorrect. Intuit did not enter into a “settlement agreement” with the attorneys general of each state and the District of Columbia; it entered into a binding Consent Order enforceable in court—and entered as a final judgment and permanent injunction in Los Angeles County Superior Court (Case No. 19STCV15644) on June 25, 2022. (PFF ¶806; RX261 (Intuit); RX399 (Intuit)).

The Proposed Finding is also misleading because, as Complaint Counsel later recognize, Intuit did not admit any liability as part of the Consent Order. (RX76 (Intuit); CCF ¶936). The Consent Order’s reference to attorneys general’s investigations into Intuit’s advertising practices is therefore not evidence of anything at issue in this case. *See, e.g., Loreley Fin. (Jersey) No. 3*

Ltd. v. Wells Fargo Sec., LLC, 797 F.3d 160, 179 n.11 (2d Cir. 2015) (“[W]e have consistently held [Consent] orders like the one at issue here inadmissible to prove the facts of liability.”); *United My Funds, LLC v. Perera*, 470 F. Supp. 3d 660, 662 (E.D. Tex. 2020) (noting that, where the signatory “did not admit to the substantive allegations in the Consent Order,” the prior Consent Order was “akin to a summary of out of court allegations”).

936. In the settlement with Intuit, the States and DC made findings including:

- 1) “Since at least 2017, Intuit has called its ‘freemium’ product ‘TurboTax Free Edition.’ In 2016, Intuit called its ‘freemium’ product ‘Federal Free Edition.’”
- 2) “This TurboTax ‘freemium’ product is only available to consumers with ‘simple’ tax returns, as defined by Intuit; other consumers are required to upgrade to paid products to file through Intuit.”
- 3) “Many of Intuit’s ads contain a fine print disclaimer at the end of the commercial informing consumers that the offer is limited to consumers with ‘simple tax returns’ or ‘simple U.S. returns only.’ This fine print disclaimer was not conveyed audibly.”
- 4) “The disclaimers are inadequate to cure the express representation that the advertised products are free.”
- 5) “A reasonable consumer could believe that the products Intuit advertises as free are free for them, given that online products in many industries, including in online tax preparation, are routinely offered to consumers completely free of charge.”
- 6) “Intuit’s false statements or representations that Turbo Tax is free, without adequately disclosing the limitations of its free offer, have induced consumers to begin using TurboTax and, after discovering they are not eligible for Intuit’s ‘freemium’ product (as described below), to pay for paid Turbo Tax products.”
- 7) “When consumers who saw Intuit’s advertisements visited the TurboTax website, the website’s home page failed to adequately disclose the limitations on eligibility for Intuit’s ‘freemium’ product.”
- 8) Intuit neither admitted nor denied these findings.

(RX76 (Intuit) at INTUIT-FTC-PART3-000614660 to -000614671).

Response to Finding No. 936:

The Proposed Finding is incorrect. Intuit did not enter into a settlement agreement with the attorneys general of each state and the District of Columbia; it entered into a binding Consent Order enforceable in court—and entered as a final judgment and permanent injunction in Los Angeles County Superior Court (Case No. 19STCV15644) on June 25, 2022. (PFF ¶806; RX261 (Intuit); RX399 (Intuit)).

The Proposed Finding is also misleading. However labeled, these statements in the Consent Order were not “findings” in any commonly understood sense of the term. State attorneys general are not judges nor juries. The supposed “findings” were nothing more than allegations and, similar to Complaint Counsel’s allegations here, in a contested proceeding they would not have held up under scrutiny. *See, e.g., Loreley Fin. (Jersey) No. 3 Ltd. v. Wells Fargo Sec., LLC*, 797 F.3d 160, 179 n.11 (2d Cir. 2015) (“[W]e have consistently held [Consent] orders like the one at issue here inadmissible to prove the facts of liability.”); *United My Funds, LLC v. Perera*, 470 F. Supp. 3d 660, 662 (E.D. Tex. 2020) (noting that, where the signatory “did not admit to the substantive allegations in the Consent Order,” the prior Consent Order was “akin to a summary of out of court allegations”).

Indeed, the evidence admitted in this case contradicts or clarifies all of these purported “findings.”

1. As an initial matter, TurboTax Free Edition is not a “‘freemium’ product,” whatever that means. It is a *bona fide*, completely free product used by millions of consumers to file their taxes for free every year. (CCFF ¶23; PFF ¶113).
2. All consumers with simple tax returns—a term that is defined by *the IRS* and which is used extensively in the tax preparation industry, not just by Intuit—qualify to use TurboTax Free Edition. (PFF ¶¶119-125, 141-143).

3. None of the challenged ads included a disclaimer, because there was nothing in the ads that needed disclaiming. Instead, all challenged advertisements included qualifications that prevented consumers from believing that all TurboTax SKUs were free. (PFF ¶¶215, 248, 273-274, 281-294). And contrary to the allegations in the Consent Order, many of those advertisements included audio disclosures. (PFF ¶¶217-218, 252).
 4. None of the ads made the express claim that “TurboTax is free.” Intuit’s ads expressly—and truthfully—stated that a particular TurboTax SKU or SKUs were free, that the free offers were available to taxpayers with simple returns, and often that consumers could “see if they qualify” on the TurboTax website. (*See* PFF ¶¶206, 209-210, 212). Where the ads did not direct consumers to the website, they linked directly to the TurboTax website. (PFF ¶¶253, 269, 284).
 5. Both as a result of these extensive disclosures and because of the nature of the tax preparation industry and consumers’ skepticism of free offers, the evidence in this case demonstrates that reasonable consumers were not likely to be misled by the challenged ads. (PFF ¶¶470-527, 623-766).
 6. Advertisements for free TurboTax products were not material to reasonable consumers’ decisions—as expert testimony and survey evidence admitted in this case established. (PFF ¶¶782-786).
 7. As recognized by Complaint Counsel and their witnesses (PFF ¶369-370), the TurboTax website has consistently included clearly visible disclosures regarding the qualifications for TurboTax Free Edition (PFF ¶¶364-418).
937. Intuit’s settlement with the States allows for “Space-Constrained Advertisements” in which Intuit need only disclose that “eligibility requirements apply” and provide a

hyperlink to more fulsome disclosures. (RX76 (Intuit) at INTUIT-FTC-PART3-000614673).

Response to Finding No. 937:

The Proposed Finding is incorrect in that it references a settlement. Intuit did not enter into a settlement agreement with the attorneys general of each state and the District of Columbia; it entered into a binding Consent Order enforceable in court—and entered as a final judgment and permanent injunction in Los Angeles County Superior Court (Case No. 19STCV15644) on June 25, 2022. (PFF ¶806; RX261 (Intuit); RX399 (Intuit)).

The Proposed Finding is also incomplete and misleading. The Consent Order imposes separate requirements for space-constrained video advertisements and space-constrained non-video advertisements. (RX76 (Intuit) at INTUIT-FTC-PART3-000614673). For space-constrained *non-video* advertisements, which this Proposed Finding appears to be referencing, the settlement agreement requires that Intuit always “disclose that eligibility requirements apply.” (RX76 (Intuit) at INTUIT-FTC-PART3-000614673). The Consent Order also requires, if the space-constrained non-video advertisement is made online, either 1) that the ad include a hyperlink to a landing page or webpage on the TurboTax website providing full disclosure, or 2) that the ad itself be clickable, and that clicking on the ad direct the consumer to a landing page or webpage on the TurboTax website providing full disclosure. (RX76 (Intuit) at INTUIT-FTC-PART3-000614673). By contrast, all space-constrained *video* advertisements must “visually disclose, Clearly and Conspicuously, and in Close Proximity to the representation that the product is free, (1) the existence and category of material limitations on a consumer’s ability to use that free product, and (2) that not all taxpayers qualify.” (RX76 (Intuit) at INTUIT-FTC-PART3-000614673). In addition, all space-constrained video advertisements longer than eight seconds must also “verbally disclose, Clearly and Conspicuously and in Close Proximity to the

representation that the product is free, that not all taxpayers qualify.” (RX76 (Intuit) at INTUIT-FTC-PART3-000614673).

Tellingly, Complaint Counsel do not challenge *any* ad that Intuit has ran since the Consent Order went into effect, nor do they argue that any of those ads are deceptive. (PFF ¶¶214; *see generally* Complaint Counsel’s Post-Trial Br.; CCF ¶¶47-454). Indeed, the proposed order Complaint Counsel provided to Intuit as part of settlement negotiations in November 2021 contained similar provisions allowing for different disclosure requirements in space-constrained ad, an obvious recognition of the unfeasibility of providing lengthy disclaimers in a space-constrained format. (RX262 (Intuit) at 6-7; RX1023 (Intuit) at 1). For a wide range of space-constrained advertisements, it is simply not possible to provide extensive disclosures. (*E.g.*, GX506 (Intuit); GX507 (Intuit)). And as the Court itself saw through the various space-constrained ads shown at the hearing, there is nothing deceptive about short-length advertisements that say prominently “Simple Tax Returns Only,” identify the product being advertised, and link to the TurboTax website. (*E.g.*, GX555 (Intuit); RX1420 (Intuit)). Nor does Complaint Counsel offer any basis for their argument that the disclosures required in space-constrained video ads, either longer or shorter than 8 seconds, are insufficient. Instead, the evidence shows that requiring audio disclosures in video ads of less than 8 seconds is unhelpful: reasonable consumers do not digest and understand lengthy disclosures provided in a short advertisement. (PFF ¶¶835, 839-841). Rather than improving consumers’ understanding, such disclosures would result in more confusion and consumers tuning out from the disclosures. (PFF ¶¶835, 839-841)

Furthermore, to the extent this Proposed Finding is intended to suggest that it is improper to have different requirements for space-constrained and non-space-constrained ads, it ignores

that the Commission itself recently issued a Decision and Order in *LCA-Vision*, 2023 WL 621935 (F.T.C. Jan. 19, 2023), that imposed different requirements for space-constrained and non-space-constrained advertisements. (RX1490 (Intuit) at 4-5).

938. The settlement with the States also allows for visual-only disclosures in “Space-Constrained Video Advertisements,” allowing the audio portion to disclose only “that not all taxpayers qualify”—and not even that in a video of 8 seconds or less, as is often the case for social media video posts; and this provision sunsets after ten years. (RX76 (Intuit) at INTUIT-FTC-PART3-000614673).

Response to Finding No. 938:

The Proposed Finding is incorrect in that it references a settlement. Intuit did not enter into a settlement agreement with the attorneys general of each state and the District of Columbia; it entered into a binding Consent Order enforceable in court—and entered as a final judgment and permanent injunction in Los Angeles County Superior Court (Case No. 19STCV15644) on June 25, 2022. (PFF ¶806; RX261 (Intuit); RX399 (Intuit)).

The proposed finding is also incomplete and misleading. Under the Consent Order, all Intuit space-constrained video advertisements must “visually disclose, Clearly and Conspicuously, and in Close Proximity to the representation that the product is free, (1) the existence and category of material limitations on a consumer’s ability to use that free product, and (2) that not all taxpayers qualify.” (RX76 (Intuit) at INTUIT-FTC-PART3-000614673). In addition, all space-constrained video advertisements longer than eight seconds must also “verbally disclose, Clearly and Conspicuously and in Close Proximity to the representation that the product is free, that not all taxpayers qualify.” (RX76 (Intuit) at INTUIT-FTC-PART3-000614673).

Tellingly, Complaint Counsel do not challenge *any* ad that Intuit has ran since the Consent Order went into effect, nor do they argue that any of those ads are deceptive. (PFF ¶214; *see generally* Complaint Counsel’s Post-Trial Br.; CCF ¶¶47-454). Indeed, the proposed

order Complaint Counsel provided to Intuit as part of settlement negotiations in November 2021 contained similar provisions allowing for different disclosure requirements in space-constrained ad, an obvious recognition of the unfeasibility of providing lengthy disclaimers in a space-constrained format. (RX262 (Intuit) at 6-7; RX1023 (Intuit) at 1). For a wide range of space-constrained advertisements, it is simply not possible to provide extensive disclosures. (*E.g.*, GX506 (Intuit); GX507 (Intuit)). And as the Court itself saw through the various space-constrained ads shown at the hearing, there is nothing deceptive about short-length advertisements that say prominently “Simple Tax Returns Only,” identify the product being advertised, and link to the TurboTax website. (*E.g.*, GX555 (Intuit); RX1420 (Intuit)). Nor does Complaint Counsel offer any basis for their argument that the disclosures required in space-constrained video ads, either longer or shorter than 8 seconds, are insufficient. Instead, the evidence shows that requiring audio disclosures in video ads of less than 8 seconds is unhelpful: reasonable consumers do not digest and understand lengthy disclosures provided in a short advertisement. (PFF ¶¶835, 839-841). Rather than improving consumers’ understanding, such disclosures would result in more confusion and consumers tuning out from the disclosures. (PFF ¶¶835, 839-841)

Furthermore, to the extent this Proposed Finding is intended to suggest that it is improper to have different requirements for space-constrained and non-space-constrained ads, it ignores that the Commission itself recently issued a Decision and Order in *LCA-Vision*, 2023 WL 621935 (F.T.C. Jan. 19, 2023), that imposed different requirements for space-constrained and non-space-constrained advertisements. (RX1490 (Intuit) at 4-5).

The Proposed Finding is also incorrect insofar as it suggests that this provision sunseting in ten years renders the Consent Order deficient. It ignores that the Commission itself recently

agreed to a consent order in another case, *Mastercard, Inc.*, 2022 WL 17975182 (F.T.C. Dec. 23, 2022), that sunsets after ten years. (RX380 (Intuit) at 7). Moreover, the possibility that, more than ten years from now, Intuit could engage in deceptive conduct provides no basis for relief now.

939. The State settlement defines “Space-Constrained Advertisements” as any “that has space, time, format, size, or technological restrictions that limit Intuit from being able to make the disclosures required by this Assurance.” (RX76 (Intuit) at INTUIT-FTC-PART3-000614658 to -000614659).

Response to Finding No. 939:

The Proposed Finding is incorrect in that it references a settlement. Intuit did not enter into a settlement agreement with the attorneys general of each state and the District of Columbia; it entered into a binding Consent Order enforceable in court—and entered as a final judgment and permanent injunction in Los Angeles County Superior Court (Case No. 19STCV15644) on June 25, 2022. (PFF ¶806; RX261 (Intuit); RX399 (Intuit)).

The Proposed Finding is also incomplete. The Consent Order defines “Space-Constrained Advertisement” as: “any online Advertisement (including but not limited to Paid Display Advertisements and Paid Search Advertisements) or any Video Advertisement that has space, time, format, size, or technological restrictions that limit Intuit from being able to make the disclosures required Intuit bears the burden of showing that there is a constraint or insufficient space and time to make a required disclosure that is Clear and Conspicuous and in Close Proximity to the triggering term. Space-Constrained Advertisements do not include Advertisements on a Turbo Tax Website.” (RX76 (Intuit) at -4659). This is the exact same definition of the term “Space-Constrained Advertisement” that Bureau of Consumer Protection staff had drafted in a proposed order circulated to Intuit in November 2021 as part of settlement discussions. (RX262 (Intuit) at 5). And it is substantively identical to the definition of space-

constrained advertisement used in the Commission’s recent order in *LCA-Vision*, 2023 WL 621935 (F.T.C. Jan. 19, 2023). There, the Commission defined “space-constrained advertisement” as “any communication (including, but not limited to, Internet search results and banner ads) that has space, format, size, or technological restrictions (‘Space Constraint’) that limit Respondent from being able to make the disclosures required by Paragraph A(3) of this Section. Respondent bears the burden of showing that there is a Space Constraint to make a required disclosure that is Clear and Conspicuous and in Close Proximity to the triggering representation.” (RX1490 (Intuit) at 5).

940. The state settlement allows hyperlinks to disclosures on Intuit’s website, without specifying that information integral to the claim cannot be hidden behind a hyperlink. (RX76 (Intuit) at INTUIT-FTC-PART3-000614674).

Response to Finding No. 940:

The Proposed Finding is incorrect in that it references a settlement. Intuit did not enter into a settlement agreement with the attorneys general of each state and the District of Columbia; it entered into a binding Consent Order enforceable in court—and entered as a final judgment and permanent injunction in Los Angeles County Superior Court (Case No. 19STCV15644) on June 25, 2022. (PFF ¶806; RX261 (Intuit); RX399 (Intuit)).

The proposed finding is also incorrect that the Consent Order allows Intuit to hide “information integral to the claim” behind a hyperlink. For online space-constrained (non-video) ads, the Consent Order requires that Intuit both “disclose that eligibility requirements apply” and “also (1) Clearly and Conspicuously include a hyperlink to a landing page or webpage on a Turbo Tax Website that Clearly and Conspicuously contains full disclosure of all material eligibility restrictions or (2) link by clicking on the Advertisement itself to a landing page or webpage on a Turbo Tax Website that Clearly and Conspicuously sets forth full disclosure of all material eligibility restrictions.” (RX76 (Intuit) at -4673). Accordingly, space-constrained (non-

video) ads must clearly disclose qualifications in addition to the hyperlink. For example, Tax Year 2022 display ads all include prominent written disclosures stating both “Simple tax returns only” and “See if you qualify.” (PFF ¶342). Tellingly, Complaint Counsel do not take issue with that ad or any other Tax Year 2022 ad that have ran after the Consent Order went into effect. In fact, Complaint Counsel do not challenge *any* ad that Intuit has ran since the Consent Order went into effect, nor do they argue that any of those ads are deceptive. (PFF ¶214; *see generally* Complaint Counsel’s Post-Trial Br.; CCF ¶¶47-454).

941. Finally, the state settlement only provides monetary relief for “Covered Consumer[s]” harmed from 2016 to 2018. (RX76 (Intuit) at INTUIT-FTC-PART3-000614657 & INTUIT-FTC-PART3-000614675 to -000676).

Response to Finding No. 941:

The Proposed Finding is incorrect in that it references a settlement. Intuit did not enter into a settlement agreement with the attorneys general of each state and the District of Columbia; it entered into a binding Consent Order enforceable in court—and entered as a final judgment and permanent injunction in Los Angeles County Superior Court (Case No. 19STCV15644) on June 25, 2022. (PFF ¶806; RX261 (Intuit); RX399 (Intuit)).

The Proposed Finding is also irrelevant because Complaint Counsel cannot seek monetary relief in these proceedings. This proceeding is only about a cease-and-desist order, and a cease-and-desist order cannot serve “to fasten liability on respondents for past conduct.” (*FTC v. Cement Institute*, 333 U.S. 683, 706 (1948)). As such, any consideration of monetary relief would be improper. Complaint Counsel disregard that principle by premising their claim partly on the supposed need to obtain monetary relief for years-old conduct.

In any event, Complaint Counsel’s desire for retrospective monetary relief does not justify a prospective injunction here. Complaint Counsel have not even pleaded the requisite “dishonest or fraudulent” conduct that would be necessary to obtain monetary relief in a

subsequent proceeding. (15 U.S.C. §57b(a)(2)). And the record refutes any suggestion that Intuit intended to deceive consumers. The *only* evidence regarding intent shows that Intuit has always sought to be fully honest and transparent with consumers. Complaint Counsel conceded before trial that they lack evidence of intent to deceive. (PFF ¶175). And at trial, Intuit’s former and current executives testified that Intuit’s foundational values, goals, and business interests are inconsistent with deception (PFF ¶¶30, 33-38, 73, 167, 647, 850-852), and that Intuit “would have stopped” running any ad it had reason to believe was deceptive (PFF ¶174; *see also* PFF ¶¶169-173, 176, 769, 860, 870). That testimony is corroborated by the “mandatory” instructions Intuit gave its ad agencies—when no government regulator was investigating and no litigation was ongoing—to “drive absolute clarity around who ... TurboTax Free Edition was meant for.” (PFF ¶¶172-173). It is also corroborated by expert testimony that economic incentives in the online tax-prep industry make deception a losing strategy (PFF ¶¶39, 89), as well as by case law recognizing “the importance of reputation and brand in driving consumer behavior in purchasing” online tax-prep products (*United States v. H&R Block, Inc.*, 833 F.Supp.2d 36, 75 (D.D.C. 2011)).

VI. Stipulated Facts on JX1

A. Respondent

942. Respondent Intuit Inc. is a Delaware corporation with its principal office or place of business at 2700 Coast Ave., Mountain View, California 94043. (Compl. ¶ 1; Answer ¶ 1.) It advertises, markets, promotes, distributes, and sells TurboTax, an online tax preparation service. (Answer ¶ 2.). (JX-1 ¶ 6).

Response to Finding No. 942:

Intuit has no specific response except to note that it neither advertises, markets, promotes, distributes, nor sells “TurboTax.” Rather, TurboTax is the brand name for a suite of online tax

preparation products and services offered by Intuit. (JX1 ¶8; *see also* Responses to CCFF ¶¶4, 6).

B. TurboTax Services

1. General Background

943. Intuit uses the term “Tax Year” to refer to the calendar year preceding the period during which consumers prepare and file their annual individual tax returns. For example, Tax Year 2021 refers to tax returns filed in calendar year 2022 for income earned in calendar year 2021. (JX-1 ¶ 7).

Response to Finding No. 943:

Intuit has no specific response.

2. TurboTax Background

944. “TurboTax” is the brand name of a suite of online tax preparation products and services offered by Intuit that enable consumers to prepare and file their individual federal and state income tax returns. (JX-1 ¶ 8).

Response to Finding No. 944:

Intuit has no specific response except to note that the Proposed Finding is duplicative of CCFF ¶6.

945. From Tax Year 2013 to 2016, TurboTax Free Edition was known as “Federal Free Edition.” (JX-1 ¶ 9).

Response to Finding No. 945:

Intuit has no specific response.

946. Consumers that file an IRS Form 1040 without any attached forms or schedules (or, before Tax Year 2018, by a IRS Form 1040A or Form 1040EZ) qualify to use Free Edition. (JX-1 ¶ 10).

Response to Finding No. 946:

Intuit has no specific response other than to note that those filing a Form 1040 without any attached forms or schedules are not the only taxpayers who qualify to use TurboTax Free Edition. TurboTax Free Edition has been and is available to additional consumers beyond those

with simple tax returns. For example, currently consumers deducting their student loan interest by attaching Schedule 1 to their Form 1040 also qualify to use TurboTax Free Edition. (PFF ¶149; Ryan (Intuit) Tr. 706; RX6 (Intuit); RX1498 (Intuit)). In Tax Year 2020, taxpayers who did not have simple tax returns because they had unemployment income could use TurboTax Free Edition. (PFF ¶148; Ryan (Intuit) Tr. 706; RX59 (Intuit) at 35). And active-duty enlisted servicemembers can use any TurboTax SKU without paying, regardless of the complexity of their tax return. (PFF ¶¶151-152; Johnson (Intuit) Tr. 578-580, 653; RX1550 (Intuit)).

947. Taxpayers qualified to use IRS Forms 1040EZ or 1040A if they made less than \$100,000, were only claiming the standard deduction, and met certain other qualifications, such as claiming no dependents (Form 1040EZ) or only reporting limited types of income (Form 1040A). (JX-1 ¶ 11).

Response to Finding No. 947:

Intuit has no specific response.

948. Before Tax Year 2018, Congress passed tax reform legislation. In response, the IRS eliminated Forms 1040EZ and 1040A and launched in its place a new Form 1040. Form 1040 became the most basic individual tax form. (JX-1 ¶ 12).

Response to Finding No. 948:

Intuit has no specific response.

949. Beginning in Tax Year 2018, Intuit modified its definition of simple tax returns to refer to returns that could be filed on a Form 1040 without any attached forms or schedules. (JX-1 ¶ 13).

Response to Finding No. 949:

Intuit has no specific response other than to point out that it modified its definition of simple tax returns so that it would remain consistent with the IRS's definition: returns filed using the most basic form for an individual income-tax return, without any schedules. (PFF ¶¶119-125). When Form 1040 with no attached schedules became the most basic form for an individual income-tax return beginning in Tax Year 2018, Intuit updated its definition of simple tax returns to maintain alignment with the IRS's definition. (PFF ¶¶68, 124). Intuit had no

control over the changes to the tax code, and if it had not aligned its definition of simple tax returns to the IRS's definition after tax reform, no one would have qualified for TurboTax Free Edition. (PFF ¶125).

950. RX095 shows that of the 157,682,637 returns filed with the IRS in 2020, 57,671,912 returns included only Form 1040 with no Schedules 1-6 or Schedule A attached. (JX-1 ¶ 14).

Response to Finding No. 950:

Intuit has no specific response other than to note that—as the Court recognized during the hearing—comparing the number of consumers who qualify for free TurboTax offerings to the total number of U.S. taxpayers is an exercise that is “pretty much meaningless.” (PFF ¶463). As Intuit's executives and expert witnesses explained at trial, it is more informative to compare the number of taxpayers who qualify for free TurboTax offerings with the number of taxpayers who are in the market for online tax-preparation services (approximately 75 million), a majority of whom qualify to use free TurboTax products. (PFF ¶¶129, 464).

Intuit further notes that the number of taxpayers who filed only a Form 1040 with no attached schedules undercounts the number of consumers who could file a simple tax return and thus qualify for free TurboTax SKUs. This data does not include the millions of consumers who could have filed their taxes on a Form 1040 only but chose not to, such as individuals who chose to claim additional deductions or credits (PFF ¶673), or married individuals who filed jointly but could have filed separately on a Form 1040 only (PFF ¶128). Even though those consumers did not in fact file a simple tax return, they had the option of filing a simple tax return and thus were eligible for free TurboTax SKUs. (PFF ¶673). Moreover, the Proposed Finding does not account for the number of consumers eligible for free TurboTax SKUs in Tax Years 2020 and 2021, when eligibility for those free SKUs extended beyond simple tax returns in response to unemployment caused by COVID-19 and the student debt crisis. (PFF ¶¶148-149). Finally, Intuit reiterates that

many consumers with more complex tax returns also qualify to take advantage of free TurboTax offerings, such as enlisted servicemembers (PFF ¶¶151-152).

3. Intuit's Business Model

951. TurboTax software products and services “are designed to enable customers to prepare and file their federal and state income tax returns.” (GX288 at 8). (JX-1 ¶ 15).

Response to Finding No. 951:

Intuit has no specific response.

C. Intuit's Advertising Practices

1. Overview

952. Intuit advertises for its individual free and paid TurboTax SKUs, as well as the TurboTax brand generally. (JX-1 ¶ 16).

Response to Finding No. 952:

Intuit has no specific response other than to note that Intuit does not advertise the TurboTax brand generally but instead advertises specific TurboTax SKUs. (*See* Johnson (Intuit) Tr. 573-574; GX156 (Ryan (Intuit) IHT) at 107-134; Ryan (Intuit) Tr. 691; PFF ¶¶161, 171, 173, 178). Product-specific advertising can incidentally increase awareness of the broader TurboTax brand, such as when advertising for paid TurboTax SKUs spurs interest in free TurboTax offerings. (Ryan (Intuit) Tr. 791-793; Rubin (Intuit) Tr. 1526-1527; GX149 (Crosby (Intuit) Dep.) at 83-85; GX144 (Soukas (Intuit) Dep.) at 123-124).

953. Intuit markets both its free and paid TurboTax SKUs in numerous advertising channels, including linear television advertisements; online video and audio advertisements; non-video display, mobile, and paid social media advertisements; paid search advertisements; and direct email marketing. (JX-1 ¶ 17).

Response to Finding No. 953:

Intuit has no specific response except to note that its proposed findings of fact describe its use of different advertising channels in more detail. (*See* PFF ¶¶178-187).

954. Intuit uses different advertising channels to advertise TurboTax products and services, including direct response, holistic search marketing, display/social/mobile marketing, and brand advertising. (GX156 at 25:22-26:4 & 29:6-15; 39:9-13). (JX-1 ¶ 18).

Response to Finding No. 954:

Intuit has no specific response except to note that its proposed findings of fact describe its use of different advertising channels in more detail. (See PFF ¶¶178-187).

955. Intuit uses the brand advertising channel to promote TurboTax products and services, for example through TV, radio, audio, and video ads, advertising in traditional broadcast and cable-type environments. (GX156 at 41:16-42:2). (JX-1 ¶ 19).

Response to Finding No. 955:

Intuit has no specific response except to note that its proposed findings of fact describe its use of the brand advertising channel in more detail. (See PFF ¶¶178-180, 214-246).

956. Intuit has advertised TurboTax products and services on Facebook, Instagram, Twitter, SnapChat, and TikTok. (GX156 at 28:21-29:2). (JX-1 ¶ 20).

Response to Finding No. 956:

Intuit has no specific response except to note that its proposed findings of fact describe its use of the display advertising channel in more detail. (See PFF ¶¶178, 181, 247-264).

957. Intuit uses direct response marketing to promote TurboTax products and services through emails. (GX156 at 40:13-24). (JX-1 ¶ 21).

Response to Finding No. 957:

Intuit has no specific response except to note that its proposed findings of fact describe its use of the direct marketing channel in more detail. (See PFF ¶¶178, 186-187, 280-292).

2. Television Ads

958. A true and correct copy of the 60-second “Boston Tea Party” TV ad that aired in Tax Year 2014 is at RX200. (JX-1 ¶ 22).

Response to Finding No. 958:

Intuit has no specific response.

959. A true and correct copy of the 45-second “Anthem” TV ad that aired in Tax Year 2017 is at RX1096. (JX-1 ¶ 23).

Response to Finding No. 959:

Intuit has no specific response.

960. A true and correct copy of the 15-second “Baby” TV ad that aired in Tax Year 2017 is at RX1097. (JX-1 ¶ 24).

Response to Finding No. 960:

Intuit has no specific response.

961. A true and correct copy of the 30-second “Cruise” TV ad that aired in Tax Year 2017 is at RX1098. (JX-1 ¶ 25).

Response to Finding No. 961:

Intuit has no specific response.

962. A true and correct copy of the 15-second “Fish” TV ad that aired in Tax Year 2017 is at RX1006. (JX-1 ¶ 26).

Response to Finding No. 962:

Intuit has no specific response.

963. A true and correct copy of the 15-second “Guzman” TV ad that aired in Tax Year 2017 is at RX1101. (JX-1 ¶ 27).

Response to Finding No. 963:

Intuit has no specific response.

964. A true and correct copy of the 30-second “Big Kick” TV ad that aired in Tax Year 2018 is at RX1102. (JX-1 ¶ 28).

Response to Finding No. 964:

Intuit has no specific response.

965. A true and correct copy of the 15-second “Court Reporter” TV ad that aired in Tax Year 2018 is at RX1104. (JX-1 ¶ 29).

Response to Finding No. 965:

Intuit has no specific response.

966. A true and correct copy of the 15-second “Credits” TV ad that aired in Tax Year 2018 is at RX1108. (JX-1 ¶ 30).

Response to Finding No. 966:

Intuit has no specific response.

967. A true and correct copy of the 30-second “Credits” TV ad that aired in Tax Year 2018 is at RX1117. (JX-1 ¶ 31).

Response to Finding No. 967:

Intuit has no specific response.

968. A true and correct copy of the 15-second “Game Show” TV ad that aired in Tax Year 2018 is at GX356. (JX-1 ¶ 32).

Response to Finding No. 968:

Intuit has no specific response.

969. A true and correct copy of the 15-second “Crossword” TV ad that aired in Tax Year 2018 is at RX1113. (JX-1 ¶ 33).

Response to Finding No. 969:

Intuit has no specific response.

970. A true and correct copy of the 30-second “Game Show” TV ad that aired in Tax Year 2018 is at RX1116. (JX-1 ¶ 34).

Response to Finding No. 970:

Intuit has no specific response.

971. A true and correct copy of the 30-second “Lawyer” TV ad that aired in Tax Year 2018 is at RX1106. (JX-1 ¶ 35).

Response to Finding No. 971:

Intuit has no specific response.

972. A true and correct copy of the 15-second “Spelling Bee” TV ad that aired in Tax Year 2018 is at RX1110. (JX-1 ¶ 36).

Response to Finding No. 972:

Intuit has no specific response.

973. A true and correct copy of the 30-second “Spelling Bee” TV ad that aired in Tax Year 2018 is at RX1118. (JX-1 ¶ 37).

Response to Finding No. 973:

Intuit has no specific response.

974. A true and correct copy of the 15-second “Court Reporter” TV ad that aired in Tax Year 2019 is at RX1112. (JX-1 ¶ 38).

Response to Finding No. 974:

Intuit has no specific response.

975. A true and correct copy of the 15-second “Credits” TV ad that aired in Tax Year 2019 is at RX1400. (JX-1 ¶ 39).

Response to Finding No. 975:

Intuit has no specific response.

976. A true and correct copy of the 15-second “Crossword” TV ad that aired in Tax Year 2019 is at RX1398. (JX-1 ¶ 40).

Response to Finding No. 976:

Intuit has no specific response.

977. A true and correct copy of the 15-second “Game Show” TV ad that aired in Tax Year 2019 is at RX1115. (JX-1 ¶ 41).

Response to Finding No. 977:

Intuit has no specific response.

978. A true and correct copy of the 15-second “Spelling Bee” TV ad that aired in Tax Year 2019 is at RX1399. (JX-1 ¶ 42).

Response to Finding No. 978:

Intuit has no specific response.

979. A true and correct copy of the 15-second “Auctioneer” TV ad that aired in Tax Year 2020 is at RX1408. (JX-1 ¶ 43).

Response to Finding No. 979:

Intuit has no specific response.

980. A true and correct copy of the 15-second “Dance Workout” TV ad that aired in Tax Year 2020 is at RX1122. (JX-1 ¶ 44).

Response to Finding No. 980:

Intuit has no specific response.

981. A true and correct copy of the 30-second “Dance Workout” TV ad that aired in Tax Year 2020 is at RX1412. (JX-1 ¶ 45).

Response to Finding No. 981:

Intuit has no specific response.

982. A true and correct copy of the 15-second “Dog Show” TV ad that aired in Tax Year 2020 is at RX1120. (JX-1 ¶ 46).

Response to Finding No. 982:

Intuit has no specific response.

983. A true and correct copy of the 30-second “Dog Show” TV ad that aired in Tax Year 2020 is at RX1403. (JX-1 ¶ 47).

Response to Finding No. 983:

Intuit has no specific response.

984. A true and correct copy of the 30-second “Freeloader” TV ad that aired in Tax Year 2020 is at RX1401. (JX-1 ¶ 48).

Response to Finding No. 984:

Intuit has no specific response.

985. A true and correct copy of the 15-second “Auctioneer” TV ad that aired in Tax Year 2021 is at RX1119. (JX-1 ¶ 49).

Response to Finding No. 985:

Intuit has no specific response.

986. A true and correct copy of the 15-second “Dance Workout” TV ad that aired in Tax Year 2021 is at RX1417. (JX-1 ¶ 50).

Response to Finding No. 986:

Intuit has no specific response.

987. A true and correct copy of the 15-second “Spit Take” TV ad that aired in Tax Year 2021 is at RX1121. (JX-1 ¶ 51).

Response to Finding No. 987:

Intuit has no specific response.

3. TurboTax Website

988. A version of the TurboTax homepage available to consumers in Tax Year 2016 is found at RX1211. (JX-1 ¶ 52).

Response to Finding No. 988:

Intuit has no specific response.

989. A version of the TurboTax homepage available to consumers in Tax Year 2017 is found at RX1212. (JX-1 ¶ 53).

Response to Finding No. 989:

Intuit has no specific response.

990. A version of the TurboTax homepage available to consumers in Tax Year 2018 is found at RX022. (JX-1 ¶ 54).

Response to Finding No. 990:

Intuit has no specific response.

991. A version of the TurboTax homepage available to consumers in Tax Year 2019 is found at RX1214. (JX-1 ¶ 55).

Response to Finding No. 991:

Intuit has no specific response.

992. A version of the TurboTax homepage available to consumers in Tax Year 2020 is found at RX019. (JX-1 ¶ 56).

Response to Finding No. 992:

Intuit has no specific response.

993. A version of the TurboTax homepage available to consumers in Tax Year 2021 is found at RX007. (JX-1 ¶ 57).

Response to Finding No. 993:

Intuit has no specific response.

994. A version of the TurboTax homepage available to consumers in Tax Year 2022 is found at RX1500. (JX-1 ¶ 58).

Response to Finding No. 994:

Intuit has no specific response.

4. Additional Information on TurboTax Advertisements**a. Online Video Advertisements**

995. Consumers who clicked on GX601-608, 613-616, 620-626, 628 and 629 were immediately directed to a webpage on the TurboTax website, <https://turbotax.intuit.com/>. (JX-1 ¶ 59).

Response to Finding No. 995:

Intuit has no specific response except to note that consumers who clicked on *any* challenged display ad were taken directly to relevant webpages on the TurboTax website, where they would see detailed information about the free offer's qualifications. (PFF ¶253). For challenged display ads for TurboTax Free Edition, for example, consumers who clicked on the ads were taken directly to the TurboTax Free Edition landing page, where they would see detailed information about Free Edition's qualifications. (PFF ¶253). Reasonable consumers understood that clicking on the challenged display ads would take them to a website with more information about the advertised free offer. (PFF ¶254). And by linking to the TurboTax website, the challenged display ads integrated the information on the website, meaning that the information on the website needs to be considered when assessing the claim conveyed by the challenged ads and whether reasonable consumers were likely misled. (PFF ¶254; CCF ¶455 (Complaint Counsel conceding that the TurboTax website "is integrated into TurboTax's free advertising"))).

b. Non-Video Display, Mobile, and Social Media Advertisements

996. Intuit also runs non-video advertisements, such as banner or social media advertisements, on multiple online platforms. (JX-1 ¶ 60).

Response to Finding No. 996:

Intuit has no specific response.

997. Consumers who clicked on GX505-508, 524, 527, 534-536, 543, 548-556, 560, 563-566, 568-569, 572-575, 580, 583-588, 594-596, 598, and 600, and RX139, were immediately directed to a webpage on the TurboTax website, <https://turbotax.intuit.com/>, or to an application store to download the TurboTax mobile application. (JX-1 ¶ 61).

Response to Finding No. 997:

Intuit has no specific response except to note that consumers who clicked on *any* challenged display ad were taken directly to relevant webpages on the TurboTax website, where they would see detailed information about the free offer's qualifications. (PFF ¶253). For challenged display ads for TurboTax Free Edition, for example, consumers who clicked on the ads were taken directly to the TurboTax Free Edition landing page, where they would see detailed information about Free Edition's qualifications. (PFF ¶253). Reasonable consumers understood that clicking on the challenged display ads would take them to a website with more information about the advertised free offer. (PFF ¶254). And by linking to the TurboTax website, the challenged display ads integrated the information on the website, meaning that the information on the website needs to be considered when assessing the claim conveyed by the challenged ads and whether reasonable consumers were likely misled. (PFF ¶254; CCF ¶455 (Complaint Counsel conceding that the TurboTax website "is integrated into TurboTax's free advertising")).

c. Paid Search Advertisements

998. Consumers who clicked on GX178-180, 190-195, or 723-729 were immediately directed to a webpage on the TurboTax website, <https://turbotax.intuit.com/>. (JX-1 ¶ 62).

Response to Finding No. 998:

Intuit has no specific response except to note that consumers who clicked on any challenged paid-search ad for TurboTax Free Edition were taken directly to the TurboTax Free Edition landing page. (PFF ¶269). On the Free Edition landing page, consumers would find detailed information about qualifications for free TurboTax SKUs. (PFF ¶269). Reasonable consumers understood that clicking on the challenged paid-search ads would take them to a website with more information about the advertised free offer. (PFF ¶270). And by linking to the TurboTax website, the challenged paid-search ads integrated the information on the website, meaning that the information on the website needs to be considered when assessing the claim conveyed by the challenged ads and whether reasonable consumers were likely misled. (PFF ¶270; CCF ¶455 (Complaint Counsel conceding that the TurboTax website “is integrated into TurboTax’s free advertising”).

d. Direct Email Advertisements

999. Consumers who clicked on GX181-182, 371-381, 383, 386, 477, 480, and 501, were immediately directed to a webpage on the TurboTax website, <https://turbotax.intuit.com/>. (JX-1 ¶ 63).

Response to Finding No. 999:

Intuit has no specific response except to note that consumers who clicked any challenged email ad would be taken directly to the TurboTax website, where they would find detailed information about the qualifications for free TurboTax SKUs. (PFF ¶284). Reasonable consumers understood that clicking on the challenged email ads would take them to a website with more information about the advertised free offer. (PFF ¶285). And by linking to the TurboTax website, the challenged email ads integrated the information on the website, meaning that the information on the website needs to be considered when assessing the claim conveyed by the challenged ads and whether reasonable consumers were likely misled. (PFF ¶285; CCF ¶

¶455 (Complaint Counsel conceding that the TurboTax website “is integrated into TurboTax’s free advertising”).

**INTUIT’S REPLY TO COMPLAINT COUNSEL’S
PROPOSED CONCLUSIONS OF LAW**

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INTUIT'S REPLY TO COMPLAINT COUNSEL'S PROPOSED CONCLUSIONS OF LAW

I. Jurisdiction

1. Under the FTC Act, the Commission has jurisdiction over persons, partnerships, and corporations using unfair or deceptive acts or practices “in or affecting commerce.” 15 U.S.C. § 45(a) (enumerating certain exceptions, not relevant here, to the persons, partnerships, and corporations covered).

Response to Conclusion No. 1:

The Proposed Conclusion is incomplete. Although the FTC Act grants the Commission statutory authority to enforce its provisions in either administrative proceedings or federal court, the statute does not provide the Commission an intelligible principle (or any principle) by which to decide whether to bring proceedings in an administrative or judicial forum. *See* 15 U.S.C. §§45(b), 53(b). This lack of an intelligible principle violates the non-delegation doctrine. *See generally Gundy v. United States*, 139 S.Ct. 2116, 2123 (2019) (plurality); *Panama Refining Co. v. Ryan*, 293 U.S. 388, 430 (1935); *see also* Intuit's Proposed Conclusions of Law (PCL) ¶¶175-181.

2. The Commission has jurisdiction over Respondent with respect to its alleged deceptive acts and practices.

Response to Conclusion No. 2:

The Proposed Conclusion is incomplete for the reasons set forth in the Response to Complaint Counsel's Proposed Conclusions of Law (CCCL) ¶1.

II. Standard of Proof

3. “It is well established that the preponderance of the evidence standard governs Federal Trade Commission ... enforcement actions.” *In re POM Wonderful LLC*, 2012 FTC LEXIS 106, at *463–65 (May 17, 2012) (citing cases).

Response to Conclusion No. 3:

Intuit has no specific response.

III. Legal Standard for Deception

4. “An advertisement is deceptive if it contains a representation or omission of fact that is likely to mislead a consumer acting reasonably under the circumstances, and that representation or omission is material to a consumer’s purchasing decision.” *In re POM Wonderful, LLC*, 155 F.T.C. 1, 10 (2013), *aff’d sub nom. POM Wonderful, LLC v. FTC*, 777 F.3d 478 (D.C. Cir. 2015); *see also In re California Naturel, Inc.*, 162 F.T.C. 1066, 1078 (2016); *FTC Policy Statement on Deception*, 103 F.T.C. 174, 175 (1984) (appended to *Cliffdale Assocs., Inc.*, 103 F.T.C. 110 (1984)) (hereinafter “Deception Policy Statement”).

Response to Conclusion No. 4:

Intuit has no specific response.

5. In determining whether an advertisement is deceptive, the Commission considers (1) what claims are conveyed in the ad; (2) whether those claims are false or misleading; and (3) whether the claims are material. *In re Health Research Labs., LLC*, No. 9397, 2021 WL 5711355, at *5 (F.T.C. Nov. 19, 2021); *In re Traffic Jam Events*, No. 9395, 2021 WL 5124183, at *12 (F.T.C. Oct. 25, 2021), *pet. for review filed*, No. 21-60947 (5th Cir. Dec. 21, 2021); *California Naturel*, 162 F.T.C. at 1078.

Response to Conclusion No. 5:

The Proposed Conclusion is incomplete. Intuit does not dispute that the Proposed Conclusion correctly recites the three elements of a deceptive-advertising claim. But the Proposed Conclusion neglects to recite several important principles.

First, an advertisement is deceptive only if *all* three elements—an alleged claim is actually conveyed, that claim is false or misleading to reasonable consumers, and that claim is material—are met. *FTC v. DirecTV, Inc.*, 2018 WL 3911196, at *5 (N.D. Cal. Aug. 16, 2018).

Second, Complaint Counsel “have the burden of proof” as to each element and “with respect” to “any factual proposition” they assert. 16 C.F.R. §3.43(a). To satisfy their burden,

Complaint Counsel must prove each element by a “preponderance of the evidence.” *Telebrands Corp.*, 140 F.T.C. 278, 426 (2005).

Third, an ad may be found misleading only “if at least a significant minority of reasonable consumers are likely to take away the misleading claim.” *Telebrands*, 140 F.T.C. at 291. Complaint Counsel must therefore prove not just that the alleged claim was made and that it was misleading, but also that the claim was likely to mislead a significant minority of consumers “acting reasonably under the circumstances.” *DirecTV*, 2018 WL 3911196, at *5. In determining what constitutes consumers “acting reasonably under the circumstances,” *id.*, reasonable consumers are presumed as a matter of law to understand concepts that “are commonplace in the [relevant] market,” *Ebner v. Fresh, Inc.*, 838 F.3d 958, 965 (9th Cir. 2016), including when qualifications or requirements are “often ... associated with” a product, *Marksberry v. FCA US LLC*, 606 F.Supp.3d 1075, 1081 (D. Kan. 2022).

Fourth, where deceptiveness is not apparent from the face of the challenged advertisement, a factfinder “will not find” a likelihood of deception “unless extrinsic evidence allows [it] to conclude” that reasonable consumers were likely to be deceived. *Telebrands*, 140 F.T.C. at 429.

A. What Claims Are Conveyed

6. Claims may be express or implied: express claims are those that directly state the representation at issue, while implied claims are any that are not express. *In re Kraft, Inc.*, 114 F.T.C. 40, 120 (1991), *aff’d sub nom. Kraft, Inc. v. FTC*, 970 F.2d 311 (7th Cir. 1992).

Response to Conclusion No. 6:

Intuit has no specific response.

7. Both express and implied claims may be deceptive. *Fedders Corp. v. FTC*, 529 F.2d 1398, 1402-03 (2d Cir. 1976).

Response to Conclusion No. 7:

Intuit has no specific response.

8. “In cases of express claims, the representation itself establishes the meaning.” *See* Deception Policy Statement, at 176.

Response to Conclusion No. 8:

The Proposed Conclusion is incomplete. When determining what representation an ad makes, the ad “must” be considered “in its entirety.” *S.C. Johnson & Son, Inc. v. Clorox Co.*, 241 F.3d 232, 238 (2d Cir. 2001); *see also FTC Policy Statement on Deception*, 103 F.T.C. 174, 176 & n.7 (1984) (requiring consideration of “the entire document”), appended to *Cliffdale Associates, Inc.*, 103 F.T.C. 110 (1984). The FTC’s “.com Disclosure” guidelines similarly provide that an ad must be “consider[ed] ... as a whole.” Intuit’s Proposed Finding of Fact (PFF) ¶320. Accordingly, isolated snippets of an ad cannot be relied on to the exclusion of other parts of the ad to determine the express (or implied) claim or claims made by the ad.

9. “In evaluating what message an ad could reasonably be interpreted as containing, the Commission has traditionally distinguished between express and implied claims. Express claims are ones that directly state the representation at issue. Because the message is stated unequivocally, it is reasonable to interpret the ads as intending to make the claim. Implied claims are any claims that are not express. They range from claims that would be virtually synonymous with an express claim through language that literally says one thing but strongly suggests another to language which relatively few consumers would interpret as making a particular representation.” *In re Thompson Med. Co., Inc.*, 104 F.T.C. 648, 788 (1984) (cleaned up).

Response to Conclusion No. 9:

The Proposed Conclusion is incomplete in three respects.

First, when determining what representation an ad makes, the ad “must” be considered “in its entirety,” not in isolated snippets. *S.C. Johnson*, 241 F.3d at 238; *see also supra* Response to CCCL ¶8.

Second, any claim conveyed must be assessed from the perspective of a reasonable consumer, *Telebrands*, 140 F.T.C. at 291, *DirectTV*, 2018 WL 3911196, at *5, and reasonable consumers are deemed, as a matter of law, to “understand[]” concepts that “are commonplace in the market,” *Ebner*, 838 F.3d at 965.

Third, a party’s “inten[t] to convey” a particular claim is a relevant factor in determining what claim an ad conveyed. *Telebrands*, 140 F.T.C. at 304. Here, Complaint Counsel failed to prove that Intuit intended to implicitly convey the claims assertedly made by the challenged ads. Instead, the record shows that Intuit intended to convey that a specific TurboTax product was free, that it was free only for qualifying consumers, and often that there was additional information on the TurboTax website. PFF ¶¶167-174, 190, 192-202, 353-363, 405, 852, 857, 860, 870.

10. “Deception may be accomplished by innuendo rather than by outright false statements.” *FTC v. Wilcox*, 926 F. Supp. 1091, 1098 (S.D. Fla. 1995) (quoting *Regina Corp. v. FTC*, 322 F.2d 765, 768 (3d Cir. 1963)); *FTC v. Cap. Choice Consumer Credit, Inc.*, No. 02-21050 CIV, 2003 WL 25429612, at *4 (S.D. Fla. Jun. 2, 2003) (same), *aff’d*, 157 F. App’x 248 (11th Cir. 2005).

Response to Conclusion No. 10:

The Proposed Conclusion is incomplete and misleading. Whether an ad engaged in deceptive innuendo requires consideration of the ad as a whole and not selective snippets.

Response to CCCL ¶8.

Additionally, Complaint Counsel failed to prove that any of the challenged ads contained any “innuendo.” Instead, the ads all truthfully conveyed to consumers that (1) a specific TurboTax stock keeping unit (SKU) was free for those who qualify, (2) qualifications were tied to the complexity of consumers’ tax returns, and often (3) the details about those qualifications were available on the TurboTax website. That is so for three reasons.

First, the ads’ inclusion of the product name was itself sufficient to prevent reasonable consumers from misunderstanding that all TurboTax products were free. *See* PFF ¶¶317-321. *Second*, the inclusion of the phrase “simple tax returns only” (or substantively identical language) in each of the challenged ads conveyed to reasonable consumers that not all tax returns were covered by the product being advertised and thus that not all consumers would qualify to use the product. *See, e.g., Estrella-Rosales v. Taco Bell Corp.*, 2020 WL 1685617, at *2 (D.N.J. Apr. 7, 2020) (approving disclosure with less detail); *Little Caesars Enterprises, Inc. v. Smith*, 895 F.Supp. 884, 888, 899 (E.D. Mich. 1995) (same). The “simple tax returns only” language communicated the existence of qualifications, which is enough to defeat Complaint Counsel’s claim. PFF ¶131. That language also told consumers that the ability to use the free TurboTax offer depended on the complexity of the consumer’s tax returns and that only those with “simple tax returns” would qualify. PFF ¶¶134-136, 322. *Third*, inclusion of language in the challenged ads inviting consumers to “see if you qualify” or “see details” at the TurboTax website further conveyed to reasonable consumers that there were qualifications or details associated with the free TurboTax offer, that not all consumers would qualify to use the product, and that consumers could visit the TurboTax website to learn if they qualify. PFF ¶¶254, 270, 285, 323-329.

11. The meaning of marketing communications can be determined “through an examination of the representation itself.” Deception Policy Statement, at 176; *see also FTC v. Fleetcor*

Techs., Inc., No. 1:19-cv-5727, 2022 WL 3273286, at *6, *9 (N.D. Ga. Aug. 9, 2022); *Fanning v. FTC*, 821 F.3d 164, 170 (1st Cir. 2016); *In re Stouffer Foods Corp.*, 118 F.T.C. 746, 798 (1994); *Kraft*, 970 F.2d at 319 (“when confronted with claims that are implied, yet conspicuous, extrinsic evidence is unnecessary because common sense and administrative experience provide the Commission with adequate tools to makes its findings”).

Response to Conclusion No. 11:

The Proposed Conclusion is incorrect and incomplete. Where it is not apparent from the face of a challenged advertisement that an allegedly deceptive claim was conveyed, a court “will not find” a likelihood of deception “unless extrinsic evidence allows [it] to conclude” that reasonable consumers were likely to be deceived. *Telebrands*, 140 F.T.C. at 429; *see also United States v. Bayer Corp.*, 2015 WL 5822595, at *11 (D.N.J. Sept. 24, 2015); *FTC v. National Urological Group, Inc.*, 645 F.Supp. 2d 1167, 1193 (N.D. Ga. 2008), *aff’d*, 356 F.App’x 358 (11th Cir. 2009) (per curiam). This Court will not find a likelihood of deception where the “available extrinsic evidence” cuts against such a finding. *Kraft, Inc. v. FTC*, 970 F.2d 311, 322 (7th Cir. 1992). Moreover, as Complaint Counsel itself have acknowledged, “if relevant extrinsic evidence regarding the meaning of the ad has been introduced, the Commission will consider it. CCCL ¶15 (emphasis added).

12. Absent an explicit representation, the question of whether the advertisement at issue makes a particular representation is determined by considering the “net impression” of such an advertisement for the reasonable consumer-viewer. *Traffic Jam Events*, 2021 WL 5124183, at *12; *In re Jerk LLC*, 159 F.T.C. 885, 891 (2015); *Pom Wonderful*, 155 F.T.C. at 12; *FTC v. Stefanichik*, 559 F.3d 924, 928 (9th Cir. 2009) (quoting *FTC v. Cyberspace.com LLC*, 453 F.3d 1196, 1200 (9th Cir. 2006)); *Removatron Int’l Corp. v. FTC*, 884 F.2d 1489, 1497 (1st Cir. 1989) (looking to “common-sense net impression” of an advertisement); *FTC v. Direct Mktg. Concepts, Inc.*, 569 F. Supp. 2d 285, 298 (D. Mass. 2008).

Response to Conclusion No. 12:

The Proposed Conclusion is incomplete. 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. at 176 & n.7. “The determination” of what an ad conveys, that is, “must be made based on the net impression created by the interaction of different elements in a given ad, not [based on] the elements by themselves.” *Telebrands*, 140 F.T.C. at 429 (alteration in original) (quotation marks omitted); *see also id.* at 286 (evaluating an ad’s claims “[b]ased on the interaction between and among various elements in the ads,” including “the product name, visual images, text, and surrounding circumstances”).

13. Where claims are reasonably clear from the face of the advertisement, “the Commission may rely on its own reasoned analysis to determine what claims, including implied ones, are conveyed.” *Kraft*, 970 F.2d at 319; *see also Stouffer Foods*, 118 F.T.C. at 798 (“If, after examining the interaction of all the different elements in the ad, the Commission can conclude with confidence that an ad can reasonably be read to contain a particular claim, a facial analysis is sufficient basis to conclude that the ad conveys the claim.”).

Response to Conclusion No. 13:

The Proposed Conclusion is incorrect and incomplete. As Complaint Counsel themselves have acknowledged, “if relevant extrinsic evidence regarding the meaning of the ad has been introduced, the Commission *will* consider it.” CCCL ¶15 (emphasis added).

Additionally, the Proposed Conclusion ignores that in determining the claim or claims an ad conveys, the ad “must” be considered “in its entirety.” *S.C. Johnson*, 241 F.3d at 238; *see also FTC Policy Statement on Deception*, 103 F.T.C. at 176 & n.7; PFF ¶320 (FTC “.com Disclosure” guidelines providing that an ad must be “consider[ed] ... as a whole.”).

Moreover, deception is not apparent on the face of any of the challenged ads. Instead, the ads truthfully conveyed to consumers that (1) a specific TurboTax SKU was free for those who qualify, (2) qualifications were tied to the complexity of the consumer's tax returns, and often (3) the details about those qualifications were available on the TurboTax website. *Supra* Response to CCCL ¶10.

14. Thus, where the ad claim is (1) express or (2) implied but conspicuous and reasonably clear, extrinsic evidence is unnecessary. *Kraft*, 970 F.2d at 319; *POM Wonderful*, 155 F.T.C. at 13-14; *Fleetcor*, 2022 WL 3273286, at *9; *FTC v. QT, Inc.*, 448 F. Supp. 2d 908, 958 (N.D. Ill. 2006), *aff'd*, 512 F.3d 858 (7th Cir. 2008).

Response to Conclusion No. 14:

The Proposed Conclusion is incorrect and incomplete for the reasons explained in the Response to CCCL ¶13.

15. However, if relevant extrinsic evidence regarding the meaning of the ad has been introduced, the Commission will consider it. *POM Wonderful*, 155 F.T.C. at 14; *In re Bristol-Myers Co.*, 102 F.T.C. 21, 319 (1983).

Response to Conclusion No. 15:

Intuit has no specific response except to note that relevant extrinsic evidence has been introduced in this case, meaning that evidence must be considered and the Court cannot rely on the ads in isolation to reach a decision.

16. It is not “necessary for the Commission to conduct a survey of the viewing public before it [can] determine that the commercials had a tendency to mislead,” *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 391-92 (1965), *see also Fleetcor*, 2022 WL 3273286, at *9.

Response to Conclusion No. 16:

The Proposed Conclusion is incomplete. Extrinsic evidence (sometimes including survey evidence) is necessary where it is not apparent from the face of the challenged advertisement that a deceptive claim is conveyed. *Telebrands*, 140 F.T.C. at 429; *see also Bayer*, 2015 WL

5822595, at *11; *National Urological Group*, 645 F.Supp. 2d at 1193. Moreover, if extrinsic evidence is introduced, the Commission must consider that evidence. CCCL ¶15. And a deceptive-advertising claim fails when the “available extrinsic evidence” cuts against a finding of deception. *Kraft*, 970 F.2d at 322.

17. “If a claim conveys more than one meaning, only one of which is misleading, a seller is liable for the misleading interpretation even if nonmisleading interpretations are possible. Liability may be imposed if at least a significant minority of reasonable consumers would be likely to take away the misleading claim.” *Fanning*, 821 F.3d at 170-71 (quoting *In re Telebrands Corp.*, 140 F.T.C. 278, 291 (2005), *aff’d*, *sub nom Telebrands Corp. v. FTC*, 457 F.3d 354 (4th Cir.2006)) (quotation marks and brackets omitted); *see also Resort Car Rental Sys., Inc. v. FTC*, 518 F.2d 962, 964 (9th Cir. 1975) (“Advertising capable of being interpreted in a misleading way should be construed against the advertiser.”); Deception Policy Statement, at 178 (“To be considered reasonable, the interpretation or reaction does not have to be the only one. When a seller’s representation conveys more than one meaning to reasonable consumers, one of which is false, the seller is liable for the misleading interpretation.”).

Response to Conclusion No. 17:

The Proposed Conclusion is incorrect. The Commission has warned that the principle that ads “should be construed against the advertiser” if they are “capable of being interpreted” as conveying a misleading claim, *Resort Car Rental Systems, Inc. v. FTC*, 518 F.2d 962, 964 (9th Cir. 1975), should not be “applied uncritically or pushed to an absurd extreme.” *Heinz W. Kirchner*, 63 F.T.C. 1282, 1290 (1963).

The Commission has also clarified that an ad is capable of a “misleading interpretation” only if the ad actually “conveys” a misleading claim, *Telebrands*, 140 F.T.C. at 291. As explained, *supra* Response to CCCL ¶10, the challenged ads are *not* capable of a misleading interpretation. Instead, the ads truthfully conveyed to reasonable consumers that (1) a specific TurboTax SKU was free for those who qualify, (2) qualifications were tied to the complexity of

consumers' tax returns, and often (3) the details about those qualifications were available on the TurboTax website.

18. “[T]he Commission will evaluate the entire advertisement, transaction, or course of dealing in determining how reasonable consumers are likely to respond. Thus, in advertising the Commission will examine the entire mosaic, rather than each title separately.” Deception Policy Statement, at 179 (cleaned up).

Response to Conclusion No. 18:

Intuit has no specific response except to note that the Proposed Conclusion is inconsistent with many other of Complaint Counsel's proposed conclusions and Complaint Counsel's argument suggesting that the Court can consider components of an ad in isolation. The Proposed Conclusion accurately recognizes that the entire ad, and any information integrated into an ad, needs to be considered when evaluating the claim conveyed and whether the ad was likely to deceive reasonable consumers. As Complaint Counsel themselves recognize, TurboTax's website “is integrated into TurboTax's free advertising.” Complaint Counsel's Proposed Findings of Fact (CCFF) ¶455. That means any evaluation of the challenged ads must include the voluminous disclosures found on the TurboTax website.

B. Whether Those Claims are False or Misleading

19. A representation is likely to mislead consumers if the express or implied message conveyed is false or lacks a reasonable basis. *See Fleetcor*, 2022 WL 3273286, at *6, *13 (“where advertisements make certain promises, do not deliver on those promises, and thus are false, the advertisements have a tendency to deceive customers”) (citing cases); *FTC v. Pantron I Corp.*, 33 F.3d 1088, 1096 (9th Cir. 1994).

Response to Conclusion No. 19:

The Proposed Conclusion is incorrect and otherwise irrelevant. The ads truthfully conveyed to consumers that (1) a specific TurboTax SKU was free for those who qualify, (2) qualifications were tied to the complexity of consumers' tax returns, and often (3) the details

about those qualifications were available on the TurboTax website. *Supra* Response to CCCL ¶10.

The Proposed Conclusion’s statement that a representation that “lacks a reasonable basis” “is likely to mislead consumers” is irrelevant because Complaint Counsel did not introduce any evidence that the challenged ads conveyed any representation that lacked a reasonable basis. To the contrary, Intuit had every reason to believe (because it is demonstrably true) that taxpayers with simple returns would be able to use the advertised free SKUs to file their taxes for free, just as it was demonstrably true that all taxpayers viewing any of the challenged ads could learn more information (including whether they qualified) at the TurboTax website. *Supra* Response to CCCL ¶10.

20. The determination of whether a representation or omission is deceptive turns on whether it is likely to mislead, not whether it has caused actual deception. Deception Policy Statement at 176; *Thompson Med. Co. v. FTC*, 791 F.2d 189, 197 (D.C. Cir. 1986); *Trans World Accts., Inc. v. FTC*, 594 F.2d 212, 214 (9th Cir. 1979) (“[p]roof of actual deception is unnecessary to establish a violation of Section 5”).

Response to Conclusion No. 20:

The Proposed Conclusion is incomplete and misleading. Evidence that consumers have not expressed frustration or anger about being misled in significant numbers suggests that reasonable consumers’ expectations, including expectations formed from ads, are being met.

DirecTV, 2018 WL 3911196, at *18.

21. It is not required to show that every reasonable consumer would have been, or in fact was, misled. *See Resort Car Rental*, 518 F.2d at 964; *Stefanchik*, 559 F.3d at 929; *Kraft*, 970 F.2d at 319.

Response to Conclusion No. 21:

The Proposed Conclusion is incomplete and misleading. Complaint Counsel are required to prove that “at least a *significant minority* of reasonable consumers are likely to take away the misleading claim.” *Telebrands*, 140 F.T.C. at 291 (emphasis added).

22. The question is whether the claim is likely to mislead a consumer acting reasonably under the circumstances. Deception Policy Statement, at 177; *Sw. Sunsites, Inc. v. FTC*, 785 F.2d 1431, 1436 (9th Cir. 1986); *Wilcox*, 926 F. Supp. at 1098.

Response to Conclusion No. 22:

The Proposed Conclusion is incomplete and misleading because it ignores that reasonable consumers are presumed to understand concepts that “are commonplace in the [relevant] market,” *Ebner*, 838 F.3d at 965, including when qualifications or requirements are “often ... associated with” a product, *Marksberry*, 606 F.Supp.3d at 1081.

23. Even ads that are technically true may be deceptive. The key question is not the literal truth of the advertisement but the net impression it creates. *See Thompson Med.*, 791 F.2d at 197 (“[L]iterally true statements may ... be found deceptive [.]”); *FTC v. Nat’l Urological Grp., Inc.*, 645 F. Supp.2d 1167, 1189 (N.D. Ga. 2008), *aff’d*, 456 F. App’x 358 (11th Cir. 2009) (“When assessing the meaning and representations conveyed by an advertisement, the court must look to the advertisement’s overall, net impression rather than the literal truth or falsity of the words in the advertisement.”); *Cap. Choice Consumer Credit*, 2004 WL 5149998, at *32 (“[A] claim may be deceptive even though it is literally true.”).

Response to Conclusion No. 23:

Intuit has no specific response except to note that in determining the net impression an ad creates, the ad “must” be considered “in its entirety.” *S.C. Johnson*, 241 F.3d at 238; *see also FTC Policy Statement on Deception*, 103 F.T.C. at 176 & n.7; PFF ¶320 (FTC “.com Disclosure” guidelines providing that an ad must be “consider[ed] ... as a whole.”).

24. Moreover, a true statement may be deceptive by omission. “The failure to disclose material information may cause an advertisement to be deceptive, even if it does not state

false facts.” *Sterling Drug, Inc. v. FTC*, 741 F.2d 1146, 1154 (9th Cir. 1984); *see also Cap. Choice Consumer Credit*, 2004 WL 5149998, at *33.

Response to Conclusion No. 24:

Intuit has no specific response.

C. Whether the Claims are Material

25. A representation is considered “material” if it “involves information that is important to consumers and, hence, likely to affect their choice of, or conduct regarding, a product.” *Cyberspace.com*, 453 F.3d at 1201 (quotation omitted); *see also* Deception Policy Statement, at 182; *Kraft*, 970 F.2d at 322; *Jerk*, 159 F.T.C. at 891.

Response to Conclusion No. 25:

Intuit has no specific response.

26. Express claims are presumed material. *See* Deception Policy Statement, at 182; *Pantron I*, 33 F.3d at 1095-96.

Response to Conclusion No. 26:

Intuit has no specific response except to note that this presumption is inapplicable in this case because Complaint Counsel failed to prove that any of the challenged ads expressly conveyed any of the claims asserted. Instead, the ads truthfully conveyed to consumers that (1) a specific TurboTax SKU was free for those who qualify, (2) qualifications were tied to the complexity of consumers’ tax returns, and often (3) the details about those qualifications were available on the TurboTax website. *Supra* Response to CCCL ¶10.

27. Consumer action based on express statements is presumptively reasonable. *See FTC v. Five-Star Auto Club, Inc.*, 97 F. Supp. 2d 502, 528 (S.D.N.Y. 2000).

Response to Conclusion No. 27:

The Proposed Conclusion is irrelevant because Complaint Counsel have failed to introduce any evidence of consumer action undertaken as a result of any of the challenged ads, or even explain why consumer action matters. The Proposed Conclusion is also irrelevant because,

for the reasons given in the Response to CCCL ¶26, Complaint Counsel failed to prove that any of the challenged ads expressly conveyed any of the claims asserted.

28. Where evidence exists that a seller intended to make an implied claim, the Commission will infer materiality. Deception Policy Statement at 182.

Response to Conclusion No. 28:

Intuit has no specific response except to note that this presumption is inapplicable because Complaint Counsel failed to prove that Intuit intended to implicitly convey the claims asserted. Instead, the record shows that Intuit intended to convey that a specific TurboTax product was free, that it was free only for qualifying consumers, and often that there was additional information on the TurboTax website. *Supra* Response to CCCL ¶9.

29. The Commission also presumes materiality where claims relate to central characteristics of the product or service such as its purpose, safety, efficacy, or cost. Deception Policy Statement at 182; *Thompson Med.*, 104 F.T.C. at 816-17; *FTC v. Commerce Planet, Inc.*, 878 F. Supp. 2d 1048, 1068 (C.D. Cal. 2012), *aff'd in part, vacated in part on other grounds*, 815 F.3d 593 (9th Cir. 2016); *FTC v. Johnson*, 96 F. Supp. 3d 1110, 1121, 1142 (D. Nev. 2015); *Novartis Corp. v. FTC*, 223 F.3d 783, 786 (D.C. Cir. 2000).

Response to Conclusion No. 29:

The Proposed Conclusion is irrelevant. The presumption that claims about central characteristics of a product or service are material does not apply because none of the claims Intuit is alleged to have conveyed pertains to the purpose, safety, efficacy, or cost of any TurboTax product or service.

Complaint Counsel's assertion (Post-Trial Br. 55 n.28) that "[a]n advertising claim that TurboTax is 'free' is a claim about the *cost* of TurboTax" is wrong because it is undisputed that TurboTax's free SKUs are actually free, PFF ¶¶67, 69. Even Complaint Counsel acknowledge as much when they describe the TurboTax Free Edition SKU as "the free version of TurboTax's do-

it-yourself offering.” CCFF ¶9. Complaint Counsel’s argument is really that Intuit did not adequately disclose the *qualifications* for consumers to use the free TurboTax SKUs. Complaint Counsel’s improper conflation of cost and qualification was noticed more than a year ago by U.S. District Judge Charles Breyer, who chastised Complaint Counsel during the oral argument on their unsuccessful preliminary injunction motion. (RX73 (Intuit) at 15-16).

30. The persistent nature with which an advertiser makes a claim suggests materiality. *See Kraft*, 114 F.T.C. at 137 (“We find it reasonable to infer from Kraft’s persistence in using the challenged ad copy ... and in making only minor modifications, that Kraft believed this copy contributed to consumer purchases of Kraft Singles.”).

Response to Conclusion No. 30:

The Proposed Conclusion is incomplete and misleading. The language quoted from *Kraft, Inc.* reflects that as factual matter, the Commission in that case was able to infer materiality from the respondent’s persistence in advertising; it never purported to set out a rule of law. Additionally, the challenged ads in *Kraft* conveyed an objectively false claim, 114 F.T.C. 40, 91 (1991). Here, however, Intuit’s free SKUs are genuinely free. CCFF ¶9, PFF ¶¶67, 69.

31. The question of whether a consumer is qualified for an advertised product is “information that is important to [the] consumer [] and, hence, likely to affect [his or her] choice of, or conduct regarding, [the] product.” *Cyberspace.com*, 453 F.3d at 1201 (quoting *Cliffdale Assocs.*, 103 F.T.C. at 165).

Response to Conclusion No. 31:

The Proposed Conclusion is unsupported by the cited authority. *FTC v. Cyberspace.com*, 453 F.3d 1196 (9th Cir. 2006), did not involve any allegations of deception regarding whether a consumer qualified for an advertised product, *see id.* at 1200-1201 (“Here, [defendants’] mailing created the deceptive impression that the \$3.50 check was simply a refund or rebate rather than an offer for services. ... The front of the check and invoice lacked any indication that by cashing

the check, the consumer was contracting to pay a monthly fee.”). The decision simply stands for the proposition that the claims in question in that case were material. Additionally, Complaint Counsel did not introduce any evidence here showing that whether a consumer is qualified for an advertised product is material.

32. Who can actually use the product is no less a central characteristic of that product than its purpose, efficacy, performance, or quality, all of which are presumptively material. *See* Deception Policy Statement at 182; *see also Cap. Choice Consumer Credit*, 2004 WL 5149998, at *33 (“[A]n inference of materiality may reasonably be made when a deceptive omission is found.” (quotation omitted)).

Response to Conclusion No. 32:

The Proposed Conclusion is unsupported by the cited authorities. Neither authority says anything about whether qualifications are a “central characteristic” of a product. To the contrary, the only case cited, *FTC v. Capital Choice Consumer Credit, Inc.*, 2004 WL 5149998 (S.D. Fla. Feb. 20, 2004), simply stands for the proposition that the claims in question *in that case* were material, *id.* at *33-34.

Nor have Complaint Counsel introduced any evidence demonstrating that reasonable consumers view the TurboTax Free SKUs qualifications as presumptively material.

Even if a presumption of materiality applies, it can be rebutted. *Arellano v. McDonough*, 143 S.Ct. 543, 547-548 (2023). And the record contains ample evidence to rebut any presumption. For example, Intuit introduced uncontroverted evidence that: consumers typically have not decided to purchase a TurboTax SKU at the time they arrive at the TurboTax website, at which point they are exposed to extensive information about the various SKUs, PFF ¶782; many consumers are inclined to visit the TurboTax website even before encountering ads, PFF ¶784; the ads at most prompt consumers to spend a handful of minutes on the TurboTax website, which

does not rise to the level of actionable materiality, PFF ¶¶668, 790-793; and consumers' decisions to purchase tax-preparation products are not driven by ads, PFF ¶¶505, 736-742, 786-787.

D. Related Issues

1. Free Claims

33. The offer of “free” products or services “is a promotional device frequently used to attract customers” that “has often been found to be a useful and valuable marketing tool.” Guide Concerning Use of the Word “Free” and Similar Representations, 16 C.F.R. § 251.1(a)(1); *see also In re Book-of-the-Month Club*, 48 F.T.C. 1297, 1312 (1952) (“The word ‘free’ is a lure. It is the bait. It is a powerful magnet that draws the best of us against our will ‘to get something for nothing.’”), *as modified*, 50 F.T.C. 778.

Response to Conclusion No. 33:

Intuit agrees with the conclusion that free offers are common and that consumers are familiar with such offers. Moreover, unrebutted evidence confirms that consumers' familiarity with free offers has made them aware that such offers are qualified even when the qualifications are not expressly stated. Support for that conclusion includes evidence that: (1) reasonable consumers understand that for-profit companies (like Intuit) need to make money to stay in business, *see* PFF ¶¶483-485, 487-488, 493; (2) consumers are exposed to a wide variety of free offers that are virtually always qualified, even when no qualification is stated, *see* PFF ¶¶473-474; (3) consumers harbor significant “free skepticism,” i.e., “a natural expectation that ... costs are involved,” PFF ¶¶485-490; and (4) consumers exhibit “care and consideration,” including by consulting a variety of information sources and evaluating alternatives, before selecting a tax-preparation product, PFF ¶¶506, 513, 783; *see also* PFF ¶¶471-472, 487, 502-509. Even the FTC's “free” guidelines—which this Court has already recognized “do not constitute binding law,” Order Denying Intuit's Mot. for Discovery Pursuant to Rule 3.36 at 4 (Nov. 7, 2022); *see*

also *FTC v. Mary Carter Paint Co.*, 382 U.S. 46, 47-48 (1965) (FTC guidelines are “guides, not fixed rules”)—recognize that the “public understands” that free offers are usually coupled with the *requirement* to purchase paid products. PFF ¶476.

Additionally, to the extent Complaint Counsel are trying to imply through this Proposed Conclusion that Intuit acted unlawfully by advertising its free SKUs as free, such an implication is unsupported and improper. Intuit’s free SKUs are genuinely free. CCFF ¶9, PFF ¶¶67, 69. And all the challenged advertisements sufficiently conveyed to the reasonable consumer that a free offer was only for a particular SKU, that the offer applied only to certain consumers (those with simple returns), and that more information can be found on the TurboTax website. *Supra* Response to CCCL ¶10.

The fact that Intuit’s free SKUs are genuinely free renders Complaint Counsel’s citation to *Book-of-the-Month Club*, 48 F.T.C. 1297 (1952), unavailing because in that case, the product being advertised as free was not actually free; consumers either had to “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. TurboTax’s free SKUs, by contrast, do not require consumers to spend any money. In fact, Intuit does not even have any short-term revenue goals from consumers who use its free SKUs. PFF ¶86.

34. “Because the purchasing public continually searches for the best buy, and regards the offer of ‘free’ merchandise or service to be a special bargain, all such offers must be made with extreme care so as to avoid any possibility that consumers will be misled or deceived.” 16 C.F.R. § 251.1(a)(2). For this reason, the Commission has consistently taken the position that “free” means free. *See generally* 16 C.F.R. § 251.1(b)(1) (“Meaning of ‘Free’”); *Book-of-the-Month Club*, 48 F.T.C. at 1312.

Response to Conclusion No. 34:

To the extent the Proposed Conclusion is offered to support the argument Complaint Counsel make in their post-trial brief (at 56) that “claims that an item is free require a heightened standard of disclosure of all material terms,” that argument is incorrect. Complaint Counsel have cited no support for a heightened standard, and the authorities in the Proposed Conclusion recite the commonplace (not “heightened”) standards governing deceptive advertising. Indeed, this Court has already recognized that the FTC’s “free” guidelines, 16 C.F.R. §251.1, which the Proposed Conclusion repeatedly cites, “do not constitute binding law.” Order Denying Intuit’s Mot. for Discovery Pursuant to Rule 3.36 at 4 (Nov. 7, 2022); *see also Mary Carter Paint Co.*, 382 U.S. at 47-48 (FTC guidelines are “guides, not fixed rules”).

Additionally, to the extent Complaint Counsel are trying to imply through this Proposed Conclusion that Intuit acted unlawfully by advertising its free SKUs as free, such an implication is unsupported and improper for the reasons explained in the Response to CCCL ¶33.

35. In other words, when a merchant advertises that a product or service is “free,” the purchasing public understands the word “free” to indicate that the consumer will pay nothing. 16 C.F.R. § 251.1(b)(1).

Response to Conclusion No. 35:

Intuit has no specific response except to note that to the extent Complaint Counsel are trying to imply through this Proposed Conclusion that Intuit acted unlawfully by advertising its free SKUs as free, such an implication is unsupported and improper for the reasons explained in the Response to CCCL ¶33. Additionally, this Court has already recognized that the FTC’s “free” guidelines, 16 C.F.R. §251.1, the lone authority cited in this Proposed Conclusion, “do not constitute binding law.” Order Denying Intuit’s Mot. for Discovery Pursuant to Rule 3.36 at 4

(Nov. 7, 2022); *see also Mary Carter Paint Co.*, 382 U.S. at 47-48 (FTC guidelines are “guides, not fixed rules”).

36. Companies may not make deceptive claims that products or services are “free” when that is not the case. *See, e.g., FTC v. Triangle Media Corp.*, No. 18-cv-1388, 2018 WL 6305675 (S.D. Cal. Dec. 3, 2018) (alleging that defendants deceptively represented that a product was free, just to charge consumers for it 18 days later), *aff’d*, 765 F. App’x 184 (9th Cir. 2019); *In re Synchronal Corp.*, 117 F.T.C. 724, 739, ¶¶ 36–37 (1991) (alleging representatives told consumers that they would receive free products but ended up billing); *Book-of-the-Month Club*, 48 F.T.C. at 1312.

Response to Conclusion No. 36:

The Proposed Conclusion is irrelevant because Complaint Counsel agree that free TurboTax SKUs are in fact free. *See* CCFF ¶9 (Complaint Counsel describing the TurboTax Free Edition SKU as “the free version of TurboTax’s do-it-yourself offering.”); *see also* PFF ¶¶67, 69. Thus, this case does not involve claims that a product is free when it isn’t.

37. When a product or service is offered for free, all the terms and conditions of the offer should be made clear at the outset. *See* 16 C.F.R. § 251.1(c) (“[C]onditions and obligations upon which receipt and retention of the ‘Free’ item are contingent should be set forth clearly and conspicuously at the outset of the offer so as to leave no reasonable probability that the terms of the offer might be misunderstood. Stated differently, all of the terms, conditions and obligations should appear in close conjunction with the offer of ‘Free’ merchandise or service. For example, disclosure of the terms of the offer set forth in a footnote of an advertisement to which reference is made by an asterisk or other symbol placed next to the offer, is not regarded as making disclosure at the outset”); *Johnson*, 96 F. Supp. 3d at 1146 (holding that websites advertising “free” products were deceptive for failing to disclose negative option membership and upsells and reasoning that “[t]he mere fact that the sites contained disclosures in smaller print and described the upsells as ‘bonuses’ and trials at the bottom of the order pages, does not alter the deceptive net impression as to the cost and nature of the product because consumers would not be inclined to seek out this information”).

Response to Conclusion No. 37:

The Proposed Conclusion is incorrect or, at a minimum, incomplete and inaccurate. Courts have approved disclosures that, like the ones challenged 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 instance, the court in *Marksberry v. FCA US LLC* 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.

Additionally, Intuit has introduced un rebutted evidence that including in short advertisements exhaustive detail (such as the specific tax forms and situations covered) about the qualifications for free SKUs would be counterproductive. The various stages of consumer awareness of a product or brand are often described in terms of a “marketing funnel.” PFF ¶¶156-157. Intuit’s TurboTax ads are at the top of the marketing funnel, and are designed to “drive awareness and consideration of the brand and its products.” PFF ¶¶157, 159, 510. Further down the funnel, Intuit aims to convince consumers to visit the TurboTax website—which they must do to use any TurboTax SKU, free or paid, PFF ¶364—and ultimately to use a TurboTax product to prepare their taxes. PFF ¶¶156-160. Including the level of detail Complaint Counsel appear to want in space-constrained advertisements located near the top of the marketing funnel would overload consumers with more information than they are expecting and can process, leading to reduced consumer understanding. PFF ¶¶834-835, 841.

Moreover, the TurboTax website, which Complaint Counsel acknowledge “is integrated into TurboTax’s free advertising,” CCFF ¶455, provides full details on the free offers’ qualifications, and does so not only in a way most likely to be useful to consumers, but also

before consumers began preparing their tax returns. PFF ¶¶314, 369-370, 374-383, 390-391, 396-397, 408-409, 413-416, 419-420, 520-521.

2. Disclaimers

38. No disclosure can cure a false claim—it “can only qualify or limit a claim to avoid a misleading impression.” .com Disclosures: How to Make Effective Disclosures in Digital Advertising (Mar. 2013), at 5, *available at* ftc.gov/business-guidance/resources/com-disclosures-how-make-effective-disclosures-digital-advertising; *see also* Deception Policy Statement at 180-81.

Response to Conclusion No. 38:

The Proposed Conclusion is irrelevant because Intuit has never conveyed a “false claim” that requires a “cure.” As Complaint Counsel themselves recognize, the free TurboTax SKUs advertised are genuinely free; it is impossible to pay to use them. CCF ¶9, PFF ¶¶67, 69.

Nor have Complaint Counsel proved that the challenged ads made misleading claims absent qualifying language. The ads truthfully conveyed to consumers that (1) a specific TurboTax SKU was free for those who qualify, (2) qualifications were tied to the complexity of consumers’ tax returns, and often (3) the details about those qualifications were available on the TurboTax website. That is so for three reasons. *Supra* Response to CCCL ¶10.

Finally, there is no doubt that the qualifying language in Intuit’s ads was all sufficiently “legible” to ensure that consumers would notice it. PFF ¶¶232, 257, 272, 287, 296; *see* PCL ¶¶29-32. While Complaint Counsel failed to offer any evidence that the qualifying language could not be seen (or heard) by reasonable consumers, PFF ¶¶230-231, 255-256, 271, 286, 293, both they and their witnesses acknowledged the qualifying language in the challenged ads, PFF ¶¶208, 223, 233, 306-308, 317. Moreover, un rebutted testimony from Professor Peter Golder confirms that the qualifications in the challenged ads were statistically comparable or superior to

those in the video and social media ads of 18 benchmark companies across a series of dimensions that were both (1) drawn from the FTC’s “.com Disclosures” guidelines and (2) responsive to Complaint Counsel’s criticisms of the challenged ads. PFF ¶¶234-238, 258-259. And the appearance of the qualifications in the challenged ads met (or exceeded) standards established by case law. *Estrella-Rosales*, 2020 WL 1685617, at *2; *DirectTV*, 2018 WL 3911196, at *8.

39. If a disclosure “contradicts a material claim, the disclosure will not be sufficient,” rather, “the claim itself must be modified.” .com Disclosures at 5. And qualifications that clarify otherwise deceptive statements must be likely to come to the attention of the person who sees the basic claim; for that reason, small print or its equivalent are unlikely to be effective. *FTC v. Grant Connect, LLC*, 827 F. Supp. 2d 1199, 1214, 1220-1221 (D. Nev. 2011), *vacated in part on other grounds*, 763 F.3d 1094 (2014); Deception Policy Statement at 180-81.

Response to Conclusion No. 39:

The Proposed Conclusion is irrelevant because none of the disclosures in the challenged ads contradicted the free offer being advertised. The free TurboTax SKUs advertised are genuinely free; no consumer can pay to use them. CCFF ¶9; PFF ¶¶67, 69. Complaint Counsel also have not established that any of the ads made “otherwise deceptive statements” that required clarification. The disclosures in the challenged ads communicated limitations that consumers were already familiar with and that were already clear from the rest of each ad—that a specific TurboTax SKU is free, that it is available for consumers who qualify, and that there is additional information on the TurboTax website. *Supra* Response to CCCL ¶38.

The Proposed Conclusion is also incorrect and misleading insofar as it suggests that the challenged ads should be viewed in piecemeal fashion, with a material “free claim” that may or may not be sufficiently qualified by disclosures that appear elsewhere in the ad. This form of

analysis is improper; as explained, the claim conveyed by an ad is determined by viewing the ad as a whole. *See* Response to CCCL ¶¶8-9, 12; CCCL ¶18. And when the challenged ads are viewed as a whole, they conveyed to consumers that a specific TurboTax SKU was free for consumers who qualify, that the qualifications were based on the complexity of consumers' tax returns, and that details about those qualifications were available on the TurboTax website.

40. Disclaimers are not always effective and are not a defense if the net impression is still misleading. *Cyberspace.com*, 453 F.3d at 1200 (fine print disclaimer no defense if net impression is still misleading); *FTC v. Connelly*, No. 6-CV-701, 2006 WL 6267337 at *10 (C.D. Cal. Dec. 20, 2006) (disclaimers are particularly inadequate when they appear in a different context than the claims they purport to repudiate); *QT*, 448 F. Supp. 2d at 924 n.15 (“Defendants’ inconspicuous small-font statement appearing just six times during the 30-minute infomercial that ‘this product is not intended to diagnose, treat, cure or prevent disease’ is wholly inadequate to change the net impression of the pain relief claims made in the infomercial.”).

Response to Conclusion No. 40:

The Proposed Conclusion is irrelevant because Intuit’s ads do not include “disclaimers.” Nor have Complaint Counsel established that there is anything in the challenged ads that needed to be “disclaimed.” Instead, the ads communicated limitations that consumers were familiar with even without disclosures, and the qualifying language in the ads was all sufficiently “legible” to ensure that consumers would notice it. *Supra* Response to CCCL ¶38.

41. Disclaimers must be “prominent and unambiguous to change the apparent meaning and leave an accurate impression... [a]nything less is only likely to cause confusion by creating contradictory double meanings.” *Removatron*, 884 F.2d at 1497.

Response to Conclusion No. 41:

The Proposed Conclusion is irrelevant because Intuit’s ads do not include “disclaimers.” Nor have Complaint Counsel established that there is anything in the challenged ads that needed to be “disclaimed.” Instead, the ads communicated limitations that consumers were familiar with

even without disclosures, and the qualifying language in the ads was all sufficiently “legible” to ensure that consumers would notice it. *Supra* Response to CCCL ¶38.

42. Disclosures cannot change the net impression of an ad if they are not clear and readily visible. “Disclaimers or qualifications in any particular ad are not adequate to avoid liability unless they are sufficiently prominent and unambiguous to change the apparent meaning of the claims and to leave an accurate impression.” *Removatron*, 884 F.2d at 1497; *see also* Deception Policy Statement, at 180 (“Qualifying disclosures must be legible and understandable.”); *Fleetcor*, 2022 WL 3273286, at *10 (“the Court concludes as a matter of law that the tiny, inscrutable print of the disclaimers does not cure the net impression of the representations in the ads cited”).

Response to Conclusion No. 42:

The Proposed Conclusion is inaccurate and misleading. Intuit agrees that the quoted language accurately states the law. But for the reasons explained in the Response to CCCL ¶38, the qualifying language in the challenged ads was sufficiently clear and conspicuous to ensure that reasonable consumers would not be misled.

43. The Commission Enforcement Policy Statement in Regard to Clear and Conspicuous Disclosure in Television Advertising (Oct. 21, 1970) lays out the Commission’s requirements for clear and conspicuous television disclosures.

Response to Conclusion No. 43:

The Proposed Conclusion is incorrect. In the decades since it issued the cited policy statement, the Commission has recognized both that the written or verbal disclosures needed “[d]epend[] on the circumstances,” and that even “[l]ess elaborate Disclosures” than those in the statement “may suffice.” *FTC Policy Statement on Deception*, 103 F.T.C. at 180-181. Moreover, for the reasons explained in the Response to CCCL ¶38, the qualifying language in the challenged ads is sufficiently clear and conspicuous.

44. Disclosures that are not presented simultaneously in audio or video, in lettering that was small and/or not of a contrasting color with the background, against a background that is not one color or shade, and/or appearing for only a few seconds are insufficient to affect

the net impression of the ads. *See FTC v. US Sales Corp.*, 785 F. Supp. 737, 751 (N.D. Ill. 1992) (holding that fine print disclaimers at the bottom of the screen in TV ads were “simply not readable and [have] no effect on the overall impression of the advertisement”); *see also Fleetcor*, 2022 WL 3273286, at *9 & n.6 (“Courts ... across the country have determined that, where a disclaimer is buried in fine print and is without accentuation, it is insufficient to alter the net impression.”) (citing cases); *Cyberspace.com*, 453 F.3d at 1200 (fine print disclaimer no defense if net impression is still misleading); *Grant Connect*, 827 F. Supp. 2d at 1214, 1220-21.

Response to Conclusion No. 44:

The Proposed Conclusion is incorrect. None of the four cases Complaint Counsel cite stands for the categorical propositions in the Proposed Conclusion; they hold only that the specific disclosures at issue in those cases were inadequate. No authority supports that, as a matter of law, multi-color backgrounds preclude a finding of adequate qualifying language, that ads containing qualifying language against a non-contrasting background are always inadequate, or that ads lasting for only a handful of seconds have inadequate disclosures when those disclosures only appear for “a few” seconds. Similarly, the notion that all ads require audio and video disclosure is absurd. For example, radio ads (including the radio ads challenged by Complaint Counsel) by definition cannot include video disclosures. And either audio or video disclosures are impossible in paid search ads, including those challenged here.

Consistent with the fact-specific nature of those holdings, the *FTC Policy Statement on Deception* recognizes that the adequacy of particular qualifying language presented in a particular manner “[d]epend[s] on the circumstances.” 103 F.T.C. at 180. And for the reasons explained in the Response to CCCL ¶38, the qualifying language in the challenged ads was sufficiently clear and conspicuous that reasonable consumers would not be misled.

45. Hidden or poorly disclosed costs or conditions are deceptive. *FTC v. Willms*, No. 11-cv-828, 2011 WL 4103542, at *6 (W.D. Wash. Sept. 13, 2011) (holding that the FTC was likely to prevail on the merits where “enrollment fees and recurring costs [were] poorly

disclosed” when they appeared only after the consumer had seen the landing page and four additional webpages after that); *see also United States v. Adteractive, Inc.*, 07-cv-5940 (N.D. Cal. Nov. 26, 2007) (GX355) (consent case alleging that defendants deceptively advertised “free” merchandise without disclosing in their advertising or landing page that consumers had to accept and pay for a certain number of goods in order to be eligible for the “free” merchandise, which many consumers only discovered after spending significant time trying to qualify for the product); *see also Book-of-the-Month Club*, 48 F.T.C. at 1311 (“A seller may not make one representation in one part of his advertisement and withdraw it in another part since there is no obligation on the part of the customer to protect himself against such a practice by pursuing an advertisement to the bitter end.”).

Response to Conclusion No. 45:

The Proposed Conclusion is inaccurate and misleading. Intuit does not disagree that hidden or poorly disclosed costs or conditions can be deceptive, but the disclosures in the challenged ads are neither hidden nor poor. To the contrary, the qualifying language in the challenged ads was sufficiently clear and conspicuous that reasonable consumers would not be misled. *Supra* Response to CCCL ¶38.

Moreover, all three cases cited in the Proposed Conclusion are distinguishable. In *FTC v. Willms*, the relevant information was not disclosed until a consumer had viewed several pages of the website and was prompted to enter credit card information to purchase the product, 2011 WL 4103542, at *6 (W.D. Wash. Sept. 13, 2011). The same is true of *United States v. Adteractive*, in which Complaint Counsel acknowledged the critical disclosure was not made until many consumers had spent a significant time trying to qualify for the product. (GX355). Here, consumers are clearly and conspicuously informed of the relevant qualifying language as early as Intuit’s ads, which are at the top of the marketing funnel. *Supra* Response to CCCL ¶38; PFF ¶¶157, 159, 510. And even beyond the ads, Intuit’s website informs consumers of the terms of free offers on multiple occasions well before the point of sale. PFF ¶¶314, 369-370, 374-383,

390-391, 396-397, 408-409, 413-416, 419-420, 520-521. *Book-of-the-Month Club*, meanwhile, is inapposite because (unlike TurboTax’s free SKUs), the product being advertised there was not actually free. 48 F.T.C. at 1299; *supra* Response to CCCL ¶33.

46. “Depending on the circumstances, accurate information in the text may not remedy a false headline because reasonable consumers may glance only at the headline. Written disclosures or fine print may be insufficient to correct a misleading representation.” Deception Policy Statement, at 180.

Response to Conclusion No. 46:

The Proposed Conclusion is inaccurate and misleading. Intuit agrees that the quoted language accurately states the law as to static advertisements. But video and radio ads do not have “headlines,” so the Proposed Conclusion is irrelevant as to the challenged ads in those mediums. Additionally, the qualifying language in all challenged ads was sufficiently clear and conspicuous that reasonable consumers would not be misled. *Supra* Response to CCCL ¶38.

47. Referring consumers to a website for more information cannot cure deception. *In re ECM Biofilms, Inc.*, 160 F.T.C. 652, 734 n.75 (2015) (“It is well-established that an advertiser cannot ‘cure the deception’ in one advertisement with different statements in another.”).

Response to Conclusion No. 47:

The Proposed Conclusion is incorrect and not supported by the cited authority. The footnote from *ECM Biofilms* quoted in the Proposed Conclusion rejected an argument that a false statement in one advertisement could be modified by statements made elsewhere. *See* 160 F.T.C. 652, 734 n.75 (2015). But nothing in the quoted footnote suggests that the defendant there either informed consumers that more information could be found in the second location, or that reasonable consumers would expect to find more information in that second location. And caselaw recognizes that “for a complex product,” like tax-preparation software, PFF ¶782, “a

reasonable consumer would understand the limitations of how information is presented in a” space-or time-constrained ad for a complex product. *DirectTV*, 2018 WL 3911196, at *15.

Here, the challenged ads all expressly referenced or linked to the TurboTax website, *supra* Response to CCCL ¶33, which Complaint Counsel concede “is integrated into TurboTax’s free advertising,” CCFF ¶455. That information is thus in effect part of the challenged ad and must be considered when assessing whether any the claim the ad conveyed was likely to mislead reasonable consumers. Moreover, Intuit introduced un rebutted evidence that consumers expect that more information would be available at the website than would be in advertisements that are at the top of the marketing funnel. PFF ¶¶511-512. And even if Intuit had included more voluminous disclosures in the challenged ads, such disclosures would likely have been ineffective because consumers would experience “information overload” and thus be less likely to process what was presented to them. PFF ¶¶834-835.

48. “Disclosures that are an *integral part of a claim* or inseparable from it should not be communicated through a hyperlink. Instead, they should be placed on the same page and immediately next to the claim, and be sufficiently prominent so that the claim and the disclosure are read at the same time, without referring the consumer somewhere else to obtain this important information. This is *particularly true for cost information* or certain health and safety disclosures.” .com Disclosures, at 10 (emphasis added).

Response to Conclusion No. 48:

The Proposed Conclusion is incorrect and misleading.

First, Complaint Counsel’s claims here do not pertain to the cost of TurboTax because it is undisputed that TurboTax’s free SKUs are free, PFF ¶¶67, 69; *supra* Response to CCCL ¶21.

Second, Intuit’s use of hyperlinks complies with the .com Disclosures because the integral part of the claims conveyed—that not all users qualify for TurboTax’s free offers—is not “communicated through a hyperlink,” .com Disclosures 10. Instead, the hyperlinks themselves

convey that information. For example, the hyperlinked language on the section of the Tax Year 2022 TurboTax homepage describing Intuit's limited-time offer (an offer for filers with simple returns to use TurboTax Live Assisted Basic for free) read "See *if* you qualify." PFF ¶¶375 (emphasis added). That conveyed to consumers, even without clicking the hyperlink, that not all taxpayers qualified for the offer being advertised. PFF ¶¶323-324. *See also* PFF ¶¶376-378, 388-390, 393, 411-418 (other examples of similar qualifying language being similarly presented on the TurboTax website). Similarly, all the challenged ads that contained a hyperlink also conveyed, on the face of the ads themselves, that not all taxpayers qualified for the offer in question. PFF ¶¶253, 269, 284.

Because the integral part of the claim was included in the hyperlink itself, Intuit's use of hyperlinked disclosures was unlike the "[s]ymbols or icons" that the FTC's guidelines disapprove, which "by themselves are not likely to be effective" because they do "not provide sufficient clues about why a claim is qualified or the nature of the disclosure." (RX96 (Intuit) at 12). Intuit's hyperlinked disclosures instead mimicked the examples of *acceptable* hyperlinked disclosures in the guidelines. (RX96 (Intuit) at 33-34, A-7-A-8).

Third, Intuit introduced un rebutted evidence that placing the extensive details of what constitutes a simple return in a pop-up screen that appeared when a hyperlink was clicked made consumers more likely to process that information. This heightened awareness occurred because using a pop-up screen both "disrupt[ed] the consumer's viewing pattern to draw their attention to something that's really important," and avoided overwhelming consumers with too much information that they would be likely to tune out. PFF ¶¶379, 383.

49. Effective disclosures are especially necessary when the claim in question is that something is "free." *Book-of-the-Month Club*, 48 F.T.C. at 1312 ("The astute advertiser

well knows that once the average mind has received the impression conveyed by the meaning of the word ‘free’ *it can never be completely eradicated by any other words of explanation or contradiction.*” (emphasis added); *cf. FTC v. Mary Carter Paint Co.*, 382 U.S. 46, 47 (1965) (describing the word “free” as “commercially exploitable”).

Response to Conclusion No. 49:

The Proposed Conclusion is inaccurate and misleading. To the extent the Proposed Conclusion is offered to support the argument Complaint Counsel make in their post-trial brief (at 56) that “claims that an item is free require a heightened standard of disclosure of all material terms,” that argument is incorrect. Complaint Counsel have cited no support for a heightened standard, and the authorities in the Proposed Conclusion recite the commonplace (not “heightened”) standards governing deceptive advertising. Additionally, the challenged ads effectively conveyed to consumers that (1) a specific TurboTax SKU was free for those who qualify, (2) qualifications were tied to the complexity of the consumer’s tax returns, and often (3) the details about those qualifications were available on the TurboTax website. *Supra* Response to CCCL ¶38. Finally, Complaint Counsel’s citation to *Book-of-the-Month Club* is inapposite for the reasons given in the Response to CCCL ¶33.

50. “When making “Free” or similar offers all the terms, conditions and obligations upon which receipt and retention of the “Free” item are contingent should be set forth clearly and conspicuously at the outset of the offer so as to leave no reasonable probability that the terms of the offer might be misunderstood.” 16 C.F.R. 251.1(c).

Response to Conclusion No. 50:

The Proposed Conclusion is duplicative of CCCL ¶37 and is incorrect for the same reasons as that Proposed Conclusion.

3. Deceptive Door-Openers

51. “The Federal Trade [Commission] Act is violated if [Respondent] induces the first contact through deception, even if the buyer later becomes fully informed before entering the contract.” *Resort Car Rental*, 518 F.2d at 964; *see also Carter Prods., Inc. v. FTC*,

186 F.2d 821, 824 (7th Cir. 1951) (accord); *FTC v. OMICS Grp. Inc.*, 374 F. Supp. 3d 994, 1010 (D. Nev. 2019) (accord), *aff'd* 827 F. App'x 653 (9th Cir. 2020); *Fleetcor*, 2022 WL 3273286, at *12 (“post-hoc disclosures cannot cure earlier misleading representations”); *FTC v. E.M.A. Nationwide, Inc.*, 767 F.3d 611, 632 (6th Cir. 2014) (granting summary decision on telemarketing misrepresentations despite more accurate representations in written documents and contracts; “A court need not look past the first contact with a consumer to determine the net impression from that contact[.]” (citation omitted)); Deception Policy Statement, at 180 & n.37 (“[P]oint-of-sale material will not necessarily correct a deceptive representation or omission. Thus, when the first contact between a seller and a buyer occurs through a deceptive practice, the law may be violated even if the truth is subsequently made known to the purchaser.”); *see, e.g., In re Encyc. Britannica, Inc.*, 87 F.T.C. 421, 495-97, 531 (1976), *aff'd sub nom Encyc. Britannica, Inc. v. FTC*, 605 F.2d 964 (7th Cir. 1979), *as modified*, 100 F.T.C. 500 (1982); *see also In re Grolier, Inc.*, 99 F.T.C. 379, 383 (1982), *aff'd sub nom Grolier Inc. v. FTC*, 699 F.2d 983 (9th Cir. 1983), *as modified*, 104 F.T.C. 639 (1984); *FTC v. Gill*, 71 F. Supp. 2d 1030, 1044 (C.D. Cal. 1999) (“because each representation must stand on its own merit, even if other representations contain accurate, non-deceptive information, th[e] argument [that later disclaimers cured advertising misrepresentations] fails”), *aff'd*, 265 F.3d 944 (9th Cir. 2001).

Response to Conclusion No. 51:

The Proposed Conclusion is incorrect and misleading. For one, the notion that Intuit’s first contact with consumers, i.e., the ads themselves, was deceptive is incorrect. *Supra* Response to CCL ¶38.

Moreover, none of the cases cited in the Proposed Conclusion deals with online transactions. This distinction is critical for two reasons. *First*, the challenged ads (in Complaint Counsel’s words) “integrated” the TurboTax website into the ads themselves. CCFF ¶455. As such, the website is “readily available to the consumer,” and so must be considered when evaluating Complaint Counsel’s allegations. *See Moore v. Trader Joe’s Co.*, 4 F.4th 874, 882 (9th Cir. 2021). *Second* (and relatedly), numerous cases have rejected deception claims even where consumers had to spend significant time on a website, so long as the disclosures are made before the consumer purchased the product. *See 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).

52. A deceptive door-opening first contact is illegal in all circumstances, not only for physical, in-person sales. *See E.M.A. Nationwide*, 767 F.3d at 632 (applying principle to telemarketing sales).

Response to Conclusion No. 52:

The Proposed Conclusion is inaccurate and misleading.

First, the notion that Intuit’s first contact with consumers, i.e., the ads themselves, was deceptive is incorrect. *Supra* Response to CCL ¶38.

Second, the assertion that the deceptive door-opener theory applies in all circumstances is wrong. Again, case law establishes that, in the online context, the mere fact of the door “opening” does not establish deception so long as material information is disclosed by the point of sale. *See Washington*, 2020 WL 3058118, at *5; *Harris*, 2013 WL 5291142, at *2, *5-6. Complaint Counsel have tellingly failed to cite a single case applying the deceptive door-opener theory in the online context.

Third, Complaint Counsel’s argument that the deceptive door-opener theory applies beyond physical, in-person sales is overstated. *FTC v. E.M.A. Nationwide* was a telemarketing case, 767 F.3d 611, 619 (6th Cir. 2014), and telemarketing involves the kind of person-to-person interaction that presents a capacity for coercion, *see* 15 U.S.C. §6102(a)(3)(A) (instructing the FTC to promulgate rules preventing “telephone calls which the reasonable consumer would consider coercive”). Complaint Counsel did not present any evidence showing such coercion is possible in the online context.

Fourth, Complaint Counsel’s deceptive door-opener theory is legally inapplicable. The disclosures on the TurboTax website must be considered because those disclosures have been “integrated” into TurboTax’s advertising, CCF ¶455, and are “readily available to the consumer,” *Moore*, 4 F.4th at 882; *see also supra* Response to CCCL ¶51. And, while consumers are viewing the TurboTax website, they are simultaneously able to view offers from TurboTax’s competitors. PFF ¶¶55, 509. The ease of access to the website and the ability to view offers from multiple tax-preparation companies simultaneously render the deceptive door-opener theory inapposite.

Finally, the deceptive door-opener theory fails as a factual matter. The results of Dr. John Hauser’s Disclosure Efficacy Survey were “inconsistent with the hypothesis that TurboTax’s ad[s] served as misleading door openers” because if the ads had been door-openers as Complaint Counsel allege, the survey would have shown “fewer people statistically considering” TurboTax when Dr. Hauser “change[d] the advertisements” in the manner Complaint Counsel seek to require. PFF ¶¶737-738. Instead, when Dr. Hauser made those changes, there was “no statistical difference” in the number of consumers who would consider TurboTax. PFF ¶738.

53. The fact that most customers who chose to use a product were generally happy with that product does not render non-deceptive a particular ad that drove people to the product. *See In re Daniel Chapter One*, No. 9329, 2009 FTC LEXIS 86, at *7 (F.T.C. April 20, 2009) (“Evidence of consumer satisfaction is not relevant to determining whether the claims made are deceptive.” (citing cases)); *Cap. Choice Consumer Credit*, 2004 WL 5149998, at *34 (“[E]vidence that some consumers were not injured or were satisfied with Defendants’ services is no defense[.]”); *see also FTC v. Amy Travel Serv., Inc.*, 875 F.2d 564, 572 (7th Cir. 1989) (“[T]he existence of [satisfied] customers is not relevant to determining whether consumers were deceived and the magistrate was correct to exclude [such evidence.]”); *In re Intuit, Inc.*, 2023 WL 1778377, *at 12 (F.T.C. Jan. 31, 2023) (citing *Daniel Chapter One*, 2009 FTC LEXIS 86, at *7).

Response to Conclusion No. 53:

The Proposed Conclusion is inaccurate and misleading. The evidence Intuit introduced regarding customer experiences was introduced not to show that consumers were generally happy with their experiences with TurboTax, but rather to show that consumers' experiences with TurboTax were consistent with their expectations and inconsistent with the theory of deception.

For example, if consumers felt misled by Intuit's advertising, one would expect many of them to abandon TurboTax once they were told it was not free. PFF ¶657. But the abandonment rates for TurboTax products do not reflect such deception. Rather, consumers abandon TurboTax's paid and free products at the same 22% rate. PFF ¶656. That symmetry shows that consumers are abandoning TurboTax for a reason (or reasons) common to all products, not because they expect to file for free but are then informed that they must pay to file with TurboTax. PFF ¶657; *see also* PFF ¶658.

Moreover, data show that █████ of TurboTax consumers between Tax Years 2014 and 2021 started and finished in the same TurboTax SKU, PFF ¶661, and that during the same time period, █████ of consumers who started in Free Edition also finished there, PFF ¶82. These percentages are even higher than might be anticipated given that third-party review websites recommend that consumers "should start with Free Edition" even if they know they do not qualify. PFF ¶¶433, 662. That most consumers are starting and finishing in the same product, including Free Edition, reflects that Intuit is successful in getting customers started in the right SKU for their tax situation, contrary to Complaint Counsel's theory of deception.

TurboTax's customer-retention rate also reflects that consumers were not misled into believing that all TurboTax was free or that they could file for free when that was not the case.

If consumers came to TurboTax after being misled by an advertisement into believing that they could file for free when that was not the case, it is unlikely those consumers would return to TurboTax. PFF ¶¶649. But 83% of TurboTax customers who use paid SKUs—the consumers who allegedly were deceived into inaccurately thinking they could file for free—return the following year. PFF ¶¶650-651; *see also* PFF ¶92. That compares favorably to TurboTax’s competitors, PFF ¶91, and reflects that TurboTax consumers were not misled.

Finally, TurboTax’s consistently high customer ratings and positive reviews—those available on the TurboTax website from consumers, and those provided by independent reviewers—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 widespread negative sentiments; instead, both paid and free TurboTax SKUs have consistently received largely positive customer feedback. PFF ¶¶653-654.

IV. Relief

54. “The existence of past violations may give rise to an inference that there will be future violations; and the fact that the defendant is currently complying with the ... laws does not preclude an injunction.” *SEC v. Murphy*, 626 F.2d 633, 655 (9th Cir. 1980).

In predicting the likelihood of future violations, a court must assess the totality of the circumstances surrounding the defendant and his violations, and it considers factors such as the degree of scienter involved; the isolated or recurrent nature of the infraction; the defendant’s recognition of the wrongful nature of his conduct; the likelihood, because of defendant’s professional occupation, that future violations might occur; and the sincerity of his assurances against future violations.

Id.

Response to Conclusion No. 54:

The Proposed Finding is incomplete and misleading. To obtain a cease-and-desist order, Complaint Counsel bore the burden of proving the existence of “some cognizable danger of recurrent violation.” *United States v. W. T. Grant Co.*, 345 U.S. 629, 633 (1953); *see also Benco Dental Supply Co.*, 2019 WL 5419393, at *75 (F.T.C. Oct. 15, 2019). Although that burden can in certain circumstances be met based on past misconduct, Complaint Counsel have not met their burden to prove that any past conduct by Intuit that may have been unlawful warrants an inference that future violations will occur. Such an inference is unwarranted for three reasons.

First, the record shows that Intuit intended to convey that a specific TurboTax product was free, that it was free only for qualifying consumers, and often that there was additional information on the TurboTax website. PFF ¶¶167-174, 190, 192-202, 353-363, 405, 852, 857, 860, 870. Complaint Counsel failed to prove that Intuit ever intended to convey anything deceptive.

Second, and relatedly, Intuit’s commitment to clarity in its advertisements and compliance with the law renders a case-and-desist order unnecessary. For example, one Intuit executive testified about how deceptive advertising is inconsistent with the company’s foundational values and economic self-interest. PFF ¶¶30, 33-38, 174, 850-852. Another testified about Intuit’s March 2022 decision to voluntarily remove the “Free, Free, Free” ads despite the disruption and difficulty that decision caused. PFF ¶¶7-8. And Intuit offered testimony from its executives explaining how it has voluntarily improved its TurboTax advertisements over the years, with the goal of communicating even more clearly than before the qualifications of free TurboTax products and offers. *See* PFF ¶¶353, 357, 363. Those

improvements indicate that Intuit is matching its words with its actions, reinforcing the company's stated intent to be clear with consumers.

Intuit also introduced expert testimony explaining how Intuit's business strategy and economic incentives both would motivate Intuit to avoid deceptive advertising. This testimony was that 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 and its competitors derive far greater value from exceeding customer expectations and earning repeat business than they do from one-off transactions. PFF ¶¶39, 89. "[T]he importance of reputation and brand in driving consumer behavior in purchasing" in the online tax-preparation industry is a well-known fact. *United States v. H&R Block, Inc.*, 833 F.Supp.2d 36, 75 (D.D.C. 2011). Those incentives provide additional evidence that a cease-and-desist order is not warranted here.

Finally, any potentially unlawful conduct that Intuit might attempt to engage in is already enjoined by the Consent Order between Intuit and the attorneys general of the 50 states and the District of Columbia. Among other provisions, that order requires "Clear and Conspicuous" disclosures in Intuit's advertising, including written disclosures that not all taxpayers qualify and, in all video ads eight seconds or longer, corollary verbal disclosures. *See* PFF ¶¶809-819. Although it did not have the burden of doing so, Intuit presented un rebutted evidence of its intent to comply with the Consent Order. Such evidence included testimony about how Intuit has complied with the Consent Order since it became effective, PFF ¶¶823-828, as well as testimony about the internal steps Intuit has taken to ensure compliance going forward, PFF ¶¶821-822.

55. "It is the duty of the courts to beware of efforts to defeat injunctive relief by protestations of repentance and reform, especially when abandonment seems timed to anticipate suit, and there is probability of resumption." *United States v. W. T. Grant Co.*, 345 U.S. 629, 632 n.5 (1953).

Response to Conclusion No. 55:

The Proposed Conclusion is irrelevant because this case does not involve mere “protestations of repentance and reform,” or the abandonment of conduct “timed to anticipate suit.” Instead, the assurances of Intuit’s lawful future conduct rest on the binding Consent Order, and on Intuit’s longstanding commitment to clarity and following the law. *Supra* Response to CCCL ¶54.

56. The Commission “is not limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past.” *Grant Connect*, 763 F.3d at 1105 (quoting *FTC v. Ruberoid Co.*, 343 U.S. 470, 473 (1952)). “And those ‘caught violating’ the FTC Act ‘must expect some fencing in.’” *Grant Connect*, 763 F.3d at 1105 (quoting *FTC v. Nat’l Lead Co.*, 352 U.S. 419, 431 (1957)); *see also Fleetcor*, 2022 WL 3273286, at *48–*49.

Response to Conclusion No. 56:

The Proposed Conclusion is incomplete and misleading. Complaint Counsel’s proposed order, which would apply to any free product or service marketed by Intuit, not just TurboTax, *see* Proposed Order 4-5, is impermissibly broad.

Injunctive relief cannot extend beyond what is reasonably related to the practices alleged in the complaint. *See American Home Products Corp. v. FTC*, 695 F.2d 681, 710-711 (3d Cir. 1982). The closest Complaint Counsel have come to providing any evidence concerning any product other than TurboTax is their assertion (Br. 69) that Intuit “launch[ed] the TurboTax Live free promotion in TY 2020” and has “ [REDACTED] (emphasis added). That merely concerns Intuit’s plans to *provide* free offers, not any plans for how to *advertise* any such offers. Regardless, [REDACTED] (*id.*) is insufficiently concrete to support prospective relief, especially given Complaint Counsel’s failure to prove [REDACTED] [REDACTED]. *See W. T. Grant*, 345 U.S. at 633.

57. Fencing-in orders—those “that extend beyond violations of the Act to prevent violators from engaging in similar deceptive practices in the future”—“must be ‘reasonably relat[ed]’ to a violation of the Act.” *Kraft*, 970 F.2d at 326 (citing *Colgate-Palmolive*, 380 U.S. at 394–95; *Sears, Roebuck & Co. v. FTC*, 676 F.2d 385, 391–92 (9th Cir. 1982)).

Response to Conclusion No. 57:

Intuit has no specific response except to note that, for the reasons explained in the Response to CCCL ¶56, Complaint Counsel have failed to prove that any “fencing-in” relief, let alone the broad order they are seeking, is warranted in this case.

58. Three factors determine whether fencing-in orders bear a reasonable relationship to the unlawful practice: “(1) the deliberateness and seriousness of the present violation; (2) the respondent’s past history of violations; and (3) the transferability of the unlawful practices to other products.” *Thompson Med. Co.*, 104 F.T.C. at 833.

Response to Conclusion No. 58:

The Proposed Conclusion is incomplete and misleading. For the reasons explained in the Response to CCCL ¶56, Complaint Counsel have failed to prove that any fencing-in relief, let alone the broad order they are seeking, is warranted in this case. Indeed, each of the three elements in the Proposed Conclusion undermines the case for fencing-in relief.

First, far from proving that any violation was deliberate, the record shows that Intuit intended to convey that a specific TurboTax product was free, that it was free only for qualifying consumers, and often that there was additional information on the TurboTax website. *Supra* Response to CCCL ¶54. *Second*, no evidence suggests that Intuit has a history of past violations of the FTC Act; Complaint Counsel have not, for example, introduced any evidence that Intuit has previously flouted any Commission cease-and-desist orders. *Third*, Complaint Counsel have not even attempted to prove that Intuit’s free strategy is applicable to other products or services.

59. “The more egregious the facts with respect to a particular element, the less important it is that another negative factor be present.” *Thompson Med. Co.*, 104 F.T.C. at 833.

Response to Conclusion No. 59:

Intuit has no specific response except to note that Complaint Counsel have failed to prove that any fencing-in relief is warranted here, *supra* Response to CCCL ¶¶56-58, and certainly have not come to close to showing that advertising a free product that 14 million people a year used was “egregious.”

60. In evaluating the deliberateness and seriousness of violations, the Commission and courts have looked at the cost, size, and duration of advertising campaigns. *E.g. Kraft*, 970 F.2d at 326; *Bristol-Myers Co. v. FTC*, 738 F.2d 554, 561 (2d Cir. 1984); *Thompson Med.*, 104 F.T.C. at 833.

Response to Conclusion No. 60:

Intuit has no specific response except to note that Complaint Counsel has failed to prove that Intuit deliberately engaged in deceptive advertising. *Supra* Response to CCCL ¶54.

61. Deliberateness is also “shown by the consistency of [Respondent’s] advertising themes over the years, supporting a conclusion that they were no accident or isolated instance.” *Thompson Med.*, 104 F.T.C. at 834.

Response to Conclusion No. 61:

Intuit has no specific response except to note that Complaint Counsel has failed to prove that Intuit deliberately engaged in deceptive advertising. *Supra* Response to CCCL ¶54.

62. The Commission and federal courts commonly employ standard compliance monitoring provisions as appropriate fencing-in relief in litigated final orders. *See, e.g. In re Jerk, LLC*, 2017 WL 5171133, at *3 (F.T.C. Sept. 28, 2017) (“Numerous courts that have imposed remedial orders for FTC Act violations have recognized the contribution of compliance monitoring to achieving remedial goals”—and the Commission went on to do so in that matter); *United States v. Daniel Chapter One*, 89 F. Supp. 3d 132, 145-46 (D.D.C. 2015) (monitoring provisions “provide an oversight mechanism to better ensure that the defendants do not engage in future recidivism”), *aff’d* 650 F. App’x 20 (D.C. Cir. 2016); *FTC v. Wellness Support Network, Inc.*, No. 10-cv-4879, 2014 WL 644749, at *20–22 (N.D. Cal. Feb. 19, 2014) (finding “the proposed reporting requirements to be reasonable” and “necessary in order for the FTC to monitor Defendants’ compliance”), *judgment entered*, No. 3:10-cv-4879, 2014 WL 3805755 (N.D. Cal. Feb. 20, 2014); *FTC v. Alcoholism Cure Corp.*, 2012 WL 12903173, at *5 (M.D. Fla. July 3, 2012) (providing that “[b]road compliance monitoring provisions are necessary to ensure Defendants’

compliance”); *Daniel Chapter One*, 2009 FTC LEXIS 157, at *296-301 (Chappell, C.A.L.J., issuing similar order provisions), *aff'd* 148 F.T.C. 832, 1105–07 (2009), *aff'd* 149 F.T.C. 1574 (2010), *aff'd* 405 F. App'x 505 (D.C. Cir. 2010); *FTC v. Direct Mktg. Concepts, Inc.*, 648 F. Supp. 2d 202, 217 (D. Mass. 2009) (similar provisions “are both reasonable and necessary to ensure that the defendants take responsibility to ensure that the orders are followed by themselves and their associates, and that the FTC has the ability to monitor compliance with the orders and prevent future illegal conduct”), *aff'd*, 624 F.3d 1 (1st Cir. 2010); *FTC v. Cap. Choice Consumer Credit, Inc.*, No. 02-cv-21050, 2004 WL 5141452, at *4 (S.D. Fla. May 5, 2004), *aff'd* 157 F. App'x 248 (11th Cir. 2005); *Telebrands*, 140 F.T.C. at 350–52 (issuing similar order provisions); *FTC v. Think Achievement Corp.*, 144 F. Supp. 2d 1013, 1018 (N.D. Ind. 2000) (“Courts may order record-keeping and monitoring to ensure compliance with a permanent injunction.”), *rev'd in part on other grounds*, 312 F.3d 259 (7th Cir. 2002); *FTC v. SlimAmerica, Inc.*, 77 F. Supp. 2d 1263, 1276 (S.D. Fla. 1999) (“Record-keeping and monitoring provisions in the permanent injunction are also appropriate to permit the Commission to police the defendants’ compliance with the order.”); *In re Brake Guard Products, Inc.*, 125 F.T.C. 138, 261–62 (1998) (issuing similar order provisions); *FTC v. US Sales Corp.*, 785 F. Supp. 737, 753 (N.D. Ill. 1992) (“Ancillary equitable relief will be necessary to effectuate enforcement of Section 5 of the FTC Act and to deter future violations by these Defendants. ... The court concludes therefore that the ... order should also require Defendants to report their addresses and places of employment or business, and any subsequent changes in this information to the F.T.C.”).

Response to Conclusion No. 62:

The Proposed Conclusion is inaccurate and misleading. The Consent Order between Intuit and the attorneys generals of the 50 states and the District of Columbia already includes compliance monitoring provisions. (RX261 (Intuit) at 13-15). Any additional provisions required by this Court would be superfluous and unwarranted.

V. Defenses

63. “The party asserting mootness has the heavy burden of establishing that there is no effective relief remaining for a court to provide.” *Tinoqui-Chalola Council of Kitanemuk & Yowlumne Tejon Indians v. U.S. Dep’t of Energy*, 232 F.3d 1300, 1303 (9th Cir. 2000).

Response to Conclusion No. 63:

The Proposed Conclusion is misleading. Although Intuit has the burden of proving mootness, *Complaint Counsel* has the burden of proving the existence of “some cognizable

danger of recurrent violation,” a standard that is more rigorous than the “mere possibility” standard that governs mootness. *W. T. Grant*, 345 U.S. at 633. For three reasons, Complaint Counsel have failed to prove that any such danger exists.

First, the record shows that Intuit intended to convey that a specific TurboTax product was free, that it was free only for qualifying consumers, and often that there was additional information on the TurboTax website. *Supra* Response to CCCL ¶54. Complaint Counsel failed to prove that Intuit ever intended to convey anything deceptive. *Second*, and relatedly, Intuit’s commitment to clarity in its advertisements and compliance with the law undermines the presence of any cognizable danger of future violations. *Supra* Response to CCCL ¶54. *Third*, any potentially unlawful conduct that Intuit might attempt to engage in is enjoined by the Consent Order between Intuit and the attorneys general of the 50 states and the District of Columbia. *Supra* Response to CCCL ¶54.

This case is moot for the same reasons that no cognizable danger of recurrent violations exists. In light of the Consent Order, and Intuit’s undisputed compliance (both past and future) with that order, “[t]here is nothing for this court to enjoin” and a cease-and-desist order is unwarranted and improper. *Wold v. Robart*, 2018 WL 1135396, at *5 (E.D. Wis. Feb. 28, 2018); *see also Already, LLC v. Nike, Inc.*, 568 U.S. 85, 97 (2013) (finding 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) (finding a case moot because any relief would be “redundant” to an FTC consent decree, and the prospect of FTC enforcement “preclude[d] a reasonable expectation that the wrong w[ould] be repeated”).

64. A claim of overbroad or vague relief sought is not an affirmative defense. *See NR Grp. 3 Contractors, Inc. v. Grp. 3 Contractors, LLC*, No. 17-cv-21945, 2017 WL 7792718, at *4 (S.D. Fla. Sept. 26, 2017).

Response to Conclusion No. 64:

Intuit has no specific response except to note that Complaint Counsel are correct that a claim of overbroad or vague relief sought is not an affirmative defense, meaning Complaint Counsel—as they recognize in their post-trial brief (at 72)—bear the burden of proving that the relief sought is neither overbroad nor vague. As explained in the Response to CCCL ¶¶56-58, Complaint Counsel failed to meet that burden.

65. “[N]either equitable estoppel nor laches is a defense to an action brought by the government in the public interest.” *In re Rentacolor, Inc.*, 103 F.T.C. 400, 418 (1984); *see also Heckler v. Community Health Servs. of Crawford County*, 467 U.S. 51, 60-61 (1984); *United States v. Summerlin*, 310 U.S. 414, 416 (1940); *FTC v. Bronson Partners, LLC*, No. 3:04CVI866, 2006 WL 197357, at *1 (D. Conn. Jan. 25, 2006).

Response to Conclusion No. 65:

The Proposed Conclusion is incorrect. Courts have expressly recognized that the FTC’s status as a federal agency does not exempt it from a laches defense. *See FTC v. DirecTV, Inc.*, 2015 WL 9268119 (N.D. Cal. Dec. 21, 2015), at *3; *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 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).

66. There is no statute of limitations applicable in Part 3 litigation. *See, e.g.*, 15 U.S.C. § 57b(d) (three-year statute of limitations for claims under Section 19(a), not Section 5 actions); Mar. 7, 2022, Order on Motions *in Limine* at 3 (“Congress did not provide for a statute of limitations for actions for a cease and desist order under Section 5.”); *see also, FTC v. Ivy Capital, Inc.*, 2011 WL 2470584, at *2 (D. Nev. June 20, 2011) (striking statute of limitations affirmative defense); *United States v. Bldg. Inspector of Am., Inc.*,

894 F. Supp. 507, 513 (D. Mass. 1995) (holding no statute of limitations applies); *see generally, In re POM Wonderful LLC*, 2011 FTC LEXIS 79, at *8-9 (May 6, 2011) (denying motion *in limine* seeking to exclude advertisements that Respondents claimed were too remote in time).

Response to Conclusion No. 66:

The Proposed Conclusion is incorrect. 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). “[W]here 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.* Here, analogous state *and* federal laws point to a three-year statute of limitations. *See* Cal. Civ. Code §1783; D.C. Code §§12-301, 28-3904; N.Y. C.P.L.R. §214(2); 15 U.S.C. §57b(d). The cases cited in the Proposed Conclusion for the proposition that claims under section 5 of the FTC Act are not subject to a statute of limitations all “fail[] to mention the widely recognized rule from *DelCostello*”—the same oversight for which the FTC has previously been faulted, *FTC v. Centro National Corp.*, 2014 WL 7525697, at *7-8 (S.D. Fla. Dec. 10, 2014).

67. Section 19’s statute of limitations does not apply to other sections of the FTC Act. *See, e.g., FTC v. Sec. Rare Coin & Bullion Corp.*, 931 F.2d 1312, 1315 (8th Cir. 1991); *United States v. Prochnow*, 2007 WL 3082139, at *5 (11th Cir. Oct. 22, 2007); *FTC v. Hornbeam Special Situations, LLC*, 308 F. Supp. 3d 1280, 1296 (N.D. Ga. 2018); *FTC v. J William Enters.*, 283 F. Supp. 3d 1259, 1262 (M.D. Fla. 2017).

Response to Conclusion No. 67:

The Proposed Conclusion is incorrect for the reasons explained in the Response to CCCL

¶66.

68. Borrowing a statute of limitations from another statute and applying it here would be inappropriate “because the principles of federal equity are hostile to the ‘mechanical

rules' of statutes of limitations." *DelCostello v. International Broth. Of Teamsters*, 462 U.S. 151, 162 (1983) (quoting *Holmberg v. Armbrecht*, 327 U.S. 392, 396 (1946)).

Response to Conclusion No. 68:

The Proposed Conclusion is incorrect and unsupported by the cases cited. The language from *DelCostello* quoted by Complaint Counsel is dicta that paraphrases an earlier decision, *Holmberg v. Armbrecht*, 327 U.S. 392 (1946). *Holmberg* held that statutes of limitations should not be imported to actions *where laches applies*. *Id.* at 396. Complaint Counsel take the position that laches does not apply. CCCL ¶65. If Complaint Counsel are correct about that, *Holmberg* is inapplicable.

The implications of Complaint Counsel's argument against the applicability of laches underscore why a statute of limitations should be borrowed here. If Complaint Counsel are correct that laches does not apply and that no statute of limitations should be borrowed, the Commission would have no time limit on when it could bring an enforcement action. This unending ability to pursue claims against individuals and companies 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), recognizing that because time limits are "an almost indispensable element of fairness," *Rothensies v. Electric Storage Battery Co.*, 329 U.S. 296, 301 (1946), it would be "utterly repugnant to the genius of our laws" if government enforcement actions could "be brought at any distance of time," *Adams v. Woods*, 6 U.S. 336, 342 (1805). Complaint Counsel's position that no time limitations apply thus offends due process—and 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, accordingly, should not assume that Congress intended to exempt section 5 from the general rule that where no statute of limitations is expressly stated, an analogous statute of limitations (here, three years) is borrowed.

Finally, as a descriptive matter, the Supreme Court has never held that federal equitable claims never borrow statutes of limitations from other sources, and appellate precedent shows that is not true, *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).

69. Congress specifically vested the FTC “both with the ‘power to act in an accusatory capacity’ and with the ‘responsibility of ultimately determining the merits of the charges so presented.’” *Cinderella Career & Finishing Schools, Inc. v. FTC*, 425 F.3d 583, 590 (D.C. Cir. 1970).

Response to Conclusion No. 69:

The Proposed Conclusion is incorrect and misleading because, whether authorized by Congress or not, the vesting of dual accusatory and adjudicative functions in the FTC is unconstitutional.

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 opinion). “[A]n 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). In *Williams*, for example, the Supreme Court held that a Pennsylvania Supreme Court justice who had previously served as a prosecutor could not constitutionally adjudicate an appeal involving a defendant whom the justice had, in his service as a prosecutor, authorized the death penalty to be sought against. *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 same complaint. The potential for bias in such circumstances is substantial.

70. Issuing a press release regarding a Commission action or highlighting the existence or importance of such an action does not amount to prejudgment. *See FTC v. Cinderella Career & Finishing Schs., Inc.*, 404 F.2d 1308, 1314 (D.C. Cir. 1968).

Response to Conclusion No. 70:

The Proposed Conclusion is incorrect and misleading. Intuit is not challenging a press release issued by *the Commission*. The prejudgment at issue in this case is a press release Chair Khan tweeted from *her* Twitter account. If Chair Khan were a judge, her March 29, 2022 tweet of an FTC press release about Intuit’s “deceptive TurboTax ‘free’ filing campaign” and the need for an “immediate halt to Intuit’s deceptive ads,” PFF ¶932, would 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). *See United States v. Cooley*, 1 F.3d 985, 990 (10th Cir. 1993) (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 the FTC Chair are no different. *See Intel Corp.*, 149 F.T.C. 1548, 1552 (2010) (reasoning that the standard governing judicial disqualification applies where “Commissioners act[] as judges”).

In any event, Chair Khan’s retweet was not the only instance of her exhibiting improper prejudgment. She also publicly suggested, in a widely watched interview that took place before Intuit had an opportunity to defend itself and at a time when she was required to be (and appear to be) neutral, that Intuit engaged in “law-breaking.” PFF ¶933.

Case law establishes that either of these two instances of bias, let alone both together, violate Intuit’s due-process rights because they would cause a disinterested observer to reasonably conclude that Chair Khan has prejudged this case. *See Fast Food Workers Committee v. NLRB*, 31 F.4th 807, 815 (D.C. Cir. 2022) (due process is violated when “a disinterested observer may conclude that the agency has in some measure” prejudged the case); *American Cyanamid Co. v. FTC*, 363 F.2d 757, 768 (6th Cir. 1966) (vacating an FTC order because the FTC Chair had previously investigated “the same facts and issues”). In *Cinderella Career & Finishing Schools, Inc.*, for instance, then-FTC 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 583, 584-585 (D.C. Cir. 1970). 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 has 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 then-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.

71. The Supreme Court has observed that adjudicators are presumed to be unbiased unless the challenger produces evidence to overcome that presumption. *Schweiker v. McClure*, 456 U.S. 188, 195 (1982).

Response to Conclusion No. 71:

The Proposed Conclusion is irrelevant because Intuit has rebutted any presumption by presenting evidence that Chair Khan's engaged in conduct that created an appearance of bias.

Supra Response to CCCL ¶70.

72. The Supreme Court has rejected the idea that the combination of investigative/prosecutorial and adjudicative functions "necessarily creates an unconstitutional risk of bias in administrative adjudication" that offends due process. *Withrow v. Larkin*, 421 U.S. 35, 47 (1975); *see also id.* at 56 (no due process violation).

Response to Conclusion No. 72:

The Proposed Conclusion is incomplete and misleading. *Withrow v. Larkin*, 421 U.S. 35 (1975), recognized that "special facts and circumstances present in the case" may demonstrate "that the risk of unfairness is intolerably high," *id.* at 58. For three reasons, such special facts and circumstances are present here.

First, the commissioners both authorized the filing of a complaint against Intuit and, at the same time, will ultimately decide the merits of that same complaint. This dual accuser and

appellate tribunal role parallels the facts of *Williams*, which held that a Pennsylvania Supreme Court justice who had previously served as a prosecutor could not constitutionally adjudicate an appeal involving a defendant whom the justice had, in his service as a prosecutor, authorized the death penalty to be sought against, 579 U.S. at 4. *Second*, the FTC’s perfect win rate before itself is “a strong sign of an unhealthy and biased institutional process” that is incompatible with due process. PFF ¶934; *see also Axon Enterprise, Inc. v. FTC*, 143 S.Ct. 890, 907 n.1 (2023) (Thomas, J., concurring) (noting commissioners’ “tendency to overwhelmingly agree with their ... agency’s decisions”); *Axon Enterprise, Inc. v. FTC*, 986 F.3d 1173, 1187 (9th Cir. 2021) (observing that the “FTC has not lost a single case [in administrative proceedings] in the past quarter century”—a record that “[e]ven the 1972 Miami Dolphins would envy.”). *Third*, the FTC’s adjudication of Intuit’s private rights in an administrative proceeding poses heightened due process concerns. *See Axon*, 143 S.Ct. at 907, 910 (Thomas, J., concurring) (“[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); *see also id.* at 907 (liberty interests implicate private rights); *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 522 (1996) (Thomas, J., concurring in part) (describing “advertising” as “integral” to “liberty”).

73. In keeping with that binding decision, courts have recognized that “[t]he combination of investigative and judicial functions within an agency has been upheld against due process challenges, both in the context of the FTC and other agencies.” *Gibson v. FTC*, 682 F.2d 554, 560 (5th Cir. 1982); *see Richardson v. Perales*, 402 U.S. 389, 410 (1971) (rejecting challenge to Social Security Administration ALJs who both investigate and decide claims).

Response to Conclusion No. 73:

The Proposed Conclusion is incorrect and misleading. For the reasons explained in the Response to CCCL ¶72, the Commission’s particular combination of accusatory and adjudicative functions is unconstitutional.

74. The federal government’s decision to enforce the laws is a matter over which the “Executive Branch has exclusive authority and absolute discretion.” *United States v. Nixon*, 418 U.S. 683, 693 (1974); accord *Heckler v. Chaney*, 470 U.S. 821, 835 (1985).

Response to Conclusion No. 74:

The Proposed Conclusion is incomplete and misleading. The decision to proceed with a particular action in an administrative forum as opposed to a judicial one is different than a decision whether to initiate an action at all. While the latter is an exercise of the executive power of prosecutorial discretion, the former is not. Instead, the decision to proceed with an action in an administrative forum as opposed to a judicial one determines “which defendants should receive *certain legal processes* (those accompanying Article III proceedings) and which should not. Such a decision—to assign certain actions to agency adjudication—is a power that Congress uniquely possesses.” *Jarkesy v. SEC*, 34 F.4th 446, 462 (5th Cir. 2022), *petition for cert. filed*, No. 22-859 (U.S. Mar. 8, 2023).

Because assignment of disputes to agency adjudication is “peculiarly within the authority of the legislative department,” *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909), Congress was required to provide “an intelligible principle” for the Commission to follow in deciding which forum to proceed in, *Mistretta v. United States*, 488 U.S. 361, 372 (1989). The FTC Act does not provide any principle, let alone an intelligible one, to guide the Commission. See 15 U.S.C. §§45(b), 53(b).

75. A Commission decision whether to pursue an enforcement action in federal court or in Part 3 constitutes a “forum choice” that is a classic exercise of prosecutorial discretion, which is an executive function and not a legislative one. *See Hill v. SEC*, 114 F. Supp. 3d 1297, 1313 (N.D. Ga. 2015), *vacated on other grounds*, 825 F.3d 1236 (11th Cir. 2016).

Response to Conclusion No. 75:

The Proposed Conclusion is incorrect for the reasons explained in the Response to CCCL

¶74.

76. The Supreme Court upheld the constitutionality of the FTC’s removal protections over 85 years ago, a holding that remains binding. *Humphrey’s Executor v. United States*, 295 U.S. 602, 625 (1935).

Response to Conclusion No. 76:

The Proposed Conclusion is incomplete and misleading. The Supreme Court has repeatedly undermined *Humphrey’s Executor v. United States*, 295 U.S. 602 (1935), in the eight-plus decades since it was decided. For example, the decision in *Seila Law LLC v. CFPB*, 140 S.Ct. 2183, 2191 (2020), “repudiated almost every aspect of *Humphrey’s Executor*,” *id.* at 2212 (Thomas, J., concurring in part and dissenting in part).

Additionally, Complaint Counsel overread *Humphrey’s Executor*. That decision rested on the notion that that “the FTC (*as it existed in 1935*) ... exercis[ed] ‘no part of the executive power.’” *Seila Law*, 140 S.Ct. at 2198 (emphasis added). Whatever the merits of the Supreme Court’s understanding of the FTC’s authority in 1935, *Seila Law* recognized that *Humphrey’s Executor*’s characterization of the FTC “has not withstood the test of time” because enforcement of wide swathes of federal law is “a quintessentially executive power.” *Id.* at 2198 n.2, 2200.

Regardless, *Humphrey’s Executor* has no bearing on the constitutionality of FTC administrative law judges’ tenure protections. The dual-layer protection enjoyed by ALJs, *see* 5 U.S.C. §§1202(d), 7521(a), unconstitutionally limits the president’s article II removal power.

See Free Enterprise Fund v. Public Co. Accounting Oversight Board, 561 U.S. 477, 492, 496 (2010); *Jarkesy*, 34 F.4th at 464.

77. All of the Commissioners who participated in this matter have been “properly appointed.” *Collins v. Yellen*, 141 S. Ct. 1761, 1787–28 & n.23 (2021) (even unconstitutional removal restrictions do not “strip [an officer] of the power to undertake the other responsibilities of his office”) (citing *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2207–11 (2020)).

Response to Conclusion No. 77:

The Proposed Conclusion is misleading. Intuit does not dispute that the commissioners participating in this matter were properly appointed. But 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). Here, the FTC Act’s “unconstitutional removal provision[s] inflicted harm” on Intuit because more accountability to the president “might have altered [the commissioners’] behavior in a way that would have benefited” Intuit. *Id.* With constitutionally appropriate oversight, the president could ensure that the commissioners decide this case based on the evidence. Indeed, it seems unlikely that commissioners would overturn the decisions of their ALJs as routinely as they do 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.

VI. Evidentiary Issues

78. “Evidence that constitutes hearsay may be admitted if it is relevant, material, and bears satisfactory indicia of reliability so that its use is fair.” 16 C.F.R. §3.43(b).

Response to Conclusion No. 78:

Intuit has no specific response.

79. Courts have found consumer complaints submitted to the FTC to be reliable and trustworthy because they “were sent independently to the FTC from unrelated members

of the public,” “reported roughly similar experiences,” and “the declarants had no motive to lie to the FTC.” *FTC v. Figgie Int’l, Inc.*, 994 F.2d 595, 608 (9th Cir. 1993) (upholding trial court’s holding that consumer complaint letters were admissible under the residual hearsay rule) (*Figgie* addressed Rule 807’s predecessor, Rule 803(24)); *FTC v. AMG Services, Inc.*, No. 2:12-cv-00536, 2014 U.S. Dist. LEXIS 10240 at *44-47 (D. Nev. January 28, 2014) (written complaints, transcripts and recordings by employees and consumers admissible under FRE 807); *FTC v. Instant Response Systems*, 2015 U.S. Dist. LEXIS 49060 at *13-14 (E.D.N.Y. April 14, 2015) (elderly consumers’ caretakers’ declarations and complaints to BBBs satisfied Rule 807 and were admitted in evidence); *FTC v. Ewing*, No. 2:07-cv-479, 2014 WL 5489210, at *2–3 (D. Nev. Oct. 29, 2014) (granting FTC motion *in limine* to admit 162 consumer complaints and three consumer declarations under FRE 807); *FTC v. Direct Benefits Group*, No. 6:11-cv-1186, 2012 U.S. Dist. LEXIS 162696 at *5-6 (November 14, 2012) (same); *FTC v. Magazine Solutions, LLC*, No. 7-692, 2009 U.S. Dist. LEXIS 20629 at *1-2 (W.D. Pa. Mar. 16, 2009) (same), *aff’d* 432 Fed. Appx. 155 (3d Cir. 2011); *FTC v. Cyberspace.com, LLC*, No. CV-00-01806, 2002 U.S. Dist. LEXIS 25565, at *13, n.5 (W.D. Wash. July 10, 2002) (consumer e-mails and complaint letter admissible), *aff’d* 453 F.3d 1196 (9th Cir. 2006); *see also United States v. Murillo*, 288 F.3d 1126, 1138 (9th Cir. 2002) (when statement is made by a person with “no motive or incentive to lie,” this weighs in favor of finding it trustworthy); *Barker v. Morris*, 761 F.2d 1400, 1402 (9th Cir. 1985) (independent corroboration of a statement by others is a sign of reliability or trustworthiness); *Flow Control Industries, Inc. v. AMHI, Inc.*, 278 F. Supp. 2d 1193, 1197-98 (W.D. Wash. 2003) (communications found trustworthy where they were made independently by unrelated consumers who had similar experience and “no identifiable motive to lie”).

Response to Conclusion No. 79:

The Proposed Conclusion is incomplete and misleading. Whatever the general relevance of consumer complaints submitted to the FTC, Intuit has introduced evidence that several complaints in this case are unreliable or otherwise irrelevant because they do not relate to the deception alleged here. PFF ¶¶634-636. Relatedly, Complaint Counsel failed to take some of the most basic steps—such as confirming complainants’ identity, tax history, and/or use of TurboTax—to verify the complaints’ reliability. PFF ¶633. And even if some of the complaints Complaint Counsel invoked are admissible, they still are entitled to little weight given both their small number, PFF ¶¶637-647, and the lack of any real diligence performed by Complaint Counsel’s investigator.

80. Drafts of advertising materials are relevant, *see In re Natural Organics*, 2001 FTC LEXIS 31, *3 (March 15, 2001), and may be admitted at trial without establishing whether they were disseminated, *In re Rentacolor, Inc.*, 1984 FTC LEXIS 66, *26 (April 16, 1984).

Response to Conclusion No. 80:

The Proposed Conclusion is incomplete and misleading. Complaint Counsel does not identify how draft ads might be relevant here. And because draft ads, by definition, have not been disseminated, they cannot be evidence of what claims were conveyed to consumers, whether claims conveyed to consumers were deceptive, or whether any claims conveyed were material.

81. This Court has consistently relied on *Daubert* to assess the admissibility of expert testimony. *See Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 588 (1993); *see also In re LabMD, Inc.*, 2014 FTC LEXIS 115, *3 (May 5, 2014); *In re McWane, Inc.*, 2012 FTC LEXIS 142, at *8 (Aug. 16, 2012).

Response to Conclusion No. 81:

Intuit has no specific response.

82. Under *Daubert*, “courts consider whether the expert is qualified in the relevant field and examine the methodology the expert used in reaching the conclusions at issue.” *McWane*, 2012 FTC LEXIS at *8.

Response to Conclusion No. 82:

Intuit has no specific response.

83. [T]he court’s role as a ‘gatekeeper,’ pursuant to *Daubert*, is to prevent expert testimony from unduly confusing or misleading a jury, which purpose has little application in a bench trial.” *LabMD*, 2014 FTC LEXIS 115, at *4; *see also In re Daniel Chapter One*, 2009 FTC LEXIS 85, at *21-22 (Apr. 20, 2009) (quoting *Clark v. Richman*, 339 F. Supp. 2d 631, 648 (M.D. Pa. 2004) (“[a]s this case will be a bench trial, the court’s ‘role as a gatekeeper pursuant to *Daubert* is arguably less essential.”)); *Albarado v. Chouest Offshore, LLC*, No. 02-3504, 2003 U.S. Dist. LEXIS 16481, at *2-3 (E.D. La. Sep. 5, 2003) (“Given that this case has been converted into a bench trial, and thus that the objectives of *Daubert* ... are no longer implicated, the Court finds that defendant’s motion should be denied at this time. Following the introduction of the alleged expert

testimony at trial, the Court will either exclude it at that point, or give it whatever weight it deserves.”)).

Response to Conclusion No. 83:

The Proposed Conclusion is incomplete and misleading. “Rule 702,” including the requirement “to conduct [an] ‘assessment’ of an expert and the proposed testimony before admitted the testimony,” “applies whether the trier of fact is a judge or a jury.” *UGI Sunbury LLC v. A Permanent Easement for 1.7575 Acres*, 949 F.3d 825, 832-833 (3d Cir. 2020). And even if an expert’s testimony is admissible, “lingering questions of reliability and objectivity” are bases for affording that testimony little weight. *In re Bair Hugger Force Air Warming Devices Products Liability Litigation*, 9 F.4th 768, 783 (8th Cir. 2021).

84. Excluding expert testimony is rare. *See, e.g., PBM Prods., LLC v. Mead Johnson & Co.*, 639 F.3d 111, 123 (4th Cir. 2011).

Response to Conclusion No. 84:

Intuit has no specific response except to note that even if expert testimony is not excluded, “lingering questions of reliability and objectivity” are bases for affording that testimony little weight. *In re Bair Hugger*, 9 F.4th at 783.

85. A Court need not require methodological perfection before it will rely on a copy test or other type of consumer survey but looks to whether such evidence is reasonably reliable and probative. *See In re Bristol-Myers Co.*, 85 F.T.C. 688, 743-44 (1975).

Response to Conclusion No. 85:

Intuit has no specific response except to note that none of Complaint Counsel’s witnesses conducted copy testing, and the only survey evidence conducted by any of Complaint Counsel’s witnesses was the deeply flawed survey conducted by Professor Nathan Novemsky’s that is entitled to no weight, PCL ¶¶80-92; PFF ¶¶528-622.

86. “Flaws in the methodology may affect the weight that is given to the results of the copy test or other consumer survey.” *POM Wonderful*, 2012 FTC LEXIS 106, at *486–87.

Response to Conclusion No. 86:

Intuit has no specific response except to note that the only survey evidence conducted by any of Complaint Counsel’s witnesses, Professor Nathan Novemsky’s perception survey, is so riddled with flaws that it is entitled to no weight, PCL ¶¶80-92; PFF ¶¶528-622.

87. Any “perceived flaws in an expert’s testimony ... should be ... tested in the crucible of the adversarial system, not [serve] as the basis for truncating that process.” *McWane*, 2012 FTC LEXIS 142, at *10-11 (cleaned up).

Response to Conclusion No. 87:

The Proposed Conclusion is irrelevant because none of Complaint Counsel’s proposed expert testimony was ruled inadmissible; all of that testimony *was* subject to the adversarial process. And both of Complaint Counsel’s expert witnesses failed the test of the adversarial system, so none of that testimony is entitled to any weight. *See* PCL ¶¶80-92; PFF ¶¶528-622 (Professor Novemsky’s testimony); PFF ¶¶929-931 (Erez Yoeli’s testimony); *see also In re Bair Hugger*, 9 F.4th at 783 (8th Cir. 2021) (“lingering questions of reliability and objectivity” are bases for affording that testimony little weight.”).

Dated: June 20, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 20, 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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