

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

COMMISSIONERS: **Lina M. Khan, Chair**
 Rebecca Kelly Slaughter
 Alvaro M. Bedoya

In the Matter of:

Intuit Inc., a corporation.

Docket No. 9408

**RESPONDENT INTUIT INC.'S APPLICATION FOR A STAY PENDING REVIEW
BY THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

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January 30, 2024

GLOSSARY OF ABBREVIATIONS

Abbreviation	Meaning
ALJ	Administrative Law Judge
ID	Initial Decision
Op.	Opinion of the Commission
RAB	Respondent's Appeal Brief
RARB	Respondent's Appeal Reply Brief
RPF	Respondent's Proposed Findings of Fact
TY	Tax Year

INTRODUCTION

The Commission upheld the ALJ’s ruling and largely adopted his proposed cease-and-desist order. Intuit now moves for a stay pending Intuit’s appeal. A stay is warranted: First, Intuit’s appeal will likely succeed because (1) this proceeding was unconstitutional (including because it was tainted by bias), (2) the deception finding is fatally flawed, and (3) the cease-and-desist order is overbroad and unsupported. In fact, Fifth Circuit precedent holding analogous SEC proceedings unconstitutional by itself demonstrates that Intuit’s appeal will likely succeed. Second, Intuit faces irreparable harm, including constitutional, reputational, and competitive harms, absent a stay. Third, the public interest supports a stay, as the Commission’s order will likely harm consumers, and unlawful agency action is against the public interest.

BACKGROUND

A. Free TurboTax Products And Advertising

Under the brand “TurboTax,” Intuit offers free tax-preparation products to consumers with “simple tax returns.” RAB.2. “Simple tax returns” is a government-originated, industry-standard term meaning returns filed on the simplest IRS form, which today is Form 1040 without attached schedules. RAB.3. Consumers without simple returns cannot pay to use Free Edition or any other free TurboTax product. *Id.*

The TurboTax ads challenged here told consumers the actual cost to use Free Edition: \$0.00. RAB.3. The ads also disclosed who could use the product, i.e., those with “simple tax returns only.” *Id.* And the ads invited consumers to visit, or linked directly to, the TurboTax website (TurboTax.com) to “see if they qualify” or “see details” about the offer. *Id.* The website (and the mobile app)—one of which *must* be visited to use any TurboTax product, RAB.37—have at all relevant times included detailed disclosures regarding qualifications for free TurboTax offers. RAB.7.

B. Attorneys General Consent Order

In 2022, Intuit and the attorneys general of all 50 states and Washington, DC, agreed to a judicially enforceable consent order regarding Intuit’s free-product advertising. RAB.8. That order prohibits Intuit from running both the so-called “Free, Free, Free” ads at the center of this case, and substantially similar ads. RAB.9. It also requires that TurboTax free-product advertising clearly and conspicuously disclose that eligibility requirements apply, along with details on those requirements. *Id.* And it bars Intuit from misrepresenting any material fact. *Id.* Intuit has complied with the order since it became effective, and will continue complying. *Id.* Copy testing confirms that Intuit ads complying with the consent order are not deceptive. RAB.40-41.

C. Procedural History

The Commission issued a complaint in March 2022, alleging that ads for free TurboTax products were deceptive. The Commission simultaneously filed a complaint and preliminary-injunction motion in federal court. That motion was denied, and the administrative proceeding was removed from adjudication, 16 C.F.R. §3.26(c). Shortly after a preliminary injunction was denied, Intuit executed the AG consent order.

In August 2022, the Commission returned the matter to adjudication without explanation. Complaint Counsel promptly moved for summary decision, which the Commission denied—but only after placing a firm thumb on the scale guiding the ALJ to its preferred outcome.

After a hearing, the ALJ issued an initial decision and proposed order in Complaint Counsel’s favor. Intuit appealed, but the Commission affirmed and issued a cease-and-desist order. Intuit has petitioned the Fifth Circuit for review.

LEGAL STANDARD

In assessing whether to stay a cease-and-desist-order under 16 C.F.R. §3.56(b), the Commission analyzes: (1) the applicant’s likelihood of success on appeal, (2) whether the applicant will suffer irreparable harm absent a stay, (3) the injury to other parties a stay would cause, and (4) whether the stay is in the public interest. *ECM Biofilms*, 160 F.T.C. 1382, 1382 (2015).

ARGUMENT

I. INTUIT’S APPEAL WILL LIKELY SUCCEED

The first stay factor is satisfied. Indeed, binding Fifth Circuit precedent establishing that the FTC proceeding was unconstitutional shows that Intuit’s success is not just likely but essentially certain. And on Intuit’s other arguments, even if the Commission does not “harbor doubt about” the soundness of its decision and order, the “difficult legal question[s]” presented “establish a substantial showing of a likelihood of success on the merits.” *North Carolina Board of Dental Examiners* (“NCBDE”), 2012 WL 588756, at *2 (F.T.C. Feb. 10, 2012).

A. Under Fifth Circuit Precedent, This Proceeding Is Unconstitutional

Intuit’s earlier briefing explained how under *Jarkesy v. SEC*, 34 F.4th 446 (5th Cir. 2022) (subsequent history omitted), this proceeding was unconstitutional because the ALJ was improperly insulated from presidential removal. RAB.49. The primary rejoinder in the Commission’s order was that *Jarkesy* is wrong. Op.78. That is unavailing: *Jarkesy* is binding precedent in the Fifth Circuit, and thus will have to be followed both by the motions panel that decides Intuit’s stay request (should the Commission deny a stay) and the merits panel. *Jarkesy*

thus demonstrates the necessary “substantial showing of a likelihood of success,” *NCBDE*, 2012 WL 588756, at *2.*

B. Additional Constitutional Defects Tainted The Proceeding

Other constitutional infirmities with this proceeding confirm Intuit will likely succeed on appeal.

In violation of the Due Process Clause, the Commission’s proceeding presented not just “an unconstitutional potential for bias” against Intuit, *Williams v. Pennsylvania*, 579 U.S. 1, 8 (2016), but firm evidence of actual bias. The commissioners “serve[d] as both accuser and adjudicator,” *id.*, overseeing the investigation into the challenged conduct, voting to issue the complaint against Intuit, and then deciding the merits of the complaint’s accusations. That combination of functions posed an unconstitutional risk of unfairness, *id.* at 4, 8, and manifested itself in further “evidence of ‘actual bias,’” *Illumina*, 88 F.4th at 1047. That evidence includes the FTC’s unblemished record of winning before itself, the Commission returning this matter to adjudication without addressing the factors it previously enumerated as relevant to such a decision, the Commission pre-deciding critical aspects of this case (based on a one-sided record) in its summary-decision order, and the extreme language in the Commission’s ultimate opinion that was not just unsupported by the record, but in fact directly contradicted by it. RAB.47.

Further unconstitutional bias came from Chair Khan. Her statements outside the administrative process—including her agreement in 2023 congressional testimony that Intuit was an “evil actor” that was “trick[ing] and trap[ping] [consumers] into paying,” and that she “couldn’t agree more” that Intuit’s purported misconduct “really hurts people,” Respondent

* While *Illumina, Inc. v. FTC*, 88 F.4th 1046 (5th Cir. 2023), held that FTC commissioners’ removal protections were constitutional, *see id.* at 1047, it did not address the constitutionality of FTC ALJs’ tenure protections.

Intuit Inc.’s Motion To Disqualify (Aug. 7, 2023)—created at least an appearance of bias that necessitated her disqualification, *see Fast Food Workers Committee v. NLRB*, 31 F.4th 807, 815 (D.C. Cir. 2022). By rejecting this argument with no further explanation than it had previously offered, Op.74, the Commission compounded its erroneous denial of Intuit’s motion to disqualify the Chair, whose participation tainted the entire administrative proceeding. It is therefore unsurprising that the tone of the Commission’s final opinion often mirrored the tenor of the remarks that Chair Khan endorsed in her congressional testimony.

Finally, these proceedings violated Article III, under which “Congress may not ‘withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty,’” *Stern v. Marshall*, 564 U.S. 462, 484 (2011). Article III thus “reserve[s] to Article III courts” all “claims ... [which] involve ‘private rights.’” *Coit Independence Joint Venture v. Federal Savings & Loan Insurance Corp.*, 489 U.S. 561, 578-579 (1989). Intuit’s ability to advertise is “integral” to “liberty,” *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 522 (1996) (Thomas, J., concurring), and hence a “core private right[]” that must be adjudicated in federal court, *Axon Enterprise, Inc. v. FTC*, 598 U.S. 175, 197 (2023) (Thomas, J., concurring). As such, “responsibility for deciding [deceptive-advertising claims] rests with Article III judges in Article III courts.” *Stern*, 564 U.S. at 484.

C. The Commission’s Deception Holding Is Fatally Flawed

Intuit’s appeal is independently likely to succeed because the Commission’s holding that the challenged ads were deceptive is contrary to law. No prior case deems it deceptive to tell consumers a product’s true price. That is what the ads did: truthfully stated that a free product was free while disclosing the free offer’s qualifications. In nevertheless holding the ads deceptive, the Commission erred in four ways.

First, the Commission’s ruling assumes that free-product advertisements trigger a “particularly strong” legal standard, requiring disclosure in the ad itself of precise terms associated with a free offer. Op.45. That has no basis in law and indeed conflicts with FTC guidance. RAB.33-35 (quoting FTC, *.com Disclosures* at 10, A-8 (Mar. 2013)); RARB.2-3.

Second, the Commission ignored some challenged ads’ disclosures entirely, and analyzed other ads’ components piecemeal. In fact, the Commission *admits* that it “excerpted selected portions” of the ads (specifically their “most problematic components”) and considered “other elements of the ad[s]” only “after” assessing those “most problematic components.” Op.38 n.17. This violates both case law—which forbids such “disputatious dissection,” *S.C. Johnson & Son, Inc. v. Clorox Co.*, 241 F.3d 232, 238 (2d Cir. 2001)—and the Commission’s own policy. *See* RAB.35-36; RARB.3-4.

Third, the Commission failed to analyze the challenged ads “from the perspective of a consumer acting reasonably in the circumstances,” *FTC Policy Statement on Deception*, 103 F.T.C. 174, 175 (1983). In particular, the Commission disregarded (1) its own guidance stating that the “public understands” that free offers are typically qualified, 16 C.F.R. §251.1(b)(1); (2) the fact that qualified free offers like Intuit’s have been “an entrenched part of the [online tax-prep] market” for over two decades, *United States v. H&R Block, Inc.*, 833 F.Supp.2d 36, 46-48 (D.D.C. 2011); and (3) the fact that “reasonable consumer[s]” are deemed as a matter of law to understand terms or concepts that are “commonplace in the [relevant] market,” *Ebner v. Fresh, Inc.*, 838 F.3d 958, 965 (9th Cir. 2016)—such as, in this context, “simple tax returns.” Properly considered, the evidence established that *reasonable* consumers were not likely to jump incorrectly to the conclusion that TurboTax was free for them. *See* RAB.17-21. The Commission responded by pointing (Op.39) to a copy test in which participants said they

assumed TurboTax was free for them after viewing one of the hundreds of challenged ads. But TurboTax likely *was* free for nearly all of those respondents. *See* RPF¶¶690, 699. The fact that people *correctly* understood from Intuit’s ads that TurboTax was free for them is obviously not evidence that the ads were deceptive.

Fourth, the Commission relied on the inapplicable “deceptive-door-opener” theory to disregard the detailed disclosures provided prominently and repeatedly on the TurboTax website (to which, as noted, the challenged ads either directed or linked consumers). *See* Op.47-50. The Commission’s application of that theory is illogical and contrary to precedent. *See* RAB.37-40; RARB.5-7.

D. The Commission’s Order Cannot Stand

Even if any challenged ad were deceptive, the cease-and-desist order would still be unjustified for several reasons. To start, there is no “cognizable danger of recurrent violation.” *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953). The only record evidence concerning Intuit’s *current* ads shows those ads are *not* deceptive. RAB.40-41. And the judicially enforceable consent order with 51 attorneys general guarantees that future ads will not be deceptive either. RAB.42-43. Additionally, the Commission justified a cease-and-desist order by deeming Intuit’s conduct “egregious,” Op.81, an untenable characterization since the ALJ credited “the sincerity of [those] witnesses testifying to Intuit’s commitment not to deceive its consumers—including because of Intuit’s own business incentives.” ID.221. Finally, the Commission’s order unconstitutionally compels speech, RAB.46, and inappropriately encompasses products beyond TurboTax, RAB.45-46. Those errors establish a likelihood that the Fifth Circuit will (at a minimum) vacate the order.

II. INTUIT FACES IRREPARABLE HARM WITHOUT A STAY

Without a stay, the cease-and-desist order will irreparably harm Intuit.

First, the order flows from an adjudication riddled with constitutional defects. *Supra* Section I.A-B. Being subjected to such an order is irreparable harm. *See Valley v. Rapides Parish School Board*, 118 F.3d 1047, 1056 (5th Cir. 1997).

Second, the order subjects Intuit to ongoing burdensome oversight by an unconstitutionally structured and biased agency. Soukas Decl. ¶10. This “harm [of] ‘being subjected’ to ‘unconstitutional agency authority’ ... is ‘a here-and-now injury’” that “is impossible to remedy” after the fact. *Axon*, 598 U.S. at 191.

Third, the cease-and-desist order will inflict reputational and competitive harms on Intuit. Intuit has endeavored for years to build positive long-term relationships with consumers, founded on trust. Soukas Decl. ¶20. The cease-and-desist order directly undermines that reputation and consumer goodwill, baselessly tarring Intuit as a company that misleads consumers. *Id.* ¶¶21-22. Additionally, only Intuit—i.e., none of its competitors—will be subject to the order’s mandate to use confusing disclosures, a substantial competitive disadvantage. *Id.* ¶¶8, 23-25. These harms are irreparable. *See Paulson Geophysical Services, Inc. v. Sigmar*, 529 F.3d 303, 313 (5th Cir. 2008) (goodwill); *Burgess v. FDIC*, 871 F.3d 297, 304 (5th Cir. 2017) (reputation); *Schokbeton Industries, Inc. v. Schokbeton Products Corp.*, 466 F.2d 171, 177 (5th Cir. 1972) (competitive disadvantage).

Finally, the order’s compelled speech inflicts an additional irreparable injury, because the loss of First Amendment freedoms “constitute[s] per se irreparable harm,” *Franciscan Alliance, Inc. v. Becerra*, 47 F.4th 368, 380 (5th Cir. 2022).

The harms to Intuit are exacerbated by the timing. The order is scheduled to take effect on March 23, approximately twelve weeks into the tax season and just three weeks before the

tax-filing deadline. Soukas Decl. ¶27. It would be extremely disruptive to Intuit's business to require changes so late in the tax season. *Id.* ¶¶26-27.

III. THE REMAINING STAY FACTORS FAVOR INTUIT

Because the government is the opposing party, the final two stay factors merge. *NCBDE*, 2012 WL 588756, at *3.

The “public interest ... does not weigh against a stay” when, like here, “the constitutionality of the structure of the fact-finding procedure on which [the agency] relies lies at the heart of th[e stay] motion,” *Burgess*, 871 F.3d at 304. Consistent with this rule, the record here shows that a stay would benefit the public. Consumers face no risk of deception from a stay because the attorney general consent order already prohibits Intuit from running the challenged ads, and Intuit's current ads are not deceptive. *Supra* pp.2, 7. Additionally, the cease-and-desist order will have little if any impact on consumers given that the tax season will be almost over by the time it takes effect. Soukas Decl. ¶27. Absent a stay, however, that order: (1) would require Intuit to include confusing disclosures in its ads, likely leading to many consumers mistakenly believing they do not qualify for a free offer and failing to take advantage of that free tax filing, *id.* ¶¶11-19; and (2) could make it difficult for Intuit to advertise its free products in certain mediums, which would reduce awareness of its free offerings, again preventing taxpayers who qualify to file for free from doing so, *id.* ¶7. Preventing this consumer harm is in the public interest.

CONCLUSION

The Commission should stay its order pending appeal.

January 30, 2024

Respectfully submitted,

By: /s/ David Z. Gringer

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

COMMISSIONERS: **Lina M. Khan, Chair**
 Rebecca Kelly Slaughter
 Alvaro M. Bedoya

In the Matter of:

Intuit Inc., a corporation.

Docket No. 9408

**DECLARATION OF NICK SOUKAS IN SUPPORT OF RESPONDENT INTUIT INC.’S
APPLICATION FOR A STAY PENDING REVIEW BY THE UNITED STATES COURT
OF APPEALS FOR THE FIFTH CIRCUIT**

I, Nick Soukas, declare as follows:

1. I submit this declaration in support of Intuit’s application for a stay, pending judicial review, of the Federal Trade Commission’s cease-and-desist order in this case (the “Order”).

2. Since June 2023, I have served as Senior Vice President of Marketing at Intuit. From 2020 to 2023, I served as Vice President and Growth Leader for Business Management and Strategy at Intuit.

3. In my role as Senior Vice President of Marketing at Intuit, I have both deep familiarity and substantial experience with Intuit’s advertising for its TurboTax-branded tax-preparation software.

4. Based on this experience and familiarity, and on my review of Intuit’s relevant documents and data, I have personal knowledge of the facts set forth below.

I. ACTIONS REQUIRED TO COMPLY WITH THE FTC'S ORDER

5. If the Order (which I have reviewed) were to take effect, Intuit would be required to include certain information in its advertisements. Intuit would also need to satisfy numerous compliance and reporting requirements. The provisions of the Order discussed below impose just some of the requirements Intuit would face if the Order takes effect.

A. Provision I.B

6. Provision I.B.1 of the Order requires that Intuit disclose “the percentage of U.S. taxpayers (or other U.S. consumers, where the good or service is not offered exclusively to taxpayers), expressed in Arabic numerals, that qualify for the product.” Alternatively, if a free product is not available for a majority of U.S. taxpayers (or consumers), Intuit must disclose that “a majority of U.S. taxpayers (or other U.S. consumers) do not qualify.” Intuit believes that its free tax-preparation products *are* free for a majority of the relevant population—those who file their taxes online. This Provision requires Intuit to say something it would not say but for the Order, because Intuit does not believe the compelled language to be helpful or relevant for consumers to understand the qualifications for its free products.

7. Based on Provision I.B of the Order, in tandem with the definition of “Clearly and Conspicuously,” the Order is expected to make it difficult for Intuit to advertise its free online tax-preparation products using certain formats, including the increasingly popular short-video format (i.e., video ads lasting eight seconds or shorter). Short-video ads lasting eight seconds or less are primarily displayed on media and social-media platforms (like YouTube, Instagram, X/Twitter, Snapchat, and TikTok) and target younger audiences, who are more likely to qualify for the free products being advertised compared to the overall U.S. population and the target audience for much of the free advertising. The Order’s mandate that all advertisements with visual and audio components include both visual and audible disclosures (even where a free

claim is presented in only one form) is expected to impede Intuit's ability to run ads on these media and social-media platforms where verbal disclosures are difficult to provide or make it harder for Intuit's ads to be effective in those spaces.

8. For years, Intuit has described its Free Edition product as being for "simple tax returns only." Intuit believes that this is the clearest way to describe the qualifications for Free Edition. Intuit's competitors still advertise their free offerings as being for simple returns (even though the Order prohibiting Intuit from doing so is now public), and not being able to do so would thus place Intuit at a competitive disadvantage. To comply with Provision I.B.2, Intuit would seemingly have to include different language describing the qualifications for free TurboTax offers, such as language identifying the specific tax form or forms covered by the offer.

9. If instead the Order never takes effect, Intuit would be able to use the phrase "simple tax returns only" (or similar phrases) that it believes reasonable consumers are familiar with to describe the qualifications for free TurboTax offers.

B. Provisions III-VI

10. Provisions III-VI of the Order impose various compliance and monitoring requirements on Intuit. If the Order is not stayed pending appeal, Intuit will need to undertake the substantial effort required to ensure compliance with those provisions by the Order's effective date and for 20 years thereafter.

II. THE ORDER WILL HARM CONSUMERS

11. The ads the FTC challenged in this case communicated that free TurboTax offers were free for consumers who qualified, by identifying the specific offering being advertised, stating that the offer was for "simple tax returns only," and inviting consumers to "see if you qualify" or "see details" at TurboTax.com.

12. Based on my experience, I believe the disclosures the Order appears to mandate would harm consumers by confusing them about who qualifies for free TurboTax offers. That confusion would result in more consumers believing incorrectly that they do not qualify for free TurboTax offers and, thus, fewer consumers filing their taxes for free.

13. In my professional judgment, the disclosures the Order appears to require would likely cause information overload and confusion on the part of consumers. As a result, it is likely that fewer consumers who in fact qualify to use Free Edition would use that free product to file their taxes.

14. The Order's mandate that Intuit replace for 20 years the phrase "simple tax returns only" with qualification language identifying particular IRS forms would also likely harm consumers by causing confusion. Most consumers are not familiar with IRS tax forms and thus are less likely to understand based on references to such forms whether they qualify for a free TurboTax offer.

15. By contrast, I believe based on my experience in the tax-preparation industry that consumers understand the phrase "simple tax returns."

16. That phrase originated with the IRS and has long been used throughout the tax-preparation industry. Thus, consumers are familiar with the phrase and have come to understand what it means.

17. Intuit's research confirms that consumers understand "simple tax returns." See RX304.

18. Provision I.B.1 of the Order likewise would harm consumers. The mandated disclosure provides no information about who *does* qualify. Thus, many consumers may read the language and conclude they do not qualify when, in fact, they do.

19. Consumer confusion would be worsened further if the Order were to take effect but then be vacated after judicial review. In that scenario, consumers would receive mixed messages, in short succession, about the qualifications for free TurboTax offers. That would likely result in fewer consumers who qualify to use a free TurboTax offer understanding that they qualify for that offer, resulting in fewer consumers filing their taxes for free.

III. THE ORDER THREATENS INTUIT WITH REPUTATIONAL HARM AND A LOSS OF CONSUMER GOODWILL

20. Building a long-term relationship with consumers founded on trust is a critical component of Intuit's business strategy. TurboTax relies on a long-term, retention-based growth strategy to attract and retain consumers year over year. Accordingly, Intuit has worked for years to build a positive reputation and long-term relationship with consumers, based on the high-quality nature of its products, the clarity and simplicity with which Intuit advertises those products, and the company's commitment to its core value, "integrity without compromise."

21. The Order would undermine that reputation and associated consumer goodwill by (as discussed) requiring that Intuit use disclosures in its advertisements that are less clear than those it used previously. In the near term, those mandated disclosures are more likely to leave consumers with an unfavorable view of Intuit. In the long term, TurboTax could be harmed by consumers believing they likely do not qualify for a free offer when they do, and otherwise providing consumers with mixed messages about free TurboTax offers. That reputational harm would have a lasting impact on Intuit's ability to effectively advertise Free Edition and other free TurboTax offers.

22. Finally, the Order would injure Intuit's reputation, along with the consumer goodwill that reputation brings, by labeling Intuit a company that misled consumers about whether they are likely to qualify for a free offer. While it has taken Intuit years to develop its

reputation as a trustworthy and values-driven company, and to build lasting relationships with consumers founded on trust, the Order could undo much of that trust in a short period. That is particularly the case in light of the untrue and misleading language the Commission used in its decision. Intuit never knowingly acted to deceive anyone here. If the Commission's decision and order is not stayed, it will be difficult to regain consumer trust, and even if it could be regained, doing so would likely take years.

IV. HARM TO INTUIT FROM COMPLIANCE WITH THE ORDER

23. If the Order were to take effect, it would cause serious harm to Intuit's competitive standing in the marketplace for online tax-preparation services.

24. For example, Intuit would be competitively disadvantaged by the fact that its competitors would not be subject to the same restrictions, meaning that only Intuit (but none of its competitors) would be unable to use the phrase "simple tax returns" in its free advertising. Intuit is also required to include more information in its disclosures than its competitors, undermining the effectiveness of that advertising and potentially leading many consumers to believe incorrectly that they are unlikely to qualify for TurboTax's free products.

25. As another example, the Order would require lengthier disclosures in paid-search advertising where the available space is limited by the online-search platforms (e.g., Google and Bing). The mandated disclosures will leave less space for Intuit to communicate information about TurboTax products compared to competitors' paid-search ads. The additional disclosure language also could potentially negatively impact the score that the TurboTax ads receive from the online-search platforms, which could result in the ads being shown less prominently compared to competitors' ads.

26. Moreover, should the FTC determine that Intuit's Tax Year 2023 ads do not comply with the Order, Intuit might be unable to modify or replace its advertisements this tax

year, given that the Order was issued so late in the tax season and would become effective just a few weeks before the April 15 tax-filing deadline. Intuit significantly scales back its advertising for its online-tax-preparation products one to two weeks before that deadline, and it would be exceedingly difficult to modify or replace the prohibited ads during the one- to two-week period between the Order's March 23 effective date and when Intuit stops advertising between April 1 and April 8.

27. Lastly (and relatedly), the harms to Intuit from complying with the Order are more damaging and disruptive to Intuit's business given the Order's timing. The core of tax season runs from the beginning of the calendar year through the tax-filing deadline on April 15. The Order is scheduled to take effect March 23, approximately twelve weeks into the busy tax season and less than a month before the tax-filing deadline. Given that Intuit has been working to develop its marketing and business strategy for Tax Year 2023 since at least June 2023, it would be very difficult and costly to fundamentally alter that advertising and strategy so late in the season if the FTC took the position that Intuit were violating the Order. And the Order's various requirements would be extra burdensome at this time because the end of tax season is the busiest time of the year for Intuit and its employees. Limited company resources would have to be reallocated from serving the taxpayers filing their returns near the end of the tax season—including by providing technical support for TurboTax products, staffing TurboTax's support and customer-service channels, and otherwise ensuring that millions of consumers can file their tax returns (millions of which will be filed for free) before the IRS deadline while providing the best experience possible—to complying with the Order. At the same time, the changes the Order imposes would have relatively little impact on consumers because Intuit typically stops

advertising one to two weeks before the tax-filing deadline. Thus, any changes to Intuit’s advertising would be observed for only about two weeks.

I declare under penalty of perjury that the foregoing is true.

Executed on this 30th day of January, 2024 in San Diego.

By: *Nick Soukas*
Nick Soukas (Jan 30, 2024 06:42 PST)
Nick Soukas

**UNITED STATES OF AMERICA
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COMMISSIONERS: **Lina M. Khan, Chair**
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In the Matter of:

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PROPOSED ORDER

Upon consideration of Intuit’s Motion for a Stay Pending Review by the United States Court of Appeals for the Fifth Circuit:

IT IS HEREBY ORDERED, that the Motion is GRANTED. The effective date of the Order is stayed. This stay shall remain effective until the expiration of all deadlines for petitions for rehearing, rehearing en banc, or certiorari to the United States Supreme Court, or until final disposition of any appeal or such petitions.

By the Commission.

April J. Tabor
Secretary

SEAL:
ISSUED: _____, 2024

CERTIFICATE OF SERVICE

On January 30, 2024, I caused the foregoing document to be filed electronically using the FTC's E-Filing system, which will send notification of such filing to:

April Tabor
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The Honorable D. Michael Chappell
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Also on January 30, 2024, I caused the foregoing document to be served via email on:

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The Honorable D. Michael Chappell
Administrative Law Judge
600 Pennsylvania Avenue NW, Rm. H-110
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