

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

In the Matter of:

Intuit Inc., a corporation.

Docket No. 9408

RESPONDENT’S MOTION TO COMPEL PRODUCTION OF DOCUMENTS

Pursuant to Rule 3.38 of the Commission’s Rules of Practice, 16 C.F.R. §3.38, Respondent Intuit Inc. respectfully moves for an order compelling production of certain documents by a specific date, as well as an order compelling production of relevant materials that Complaint Counsel (“CC”) have refused to search for. Specifically, Intuit requests this Court compel production within two days from the date of the requested Order of (1) documents identified in Category J of CC’s Initial Disclosures and (2) documents and data underlying CC’s putative expert declarations. Intuit further requests this Court compel production by October 21, 2022 of (3) materials responsive to Respondent’s Requests for Production of Documents that CC have agreed to produce along with (4) a privilege log. Finally, Intuit requests an order compelling CC to specify the materials and custodians that they will search in response to Intuit’s discovery requests, to search communications reflecting information from nonparties and with Commissioners and their staff, and to search for responsive documents saved outside of CC’s investigative file. Counsel for Respondent has conferred in good faith with CC hoping to resolve these disputes, but CC have not compromised. *See* Statement Regarding Meet and Confers.

I. INTRODUCTION

For more than two decades, TurboTax has been the leader in online tax preparation. In the last decade, TurboTax has offered taxpayers a variety of options to prepare their taxes, including a free product, known as TurboTax Free Edition. TurboTax Free Edition is, as TurboTax discloses in its advertisements, completely free to everyone who qualifies. Currently, approximately 60 million tax returns qualify, and each year approximately 14 million tax returns are prepared for free using Free Edition. TurboTax's advertisements disclosed that "TurboTax Free Edition is for simple U.S. returns only" and invited consumers to "See if you qualify at turbotax.com" (or similar disclosure language). Nonetheless, CC have pursued this case claiming that it is deceptive to refer to a product as "free"—even if the product is actually free for tens of millions of people, and even with the appropriate disclosures—unless the product is free for *every person* under all circumstances. Tellingly, when presented with this same theory, a federal district court observed, in denying CC's motion for a preliminary injunction, that "nobody thinks" what CC argue reasonable consumers take away from the challenged ads. RX 73 at 17:3-5.

At issue is whether CC will be required to turn over discovery within a reasonable time and whether CC will provide basic relevant discovery. Intuit has from the outset of this proceeding asked CC for any evidence that either supports or refutes their assertions. Intuit's requests encompass, for example, communications with consumers and the data underlying the survey commissioned by CC, which has already been presented to a federal court. To date, however, CC have not provided the requested documents and will not even say when they will do so. Intuit requests an order compelling CC to produce certain documents sought (and readily accessible to CC) within two days of this Court's order, and for CC to produce the remaining

documents with an accompanying privilege log by October 21, 2022. Intuit further requests that CC search for and produce additional responsive documents in their possession.

II. BACKGROUND

On May 6, 2022, Intuit served its First Set of Requests for Production of Documents. That same day the matter was withdrawn from adjudication pursuant to Rule 3.26(c), and the case was stayed. More than three months later, the Commission returned this matter to adjudication and lifted the stay. Intuit immediately re-served its Requests for Production of Documents. Ex. A.

That same day, Intuit sent a letter to CC hoping to resolve outstanding discovery issues. Ex. B. In particular, Intuit reiterated its previous requests that CC provide Category J of CC's Initial Disclosures and the data underlying a March 2022 "TurboTax Perception Survey," which CC had relied upon in its Preliminary Injunction motion. Category J is described as "Correspondence with and documents shared by individuals during the course of the Commission's investigation, FTC File No. 1923119, including consumers sharing information about their experiences with Intuit." Ex. C.

After CC served their responses and objections to Intuit's Requests for Production, Ex. D, Intuit sent CC a letter on September 16, 2022 requesting that they provide (a) a description of how CC intend to search for responsive documents; (b) a list of the individuals and central repositories that CC intend to search for responsive documents; and (c) the timetable on which CC intend to produce documents. Ex. E. CC did not respond.

On September 26, 2022, CC provided its first and only production in response to Intuit's RFPs. That production was comprised largely of screenshots of the TurboTax website.

On September 27, 2022, the parties again conferred to discuss CC's discovery responses and Initial Disclosures. When pressed about when CC would be producing documents in

response to Intuit's requests, CC would not provide a date. When asked to identify the FTC employees whose files were being searched for responsive documents, CC identified categories of employees that would be included, but refused to say whether they were searching the files of key personnel, including Lois Greisman, who oversaw the investigation. CC further explained that they would not be searching internal communications among FTC employees. Woodman Decl. ¶9.

On September 28, 2022, Intuit asked CC to confirm that they would produce Category J of CC's Initial Disclosures and any documents related to Professor Novemsky's surveys by Wednesday, October 5, and that CC would substantially complete its production of documents responsive to Intuit's Requests for Production by Friday, October 14. CC not only disregarded Intuit's proposed dates, but they also refused to provide any date for substantial completion. Intuit also asked CC to provide a full list of the individuals whose documents they intend to search for responsive documents, and to confirm whether CC would search (1) communications and other materials sent to and from the Commissioners or the Commissioners offices; (2) communications and other materials sent between FTC counsel or other FTC legal staff that reflect conversations with third parties; and (3) communications and other materials that otherwise reflect information from external sources that are not known to Intuit. In response, CC again refused. Exhibit F.

On October 3, the parties yet again met and conferred regarding Intuit's discovery requests and CC's responses. CC confirmed that they would not search communications or other materials sent to and from the Commissioners or the Commissioners offices or communications reflecting information from third parties. Woodman Decl. ¶11. CC also stated that they would

not search documents beyond their investigative file relating to this proceeding. Woodman Decl. ¶11.

III. ARGUMENT

Intuit seeks to ensure that it will receive materials critical to this case by a date that allows for a fair proceeding in accordance with the Court's schedule. Under the Scheduling Order, "[t]he party responding to document requests must produce responsive documents on a rolling basis and will make a good-faith effort to produce them as expeditiously as possible." Apr. 27, 2022 Order, Provision 7. And under Rule 3.31(d), "[t]he Administrative Law Judge may ... make any other order which justice requires ... to prevent undue delay in the proceeding." Pursuant to that provision, the demands of this truncated proceeding, and Rule 3.38, this Court should compel CC to produce the documents sought by a date certain; to clarify the materials that are being searched; and to search additional documents relevant to this proceeding.

A. **Complaint Counsel Should Produce Requested Documents Within Two Days Of the Order And By October 21, 2022**

CC's refusal to commit to a date certain to produce documents identified in their Initial Disclosures and responsive to Intuit's Requests for Production is not a "good-faith effort" to produce documents "expeditiously." Accordingly, it threatens Intuit's ability to conduct meaningful discovery and prepare fully for the upcoming hearing. Part III proceedings leave the parties with only months to complete discovery and meet other prehearing deadlines. However, CC have only produced a single set of screenshots responsive to only three of Intuit's requests. Forty-eight days have passed since Intuit re-served its discovery requests, and twenty-seven days have elapsed since CC served their responses and objections. Yet when pressed for information about when additional documents will be produced, CC will not commit to a schedule.

CC have had access to the materials sought for many months or even years. By contrast, Intuit will have little time to review any documents produced before the deadline for issuing additional discovery requests. CC's delay in producing responsive discovery thus threatens to prejudice Intuit's ability to develop its case, as the materials sought may be steppingstones to further discovery. Indeed, the deadline for issuing discovery requests is less than two weeks away (October 14), and the close of discovery is just over six weeks later (December 2).

That prejudice is already manifest. Intuit has deposed a few of the ever-shifting consumers identified on CC's initial disclosures without having received the communications between those consumers and the FTC or any other documents provided by those consumers. In other words, CC have the documents and can decide whether to use them or not, leaving Intuit in the dark. CC's failure to provide documents related to those consumers inhibits Intuit's ability to fully question those individuals about their experiences, and threatens to impose additional burdens on the parties if those deponents need to be re-noticed after CC belatedly produces those documents.

CC's delays are especially egregious for the two categories of documents that Intuit has been seeking since CC served their initial disclosures in April 2022. These documents—consisting of Category J of CC's Initial Disclosures and documents related to the surveys the FTC sponsored—should be readily available to CC and easy to produce. There is no justification for CC's five-month delay. CC's failure to produce the survey documents is particularly serious because CC have already relied on the survey results in a dispositive motion, and there is no burden associated with CC producing the data relied upon as there are no possible privilege concerns. The only excuse that CC has offered is that they have other priorities more pressing than the production of these materials.

Intuit respectfully requests the Court compel CC to substantially complete producing documents in response to Intuit's Requests for Production and provide an accompanying privilege log by Friday, October 21, 2022. Intuit further requests that the Court compel CC to produce Category J of CC's Initial Disclosures and any documents related to Professor Novemsky's surveys within two days following the issuance of the Court's order.

B. Complaint Counsel Should Specify The Materials They Are Searching To Identify Responsive Documents And Be Required To Search Additional Documents

CC have also failed to respond to Intuit's requests to provide the names of the FTC employees whose documents CC intend to search for responsive materials. When asked to provide that information, CC identified only a few general categories of employees whose materials would be searched, not specific employees. CC further stated they would only provide that information if Intuit provided a similar list, even though the parties had not yet discussed Intuit's discovery responses—indeed, Intuit had not yet served its responses and objections, which were not due until October 3, 2022. In the course of the FTC's investigation, Intuit provided such a list, so fairness alone compels CC to do the same. CC have provided no explanation for why they are unable or unwilling to provide such a list beyond their mistaken belief that the rules "don't require it."

Moreover, CC have stated that they will limit their search to a single investigative file, and further exclude from that search internal communications among FTC employees, other than emails to and from testifying witnesses on CC's team, pursuant to 16 C.F.R. §3.31(c)(2). Intuit thus understands that CC is refusing to search (1) communications and other materials sent to and from the Commissioners or the Commissioners' offices; (2) communications and other materials sent between FTC counsel or other FTC legal staff that reflect conversations with third parties; and (3) communications and other materials that otherwise reflect information from

external sources that are not known to Intuit. Intuit also understands that CC will not search for responsive documents—regardless of whether they are required to be searched under Rule 3.31—simply because those documents were not saved to an investigative file. Intuit requests that CC be compelled to search those internal communications and materials, as well as documents beyond the investigative file related to this proceeding.

“Good cause” exists for CC to search these materials. 16 C.F.R. §3.31(c)(2). “Good cause” is satisfied where (1) the material is relevant, (2) the request is “reasonable in scope and stated with reasonable particularity,” and (3) the request seeks materials that are “not obtainable through other means.” *In re 1-800 Contacts, Inc.*, 2016 FTC LEXIS 233, at *8-9 (Dec. 20, 2016). Here, each of those elements is easily satisfied. *See* 74 Fed. Reg. 1804, 1812 (Jan. 13, 2009) (interim final rule with request for comment) (“In the rare event that material excluded by [3.31(c)(2)] is not duplicative, privileged or work product, it should not be difficult for respondent to satisfy a good cause standard[.]”).

First, communications with Commissioners and their staff may be relevant to Intuit’s affirmative defenses, including that (1) the Complaint is invalid because the Commission did not vote on the final Complaint and (2) prejudgment. Responsive communications capturing information provided by third parties but not otherwise available would likewise be relevant. Additionally, responsive documents stored outside of CC’s investigative file would plainly be relevant. As just one example, Request No. 7 sought “[a]ll DOCUMENTS relating to OR reflecting rules OR guides adopted, provided, OR administered by the FTC about how to ADVERTISEMENTS for ‘free’ merchandise or services.” Regardless of where those documents reside, they are central to the CC’s claim and Intuit’s defense. Second, Intuit’s requests are reasonable in scope and stated with particularity. Moreover, there is no basis for excluding

information obtained from nonparties from discovery simply because that information is captured in an email between FTC staff. Enforcing such a limitation would in essence allow CC to shield their entire investigatory file by simply sending information between each other. As courts have recognized in other contexts, agencies cannot withhold factual information contained in internal communications, even if the documents might otherwise be subject to the deliberative process privilege. *See Prop. of the People, Inc. v. Off. of Mgmt. & Budget*, 330 F. Supp. 3d 373, 382-83 (D.D.C. 2018). Third, the information sought is not captured elsewhere and thus is not obtainable through any other means. Indeed, inherent in the request to search and produce additional communications is the limitation that the information is otherwise unavailable. CC should therefore be required to search both internal communications and documents beyond CC's investigative file for responsive documents.

CONCLUSION

For the foregoing reasons, the Court should grant Intuit's Motion.

Dated: October 6, 2022

Respectfully submitted,

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

In the Matter of:

Intuit Inc., a corporation.

Docket No. 9408

**STATEMENT REGARDING MEET AND CONFERS PURSUANT TO
16 C.F.R. § 3.22(g) AND ADDITIONAL PROVISION 4 OF THE SCHEDULING ORDER**

Pursuant to Rule 3.22(g) of the Commission’s Rules of Practice, 16 C.F.R. §3.22(g), and Additional Provision No. 4 of the April 27, 2022 Scheduling Order, as adopted in the September 12, 2022 First Revised Scheduling Order, Respondent Intuit Inc. respectfully submits this Statement representing that Counsel for Respondent has conferred with Complaint Counsel in a good faith effort to resolve the issues raised by this motion and has been unable to reach such an agreement.

Counsel for Respondent conferred with Complaint Counsel by teleconference three times and sent five unanswered letters to discuss Complaint Counsel’s initial disclosures, discovery responses, and production deficiencies. First, on September 8, 2022 at 10 a.m. ET, David Gringer, Jonathan Paikin, Jennifer Milici, and Derek Woodman for Respondent conferred with Roberto Anguizola, Rebecca Plett, and James Evans for Complaint Counsel. Next, on September 27, 2022 at 2 p.m. ET, Derek Woodman and Phoebe Silos for Respondent conferred with Roberto Anguizola and Rebecca Plett for Complaint Counsel. Finally, on October 3, 2022, at 3 p.m. ET, Derek Woodman and Eleanor Davis for Respondent conferred with James Evans and Rebecca Plett for Complaint Counsel.

In each of these meetings and in response to Intuit’s repeated correspondence efforts, Complaint Counsel have refused to commit to a definitive production date, neglected to identify the individuals whose documents Complaint Counsel intends search for responsive documents, and confirmed that they would not search for communications and other materials sent to and from the Commissioners or the Commissioners offices; communications and other materials sent between FTC counsel or other FTC legal staff that reflect conversations with third parties; communications and other materials that otherwise reflect information from external sources that are not known to Intuit, or documents beyond CC’s investigative file related to this proceeding.

Therefore, Respondent respectfully moves this Court for an Order compelling production of documents and additional materials as set forth in Respondent’s accompanying motion.

Dated: October 6, 2022

Respectfully submitted,

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

In the Matter of:

Intuit Inc., a corporation.

Docket No. 9408

[PROPOSED] ORDER ON RESPONDENT’S MOTION TO COMPEL

Upon consideration of Respondent’s Motion to Compel Production of Documents:

IT IS HEREBY ORDERED that Respondent’s Motion is GRANTED.

IT IS FURTHER ORDERED that Complaint Counsel shall provide the documents identified in Category J of Complaint Counsel’s Initial Disclosures within two days from the date of this Order.

IT IS FURTHER ORDERED that Complaint Counsel shall provide documents and data related to Professor Nathan Novemsky’s surveys conducted on behalf of the Federal Trade Commission within two days from the date of this Order.

IT IS FURTHER ORDERED that Complaint Counsel shall provide documents responsive to Respondent’s First Set of Requests for the Production of Documents on a rolling basis, and substantially complete its document production on or before October 21, 2022.

IT IS FURTHER ORDERED that Complaint Counsel shall provide a privilege log in compliance with Rule 3.38A on or before October 21, 2022.

IT IS FURTHER ORDERED that Complaint Counsel shall identify in writing, within 2 days from the date of this Order, the custodians whose documents are being searched to respond to Respondent’s First Set of Requests for the Production of Documents.

IT IS FURTHER ORDERED that Complaint Counsel, when responding to Intuit’s First Set of Requests for Production, shall be required to search (1) communications and other materials sent to and from the Commissioners or the Commissioners offices; (2) communications and other materials sent between FTC counsel or other FTC legal staff that reflect conversations with third parties; and (3) communications and other materials that otherwise reflect information from external sources that are not known to Intuit.

PUBLIC

IT IS FURTHER ORDERED that Complaint Counsel, when responding to Intuit’s First Set of Requests for Production, shall be required to search for documents within the Bureau of Consumer Protection’s and Bureau of Economics’ possession beyond the investigative file related to this proceeding.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date: _____

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

In the Matter of:

Intuit Inc., a corporation.

Docket No. 9408

**DECLARATION OF DEREK WOODMAN IN SUPPORT OF
INTUIT INC.’S MOTION TO COMPEL PRODUCTION OF DOCUMENTS**

I, Derek Woodman, declare as follows:

1. I am a counsel at Wilmer Cutler Pickering Hale and Dorr LLP. I represent Respondent Intuit Inc. in the above-captioned proceeding.

2. I submit this declaration in support of Intuit’s Motion to Compel Production of Documents.

3. A true and correct copy of Intuit’s First Set of Requests for Production of Documents, served on Complaint Counsel on August 19, 2022, is attached hereto as Exhibit A.

4. A true and correct copy of a letter sent by David Gringer to Complaint Counsel on August 19, 2022, is attached hereto as Exhibit B.

5. A true and correct copy of Complaint Counsel’s Initial Disclosures, served on Intuit on April 21, 2022, is attached hereto as Exhibit C.

6. On September 8, 2022, Intuit met and conferred with Complaint Counsel regarding the proposed scheduling order in this matter and in an effort to resolve the outstanding discovery disputes. During the meeting, Complaint Counsel agreed to narrow the set of consumer complaints identified in their initial disclosures (one of several issues concerning Complaint Counsel’s Initial

Disclosures that Intuit had raised), but did not address Intuit's requests for Professor Novemsky's data or the documents from Category J of Complaint Counsel's Initial Disclosures.

7. A true and correct copy of Complaint Counsel's Responses and Objections to Intuit's First Set of Requests for Production of Documents, served on Intuit on September 9, 2022, is attached hereto as Exhibit D.

8. A true and correct copy of a letter sent by David Gringer to Complaint Counsel on September 16, 2022, is attached hereto as Exhibit E.

9. On September 27, 2022, Intuit met and conferred with Complaint Counsel to discuss Complaint Counsel's discovery responses and supplemental Initial Disclosures. When pressed about when Complaint Counsel would be producing documents in response to Intuit's requests, Complaint Counsel indicated they were working to produce documents but declined to provide a definitive date. When asked to identify the FTC employees whose files were being searched for responsive documents, CC identified categories of employees that would be included, but refused to say whether they were searching the files of key personnel. Complaint Counsel further explained that they would not be searching internal communications among FTC employees, pursuant to 16 C.F.R. § 3.31(c)(2).

10. A true and correct copy of email correspondence between Intuit and Complaint Counsel, with a final email dated September 30, 2022, is attached hereto as Exhibit F.

11. On October 3, 2022, Intuit met and conferred with Complaint Counsel regarding Intuit's discovery requests and Complaint Counsel's responses. Complaint Counsel confirmed that they would not search communications or other materials sent to and from the Commissioners or the Commissioners offices or communications reflecting information from third parties.

Complaint Counsel also confirmed that they would not search documents beyond their investigative file relating to this proceeding.

12. On April 21, 2022, a hearing was held before Hon. Charles Breyer in the Northern District of California on a motion for preliminary injunction that was filed by the FTC. A true and correct transcript of proceedings in *FTC v. Intuit Inc.*, No. 22-01973-CRB (N.D. Cal Apr. 21, 2022), is attached hereto as RX 73.

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

Executed on this 6th day of October, 2022, in Washington, D.C.

By: /s/ Derek Woodman

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Exhibit A

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

In the Matter of:

Intuit Inc., a corporation.

Docket No. 9408

**RESPONDENT INTUIT INC.’S FIRST SET OF REQUESTS FOR
PRODUCTION OF DOCUMENTS**

Pursuant to Rule 3.37 of the Commission’s Rules of Practice, 16 C.F.R. § 3.37, Respondent Intuit Inc., by and through its attorneys, requests that Complaint Counsel respond to these Requests for Production within 21 days of service of this request.

DEFINITIONS

1. The term “ADVERTISEMENT” refers to any written OR verbal statement OR depiction that promotes the sale OR use of a consumer good OR service, OR is designed to increase consumer interest in a brand, good, OR service, in ANY form of media, including but not limited to, television, radio, print, online display, online search, AND social media
2. The terms “AND” as well as “OR” shall be construed either disjunctively or conjunctively as necessary to bring within the scope of each request ANY responses that might otherwise be construed to be outside its scope, or in other words, to give each request its broadest possible meaning.
3. The term “ANY” means “any and all.”
4. The term “COMMUNICATION” means ANY transmission, exchange OR transfer of information (in the form of facts, ideas, inquiries, OR otherwise) by ANY means, including all written, electronic, telephonic, oral OR other inquiries, dialogues, discussions, conversations,

interviews, correspondence, consultations, negotiations, agreements, understandings, meetings, letters, notes, telegrams, advertisements, computer mail, e-mail AND ANY other DOCUMENTS evidencing ANY verbal OR nonverbal interaction between PERSONS.

5. The term “COMPLAINT” means the Part 3 Administrative Complaint filed by the Federal Trade Commission in the above-captioned proceeding.

6. The term “CONCERNING” means referencing, regarding, relating to, alluding to, describing, evidencing, reflecting, constituting, documenting, discussing, referring to, mentioning, analyzing, refuting, or recording.

7. The term “DOCUMENT” shall mean the original AND all non-identical copies AND drafts, regardless of origin OR location, of ANY writing AND ANY written, printed, typed, OR other graphic OR photographic matter of ANY kind OR description, in draft OR final form, including, but not limited to, correspondence, letters, telegrams, facsimiles, cables, telex messages, e-mail, memoranda, notes, interoffice AND interdepartmental COMMUNICATIONS, transcripts, minutes of conversations OR meetings, reports, studies, ANY audio OR video recordings, voicemail, contracts, calendar OR diary entries, pamphlets, handwritten notes, charts, tabulations, records of meetings, conferences, telephone OR other conversations OR COMMUNICATIONS, AND tapes OR slides, AND other data compilations from which information can be obtained OR translated, if necessary, by YOU through detection devices into reasonably usable form, AND all other records kept by electronic, photographic, OR mechanical means however denominated, which are in YOUR possession, custody, OR control, including electronically-stored information. If a DOCUMENT has been prepared in several copies, OR additional copies have been made, OR copies are not identical (OR, which by reason of subsequent modification of a copy by the addition of notations OR other modifications, are no longer identical), each non-identical copy is a separate

DOCUMENT.

8. The term “INTUIT” means Respondent Intuit Inc., its subsidiaries, divisions, departments, affiliates, each AND every other legal entity within its control, AND ANY officer, director, employee, agent, OR representative thereof.

9. The term “PERSON” shall mean ANY natural person, corporate entity, partnership, association, limited liability company, joint venture, government entity, trust, religious order OR other entity.

10. The term “PROCEEDING” means the above-captioned proceeding.

11. The term “TURBOTAX” means the brand under which Intuit markets and sells TURBOTAX PRODUCTS.

12. The term “TURBOTAX WEBSITE” means the website maintained by INTUIT at turbotax.intuit.com.

13. The term “TURBOTAX FREE EDITION” means the commercial online tax preparation and filing software product marketed by INTUIT for taxpayers with simple tax returns.

14. The term “TURBOTAX PRODUCTS” means ANY online tax preparation OR tax filing software product that INTUIT markets OR has marketed under the registered trademark TurboTax® (e.g., “TurboTax Free Edition,” “TurboTax Deluxe,” “TurboTax Deluxe Live,” “TurboTax Premier,” “TurboTax Premier Live,” “TurboTax Self-Employed,” and “TurboTax Self-Employed Live”).

15. The terms “YOU” AND “YOUR” refer to the Federal Trade Commission (“FTC”) AND ANY current OR former Commissioners, employees, agents, representatives, assigns, OR ANY other PERSON acting OR purporting to act on behalf of OR under the direction, authorization, OR control of the FTC.

GENERAL INSTRUCTIONS

1. The following Requests seek production of the original OR a true AND legible copy of each AND every DOCUMENT in YOUR possession OR under YOUR control AND which is described below. Photocopies produced in lieu of original DOCUMENTS must be accompanied by an affidavit of the custodian of the record stating that the copies are true, correct, AND complete copies of the original DOCUMENTS.
2. These Requests shall be deemed continuing in nature so as to require the supplemental production of all DOCUMENTS to the extent required by law.
3. Each DOCUMENT requested herein is requested to be produced in its entirety without deletion OR excisions regardless of whether YOU consider the entire DOCUMENT to be relevant OR responsive to these Requests.
4. If a DOCUMENT contains both privileged AND non-privileged information, portions of the DOCUMENT that are not privileged must be produced. If a DOCUMENT OR portion of a DOCUMENT is withheld from production on the grounds of privilege (e.g., attorney-client privilege) OR other protection, the DOCUMENT OR portion of the DOCUMENT may be withheld from production but must be identified on a privilege log which identifies the following: the DOCUMENT Bates number, the author, the date, all recipients, the basic nature of the DOCUMENT (e.g., letter, report, notes, etc.), a description of the document's subject matter AND the grounds on which the privilege OR protection is asserted.
5. To the extent responsive DOCUMENTS exist in an electronic format, please contact Respondent's counsel to discuss the manner AND format in which the DOCUMENTS will be produced AND to facilitate the production of full AND complete copies in a usable format.
6. The singular form of a word shall be interpreted as plural, and the plural form of a word

shall be interpreted as singular, whenever appropriate, in order to bring within the scope of the Request for Production of Documents ANY DOCUMENTS that might otherwise be considered beyond its scope.

7. None of the Definitions above OR Requests set forth below shall be construed as an admission relating to the existence of ANY evidence, to the relevance or admissibility of ANY evidence, OR to the truth or accuracy of ANY statement OR characterization in the Definitions OR a Request.

REQUESTS FOR PRODUCTION

Document Request No. 1

All DOCUMENTS OR COMMUNICATIONS reviewed, consulted, considered, OR relied upon in drafting the COMPLAINT.

Document Request No. 2

All DOCUMENTS that contradict ANY allegation in the COMPLAINT.

Document Request No. 3

All DOCUMENTS reviewed OR consulted in the drafting of ANY interrogatory response in this PROCEEDING.

Document Request No. 4

All notes, recordings, logs, OR other DOCUMENTS relating to interviews conducted with nonparties regarding the allegations in this PROCEEDING, the subject matter of this PROCEEDING, INTUIT, OR the PROCEEDING itself.

Document Request No. 5

All DOCUMENTS produced in response to ANY subpoena issued in this PROCEEDING OR produced voluntarily by ANY nonparty that relates to the allegations in this PROCEEDING.

Document Request No. 6

All DOCUMENTS discussing, analyzing, OR reviewing advertisements for “free” merchandise OR services by INTUIT OR ANY other company.

Document Request No. 7

All DOCUMENTS relating to OR reflecting rules OR guides adopted, provided, OR administered by the FTC about how to evaluate ADVERTISEMENTS for “free” merchandise OR services.

Document Request No. 8

All DOCUMENTS relating to OR reflecting policy discussions involving the FTC about ADVERTISEMENTS for “free” merchandise OR services.

Document Request No. 9

All screenshots from the TURBOTAX WEBSITE captured using “SnagIt” OR ANY other screen capture software OR tool, whether referenced in the Second Declaration of Diana F. Shiller in the matter of *FTC v. Intuit Inc.*, No. 3:22-cv-01973-CRB (N.D. Cal.), OR otherwise.

Document Request No. 10

All DOCUMENTS that support OR relate to the allegation in Paragraph 43 of the COMPLAINT that “the term ‘simple tax returns’ is not understood by many consumers.”

Document Request No. 11

All DOCUMENTS related to the “early testing” performed by Professor Nathan Novemsky and referenced in ¶ 9 of the Second Declaration of Nathan Novemsky in *FTC v. Intuit Inc.*, No. 3:22-cv-01973-CRB (N.D. Cal.).

Document Request No. 12

All DOCUMENTS consulted, relied upon, OR cited in drafting the First AND Second Declarations of Nathan Novemsky in *FTC v. Intuit Inc.*, No. 3:22-cv-01973-CRB (N.D. Cal.).

Document Request No. 13

All DOCUMENTS relating to OR reflecting ANY votes taken by ANY current OR former Commissioners of the Federal Trade Commission regarding TURBOTAX.

Document Request No. 14

All COMMUNICATIONS OR documents reflecting COMMUNICATIONS between anyone at the Federal Trade Commission and ANY nonparty regarding the allegations in this PROCEEDING, the subject matter of this PROCEEDING, INTUIT, OR the PROCEEDING itself, including members of Congress, their staffs, the IRS, the media, customers, competitors, OR other government agencies.

Dated: August 19, 2022

Respectfully submitted,

WILMER CUTLER PICKERING HALE
AND DORR LLP

/s/ David Z. Gringer

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Attorneys for Respondent Intuit Inc.

CERTIFICATE OF SERVICE

I certify that on August 19, 2022, I caused the foregoing document to be served via email to:

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Counsel Supporting the Complaint

Dated: August 19, 2022

Respectfully submitted,

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

Exhibit B

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WILMERHALE

August 19, 2022

David Gringer

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 Federal Trade Commission
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Re: *In the Matter of Intuit Inc.*, Docket No. 9408

Complaint Counsel:

Now that this matter has returned to adjudication, I write regarding five outstanding issues that have yet to be resolved, including aspects of Complaint Counsel's initial disclosures that still do not conform to the requirements of Rule § 3.31(b) and that we expect to be corrected when initial disclosures are due under the new case schedule. They also raise serious issues regarding the veracity of Complaint Counsel's representations to the Commissioners and to Judge Breyer about consumer complaints.

First, we have discovered additional issues with the complaint-related spreadsheets and files that the FTC provided as part of their initial disclosures. The PDF files of consumer complaints, sent by Complaint Counsel on May 6, 2022, include four complaints from consumers that are not listed in the corresponding spreadsheet titled "Consumer Contact List--Sentinel."¹ In addition, the Consumer Contact List spreadsheet lists three individuals for whom there is no corresponding complaint text among the complaint PDFs provided on May 6.² Without complete and accurate information concerning these complaints, we cannot possibly verify whether they are "relevant to the allegations of the Commission's complaint," nor can we respond to complainants' substantive allegations or decide whether to obtain discoverable information from the complainants. 16 C.F.R. § 3.31(b). As noted in our April 28, 2022 letter, "initial disclosures should be 'complete and detailed,' and should 'give the opposing party information as to the identification and location of persons with knowledge so that they can be contacted in connection with the litigation.'" *Sender v. Mann*, 225 F.R.D. 645, 640 (D. Colo. 2004).³ At present, several of the consumer complaints identified by Complaint Counsel fail to meet this standard.

Second, our initial outreach to the consumer declarants identified in Complaint Counsel's initial disclosures suggests that those consumers no longer wish to participate in this proceeding, or never intended to participate in the first place. WilmerHale attempted to contact seven

¹ These are complaints for [REDACTED], Sentinel Ref. No. 145978549; [REDACTED], Sentinel Ref. No. 146236142; [REDACTED], Sentinel Ref. No. 145698927; and an individual without a listed name, Sentinel Ref. No. 144770670. All of these complaints are contained in the PDF titled, "File95916655704."

² These entries are for [REDACTED], [REDACTED], and [REDACTED].

³ "Judicial decisions and precedents under the Federal Rules of Civil Procedure concerning discovery motions, though not controlling, provide helpful guidance for resolving discovery disputes in Commission proceedings." *In the Matter of Hoechst Marion Roussel, Inc.*, 2000 WL 33944049, at *2 (F.T.C. Oct. 17, 2000) (Chappell, J.); *see also In the Matter of Traffic Jam Events, LLC*, 2021 WL 3701656, at *4 n.5 (F.T.C. Aug. 9, 2021) (similar).

Frances L. Kern August 19, 2022

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declarants identified by the FTC by both phone and email. Four of those declarants never responded to WilmerHale's outreach. And the three declarants we were able to contact all indicated their unwillingness to participate in the administrative proceeding. For example, ██████████ stated that she was no longer interested in any of the subject matter of the FTC's investigation. She also said that she was not even aware the FTC had identified her as a declarant in this investigation and had not heard from any member of the FTC or staff since 2019. She questioned why she was being contacted about this case now, considering her declaration was drafted for her in August 2019. The other consumer declarants expressed similar questions and concerns. Considering the lack of response from several declarants and the statements from others that they are unwilling to participate in this proceeding, it appears clear that Complaint Counsel did not contact the consumers before disclosing their declarations or otherwise obtain the consumers' consent to use the declarations in this proceeding. Before relying on those declarations, Complaint Counsel must demonstrate that they have authorization from the declarants to use the outdated declarations in the adjudication. Without such authorization, the FTC should withdraw the declarations and cease their reliance on them.

Third, we asked you in April to provide us with the data underlying Professor Novemsky's survey in order to assess the credibility of his proffered report. To date, Complaint Counsel have failed to do so. As you are undoubtedly aware, Intuit voluntarily provided the FTC with the data collected by Rebecca Kirk-Fair in both of her surveys well over a year ago. Per Commission Rules and common courtesy, Complaint Counsel must now reciprocate. After all, "discovery is a two-way street." *Scoma Chiropractic, P.A. v. Dental Equities, LLC*, 2022 WL 1665446, at *2 (M.D. Fla. May 25, 2022).⁴

Fourth, we also asked you in April for the "J" category of documents from Complaint Counsel's initial disclosures. Four months later, they remain unsent. We again request that you provide those documents promptly.

Fifth, there are several deficiencies with Complaint Counsel's initial disclosures identified in our April 28 letter that still must be addressed. For instance, Complaint Counsel has yet to correct the grossly overinclusive Appendix A, which improperly designates *every* person with 50 or more emails produced to Complaint Counsel in response to its Civil Investigative Demands. Likewise, even after Complaint Counsel's second bite at the apple, the Consumer Contact List--Sentinel—which replaced Appendix B—still contains a number of individuals whose purported

⁴ "Judicial decisions and precedents under the Federal Rules of Civil Procedure concerning discovery motions, though not controlling, provide helpful guidance for resolving discovery disputes in Commission proceedings." *In the Matter of Hoechst Marion Roussel, Inc.*, 2000 WL 33944049, at *2 (F.T.C. Oct. 17, 2000) (Chappell, J.); *see also In the Matter of Traffic Jam Events, LLC*, 2021 WL 3701656, at *4 n.5 (F.T.C. Aug. 9, 2021) (similar).

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Frances L. Kern August 19, 2022

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grievances are wholly unrelated to the substance of the complaint filed by Complaint Counsel.⁵ For the reasons stated in our previous letter, those shortcomings must be cured.

We ask that Complaint Counsel address the concerns no later than the revised due date for initial disclosures. If Complaint Counsel is unwilling to do so, we request a telephonic meet and confer no later than an earlier date.

Sincerely,

/s/ David Z. Gringer

cc: Roberto Anguizola, Esq., Federal Trade Commission
Rebecca Plett, Esq., Federal Trade Commission
James Evans, Esq., Federal Trade Commission

⁵ See, e.g., ██████████, Sentinel Ref. No. 97511115 (customer went to TurboTax website to begin free tax preparation, but never finished; later discovered recurring \$25 fee; Intuit customer support clarified that customer had signed up for Quickbooks subscription; customer did not recall signing up for subscription, so it was canceled); ██████████ Sentinel Ref. No. 104961507 (customer purchased TurboTax Deluxe because of the “best refund guaranteed” promise; before mailing state return, customer checked FreeTaxUSA and discovered she would have received a larger refund; contacted Intuit for a refund; Intuit customer support clarified requirements for their Maximum Refund Guarantee and provided website/instructions to qualify for a refund).

Exhibit C

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

In the Matter of:

Intuit Inc., a corporation.

Docket No. 9408

COMPLAINT COUNSEL’S INITIAL DISCLOSURES

Pursuant to Rule 3.31(b) of the Federal Trade Commission’s Rules of Practice, 16 C.F.R. § 3.31(b), Complaint Counsel hereby serves its Initial Disclosures on Respondent Intuit Inc. (“Respondent”). The information disclosed herein is based upon information reasonably available to Complaint Counsel. Without waiving any privileges or prejudicing the ability to supplement these Initial Disclosures if additional information becomes available, Complaint Counsel makes the following disclosures:

1. Individuals Likely to Have Discoverable Information

Pursuant to Rule 3.31(b)(1), Complaint Counsel identifies the individuals listed in **Appendix A** as those who are likely to have discoverable information relevant to the allegations of the Complaint, the proposed relief, or the defenses of Respondent. In addition, Complaint Counsel also identifies the individuals listed in **Appendix B** as consumers who are likely to have discoverable information relevant to the allegations of the Complaint, the proposed relief, or the defenses of Respondent.

Complaint Counsel has provided the name and, where known, address and telephone number of each such individual. Because most of the information in Appendix A has been drawn from documents produced in the investigation, Appendix A has been marked “CONFIDENTIAL – FTC Docket No. 9408” pursuant to the protective order entered in this matter on March 30, 2022.

Respondent presently knows the identities of its current and former employees, contractors, and other individuals who have performed work for Respondent, all of whom may have discoverable and relevant information. Appendix A identifies Respondent’s current and former employees and contractors and other individuals and entities who, based on Complaint Counsel’s present knowledge, are likely to have discoverable and relevant information. Appendix B identifies consumers of whom Complaint Counsel is aware who may have discoverable and relevant information, including consumers whose complaints were obtained by searching the Federal Trade Commission’s Consumer Sentinel database for complaints dated between January 1, 2019, and April 15, 2022, about “TurboTax” or “Turbo Tax” that contained the word “free.”

Pursuant to Rule 3.31A, Complaint Counsel will disclose the identity of testifying expert(s), if any, at a later date in compliance with the Scheduling Order to be entered in this matter.

2. Documents and Electronically Stored Information

Pursuant to Rule 3.31(b)(2), Complaint Counsel provides the following description by category and location of “all documents and electronically stored information, including declarations, transcripts of investigational hearings, and

tangible things in the possession, custody, or control of the Commission” or Respondent that are “relevant to the allegations of the Commission’s complaint, to the proposed relief, or to the defenses of” Respondent and:

1. Are not subject to the limitations in Rule 3.31(c)(2),
2. Are not privileged, as defined in Rule 3.31(c)(4),
3. Do not pertain to hearing preparation, as defined in Rule 3.31(c)(5),
4. Do not pertain to experts, as defined in Rule 3.31A, or
5. Cannot be obtained from another source that is “more convenient, less burdensome, or less expensive.”

The categories and location of such documents are as follows:

	Description	Location
A	Documents produced in response to Civil Investigative Demand (“CID”) issued to Intuit Inc. dated June 28, 2019	FTC Constitution Center ¹ (INTUIT-FFA-FTC-000000001 to 000528208 and accompanying correspondence)
B	Documents produced in response to CID issued to Intuit Inc. dated May 18, 2020	FTC Constitution Center (INTUIT-FFA-FTC-000528209 to 000551349, and 000551357 to 000551364, and accompanying correspondence)
C	Documents produced in response to CID issued to Google LLC dated September 19, 2019	FTC Constitution Center (folders labeled “Google 2777350” and “Google 2777400,” accompanying correspondence)

¹ “FTC Constitution Center” means documents are physically and electronically stored with the Federal Trade Commission, Division of Marketing Practices, Constitution Center, 8th Floor, 400 Seventh St. SW, Washington, DC 20024.

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D	Transcripts of 8 investigational hearings taken of individuals and Intuit Inc. in response to CIDs issued to those individuals in their personal capacity and Intuit Inc. dated May 18 and July 20, 2020	FTC Constitution Center (GX150-57)
E	Declarations of Michael Bordonaro and Heather Hillerman (with attached exhibits), submitted in lieu of appearing at investigational hearings, in response to CIDs issued to those individuals in their personal capacity dated May 18, and July 20, 2020	FTC Constitution Center
F	Communications, PowerPoint presentations, and white papers produced by Intuit, its counsel, or its consultants during the course of the Commission's investigation, FTC File No. 1923119	FTC Constitution Center
G	Documents and exhibits produced in <i>Federal Trade Commission v. Intuit Inc.</i> , No. 3:22-CV-1973 (N.D. Cal.)	FTC Constitution Center (GX 001-116, 150-57, 200-319; documents and exhibits produced by Intuit)
H	Documents voluntarily produced by the Free File Alliance	FTC Constitution Center (FFI.FTC 0001-0144, articles, and accompanying correspondence)
I	Consumer declarations	FTC Constitution Center (12 separate .pdf files)
J	Correspondence with and documents shared by individuals during the course of the Commission's investigation, FTC File No. 1923119, including consumers sharing information about their experiences with Intuit	FTC Constitution Center
K	Consumer complaints obtained from the Better Business Bureau of Los Angeles and Silicon Valley	FTC Constitution Center (594 separate Word, .pdf, zip, and Excel files)
L	Consumer complaints obtained from Consumer Sentinel	FTC Constitution Center (File95632967968-1 through -8, and File95639793558)

M	Publicly available documents collected or reviewed during the course of the Commission’s investigation, FTC File No. 1923119 but not otherwise produced in <i>Federal Trade Commission v. Intuit Inc.</i> , 3:22-CV-1973 (N.D. Cal.)	FTC Constitution Center
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Respondent is already in possession of the categories of documents identified above by the following letters: A, B, D, F, G.

Contemporaneously with service of these Initial Disclosures, Complaint Counsel produces the documents comprising the categories identified above by the following letters: C, E, H, I, K, L.

Aside from the documents described above, Complaint Counsel is aware of no specific documents relevant to the claims, defenses, or relief in this matter.

Complaint Counsel is without knowledge at this time as to the category and location of relevant documents in the possession, custody, or control of Respondent beyond those already produced to Complaint Counsel during its investigation. Complaint Counsel believes that Respondent is in the possession of additional documents relevant to the allegations of the Commission’s Complaint and anticipates that Respondent will provide this information as part of its initial disclosures.

Dated: April 21, 2022

Respectfully submitted,

s/ Frances L. Kern
 Roberto Anguizola
 Frances Kern
 Rebecca Plett
 James Evans

Complaint Counsel

PUBLIC

Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580
Telephone: 202-492-7942
Email: fkern@ftc.gov

CERTIFICATE OF SERVICE

This is to certify that on April 21, 2022, I caused Complaint Counsel’s Initial Disclosures, along with documents specified therein, to be served via secure electronic mail on:

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(at Wilmer Cutler Pickering Hale and Door LLP)

Counsel for Respondent Intuit Inc.

Dated: April 21, 2022

Respectfully submitted,

s/ Frances L. Kern
Frances Kern

Counsel Supporting the Complaint

Exhibit D

**UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION**

In the matter of:

Intuit Inc.,
a corporation,

Respondent.

Docket No. 9408

**COMPLAINT COUNSEL’S RESPONSES AND OBJECTIONS TO INTUIT’S
FIRST SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS**

Complaint Counsel hereby makes the following Objections and Responses (“Responses”) to the Defendant Intuit Inc.’s (“Intuit’s”) First Set of Requests for Production of Documents (“Requests”). Complaint Counsel reserves its right to supplement, revise, modify, or otherwise change or amend these Responses and Objections based on any documents, tangible things, information, or evidence obtained through further investigation and discovery.

GENERAL STATEMENTS

1. By responding or agreeing to produce documents in response to these Requests, Complaint Counsel does not concede that such documents exist or are within the scope of discovery, relevant, material, or admissible in evidence. In particular, Complaint Counsel does not waive or intend to waive, but rather reserves and intends to reserve: (a) any objections to the relevance, materiality, privilege, or admissibility as evidence, for any purpose, of any documents provided in response to these Requests; (b) the right to object on any ground to the use of any documents provided in response to these Requests at any hearing; or (c) the right to object on any ground at any time to a demand for a further response.

2. Intuit’s request does not specify a time, place, or manner for making the production. *See* 16 C.F.R. 3.37(a). Complaint Counsel is gathering and reviewing documents and information requested and expects to produce responsive documents

on a rolling basis. Complaint Counsel intends to produce such documents electronically, as outlined in the “BCP Production Requirements” attached hereto.

3. Complaint Counsel’s Responses should not be construed to limit Complaint Counsel’s basis for any relief sought from Intuit in this action.

4. Complaint Counsel’s Responses are based upon discovery it has received to date. Complaint Counsel notes that fact discovery is ongoing and will continue under the Scheduling Order.

5. Complaint Counsel may be omitting from its Responses the identification of documents not yet known to Complaint Counsel. Complaint Counsel does not waive its right to rely upon or use at any hearing facts and documents that are not being produced or individually identified at this time. Complaint Counsel will identify for Intuit in advance of a hearing the documents Complaint Counsel plans to introduce as exhibits at a hearing, as set out by the Scheduling Order.

6. Complaint Counsel’s Responses are based on a search of the documents in the possession, custody, or control of the Division of Marketing Practices (“Division”), the division of the Commission’s Bureau of Consumer Protection that investigated this matter and is handling the prosecution of this action. *See* 16 C.F.R. 3.31(c)(2).

7. Complaint Counsel cannot respond to requests encompassing documents or information held by the Commissioners, the General Counsel, any Bureau or Office not involved in the matter, the office of Administrative Law Judges, or the Secretary in his or her capacity as custodian or recorder of any such information, or their respective staff. Intuit may seek such documents or information pursuant to 16 C.F.R. 3.36.

8. Privileges held by the Commission (not Complaint Counsel) can only be waived by the Commission.

General Objections

1. Complaint Counsel objects to these Requests, and each instruction and definition therein, to the extent that they seek documents that are not discoverable

pursuant to the FTC's Rules of Practice, 16 C.F.R. Parts 2, 3, and 4, the Federal Rules of Civil Procedure, or otherwise exempt from disclosure by law, including, but not limited to, identification of documents or information protected from disclosure by the attorney-client privilege, the work product doctrine, the government deliberative process privilege, the law enforcement evidentiary or investigative file privilege, the common interest rule, the informant privilege, or any other applicable privilege of law. Complaint Counsel does not intend to waive any of the privileges asserted in this objection by any inadvertent reference to, or production of, protected documents or information that may occur, and reserves the right to seek the return of any such material inadvertently produced to Intuit. The documents and information for which Complaint Counsel asserts these privileges include but are not limited to:

(a) communications and correspondence between the FTC and any law enforcement agency and any documents circulated between the FTC and law enforcement agencies; (b) documents and materials obtained from other law enforcement agencies under confidentiality agreements; (c) drafts of pleadings and declarations; (d) pre-decisional or deliberative FTC documents; (e) internal documents circulated among Commission staff; (f) memoranda from Commission staff to any of the Commissioners; (g) compilations or indices of FTC records; (h) communications and other correspondence between FTC attorneys and among FTC staff, except to the extent such staff have submitted declarations in this lawsuit and/or will be testifying witnesses and the correspondence or communication relate to the particular subject(s) addressed in their declaration and/or testimony; and (i) other notes and documents prepared for or in anticipation of litigation by Commission staff.

2. Complaint Counsel objects to these Requests, and each instruction and definition therein, to the extent they are vague, ambiguous, overly broad, unduly burdensome, or duplicative of other Requests.

3. Complaint Counsel objects to these Requests, and each instruction and definition therein, to the extent that they seek documents that are outside the scope of discovery, not relevant to any party's claim or defense, or are not proportional to the needs of the case.

4. Complaint Counsel objects to these Requests, and to each instruction and definition therein, to the extent that they seek to impose on Complaint Counsel any obligations beyond those provided for in the FTC's Rules of Practice, 16 C.F.R. Parts 2, 3 and 4, or the Federal Rules of Civil Procedure.

5. Complaint Counsel objects to these Requests to the extent that they seek documents that are not within Complaint Counsel's possession, custody, or control. Complaint Counsel does not consider documents to be in its possession, custody, or control if they are, *inter alia*, located in the offices of Intuit, or otherwise in the possession, custody, or control of Intuit or its employees or agents, and hence they will not be produced as part of Complaint Counsel's Responses.

6. Complaint Counsel objects to these Requests to the extent that they are not limited to requests for documents about Intuit's business practices that are at issue in this matter.

7. Complaint Counsel objects to these Requests to the extent that they seek information that Complaint Counsel has already provided to Intuit, including through Complaint Counsel's federal court filings and administrative proceedings in this matter.

8. Complaint Counsel objects to these Requests to the extent they seek documents that are already in the possession, custody, or control of Intuit, Intuit's counsel, or that can be obtained from some other source, such as Intuit's advertising agencies, that is more convenient to Intuit, less burdensome to Complaint Counsel, or less expensive for both parties. *See* 16 CFR 3.31(c)(2)(i).

9. Complaint Counsel objects to Intuit's Requests to the extent that they require Complaint Counsel to analyze or organize factual evidence for Intuit, which Intuit can do equally itself.

10. Complaint Counsel objects to Intuit's Requests to the extent that they require Complaint Counsel to undertake legal research for Intuit, which Intuit can do equally itself.

11. Each of the above-listed General Objections is incorporated by reference to each specific Response and objections set forth below. The specific Responses and objections set forth below are made without waiving any of the above-listed General Objections.

Specific Responses and Objections

1. **Request for Production 1:** All DOCUMENTS OR COMMUNICATIONS reviewed, consulted, considered, OR relied upon in drafting the COMPLAINT.

Response:

Complaint Counsel objects to the Request to the extent it seeks documents or information protected from discovery by the attorney-client privilege, the work product doctrine, the government deliberative process privilege, the law enforcement evidentiary or investigative file privilege, the common interest rule, the informant privilege, and/or any other applicable privilege of law.

Complaint Counsel also objects to the Request to the extent it seeks documents or information that are outside of the scope of materials to be searched or produced by Complaint Counsel pursuant to the FTC's Rules of Practice, 16 C.F.R. Parts 2, 3 and 4. Complaint Counsel further objects to the extent the Request seeks documents that have been filed as exhibits, that are publicly available, that are in the possession, custody, or control of Intuit or Intuit's counsel, or that Complaint Counsel has already provided to Intuit in this proceeding or the related federal court action. Complaint Counsel does not consider documents to be in its possession, custody, or control if they are, *inter alia*,

located in the offices of Intuit, or otherwise in the possession, custody, or control of Intuit or its employees or agents, and hence they will not be produced as part of Complaint Counsel's Responses. Complaint Counsel also objects to the Request because it is premised on an inaccurate definition of the term "COMPLAINT." Part 3 administrative complaints are not "filed," they are issued when an affirmative vote is taken by the Commission. Administrative proceedings such as this one commence "when an affirmative vote is taken by the Commission to issue a complaint." 16 C.F.R. § 3.11(a). Complaint Counsel will construe the request to relate to the administrative complaint in this matter that was issued by the Commission on March 28, 2022.

Complaint Counsel further objects to the Request as overly broad, and unduly burdensome to the extent it requests "all documents or communications reviewed, consulted, considered, or relied upon."

So construing, subject to and without waiving the foregoing general and specific objections, Complaint Counsel will produce all nonprivileged documents supporting the allegations in the complaint. Additionally, Complaint Counsel directs Intuit to the exhibits and documents it filed in the related federal court action, see Docket No. 6, Exhibit Volumes 1-7.

2. **Request for Production 2:** All DOCUMENTS that contradict ANY allegation in the COMPLAINT.

Response:

Complaint Counsel objects to the Request to the extent it seeks documents or information protected from discovery by the attorney-client privilege, the work product doctrine, the government deliberative process privilege, the law enforcement evidentiary or investigative file privilege, the common interest rule, the informant privilege, and/or any other applicable privilege of law. Complaint Counsel also objects to the Request to the extent it seeks documents or information that are outside of the

scope of materials to be searched or produced by Complaint Counsel pursuant to the FTC's Rules of Practice, 16 C.F.R. Parts 2, 3, and 4.

Complaint Counsel further objects to the extent the Request seeks documents that have been filed as exhibits, that are publicly available, that are in the possession, custody, or control of Intuit or Intuit's counsel, or that Complaint Counsel has already provided to Intuit in this proceeding or the related federal court action. Complaint Counsel does not consider documents to be in its possession, custody, or control if they are, *inter alia*, located in the offices of Intuit, or otherwise in the possession, custody, or control of Intuit or its employees or agents, and hence they will not be produced as part of Complaint Counsel's Responses. Complaint Counsel also objects to the Request because it is premised on an inaccurate definition of the term "COMPLAINT." Part 3 administrative complaints are not "filed," they are issued when an affirmative vote is taken by the Commission. Administrative proceedings such as this one commence "when an affirmative vote is taken by the Commission to issue a complaint." 16 C.F.R. § 3.11(a). Complaint Counsel will construe the request to relate to the administrative complaint in this matter that was issued by the Commission on March 28, 2022.

Moreover, Complaint Counsel objects to the Request to the extent it requires Complaint Counsel to draw legal conclusions about whether documents contradict allegations in the complaint. Subject to and without waiving the foregoing general and specific objections, Complaint Counsel states that it is not aware of any such documents in its possession, custody or control.

3. **Request for Production 3:** All DOCUMENTS reviewed OR consulted in the drafting of ANY interrogatory response.

Response:

Complaint Counsel objects to the Request to the extent it seeks documents or information protected from discovery by the attorney-client privilege, the work product doctrine, the government deliberative process privilege, the law enforcement

evidentiary or investigative file privilege, the common interest rule, the informant privilege, and/or any other applicable privilege of law. Complaint Counsel also objects to the Request to the extent it seeks documents or information that are outside of the scope of materials to be searched or produced by Complaint Counsel pursuant to the FTC's Rules of Practice, 16 C.F.R. Parts 2, 3, and 4. Complaint Counsel further objects to the extent the Request seeks documents that have been filed as exhibits, that are publicly available, that are in the possession, custody, or control of Intuit or Intuit's counsel, or that Complaint Counsel has already provided to Intuit in this proceeding or the related federal court action. Complaint Counsel does not consider documents to be in its possession, custody, or control if they are, *inter alia*, located in the offices of Intuit, or otherwise in the possession, custody, or control of Intuit or its employees or agents, and hence they will not be produced as part of Complaint Counsel's Responses.

Complaint Counsel also objects to the Request as overbroad to the extent it seeks documents Complaint Counsel may have reviewed, but that were not relevant to the Interrogatory Responses or that Complaint Counsel did not rely on in drafting the Interrogatory Responses. Complaint Counsel will construe the Request to encompass documents relied upon in drafting Interrogatory Responses. So construing the Request, subject to and without waiving the foregoing general and specific objections, Complaint Counsel will produce responsive, non-privileged documents that have not already been produced or made available to Intuit, and as to which collection and production would not pose an undue burden.

4. **Request for Production 4:** All notes, recordings, logs, OR other DOCUMENTS relating to interviews conducted with nonparties regarding the allegations in this PROCEEDING, the subject matter of this PROCEEDING, INTUIT, OR the PROCEEDING itself.

Response:

Complaint Counsel objects to the Request to the extent it seeks documents or information protected from discovery by the attorney-client privilege, the work product doctrine, the government deliberative process privilege, the law enforcement evidentiary or investigative file privilege, the common interest rule, the informant privilege, and/or any other applicable privilege of law. Complaint Counsel also objects to the Request to the extent it seeks documents or information that are outside of the scope of materials to be searched or produced by Complaint Counsel pursuant to the FTC's Rules of Practice, 16 C.F.R. Parts 2, 3, and 4. Complaint Counsel further objects to the extent the Request seeks documents that have been filed as exhibits, that are publicly available, that are in the possession, custody, or control of Intuit or Intuit's counsel, or that Complaint Counsel has already provided to Intuit in this proceeding or the related federal court action. Complaint Counsel does not consider documents to be in its possession, custody, or control if they are, *inter alia*, located in the offices of Intuit, or otherwise in the possession, custody, or control of Intuit or its employees or agents, and hence they will not be produced as part of Complaint Counsel's Responses. Complaint Counsel also objects to this Request to the extent it seeks documents that are outside the scope of discovery and/or not relevant to the claims or defenses in this matter.

Complaint Counsel further objects to the Request because it is overbroad and unduly burdensome. The Request asks for documents relating to interviews conducted with third parties about Intuit, without limiting the scope to this matter. Complaint Counsel will construe the Request to encompass the documents related to the current proceeding. So construed, and subject to and without waiving the foregoing general and specific objections, Complaint Counsel will produce responsive, non-privileged documents that have not already been produced or made available to Intuit, and as to which collection and production would not pose an undue burden.

5. **Request for Production 5:** All DOCUMENTS produced in response to ANY subpoena issued in this PROCEEDING OR produced voluntarily by ANY nonparty that relates to the allegations in this PROCEEDING.

Response:

Complaint Counsel objects to the Request to the extent it seeks documents or information protected from discovery by the attorney-client privilege, the work product doctrine, the government deliberative process privilege, the law enforcement evidentiary or investigative file privilege, the common interest rule, the informant privilege, and/or any other applicable privilege of law.

Complaint Counsel also objects to the Request to the extent it seeks documents or information that are outside of the scope of materials to be searched or produced by Complaint Counsel pursuant to the FTC's Rules of Practice, 16 C.F.R. Parts 2, 3 and 4. Complaint Counsel further objects to the extent the Request seeks documents that have been filed as exhibits, that are publicly available, that are in the possession, custody, or control of Intuit or Intuit's counsel, or that Complaint Counsel has already provided to Intuit in this proceeding or the related federal court action. Complaint Counsel does not consider documents to be in its possession, custody, or control if they are, *inter alia*, located in the offices of Intuit, or otherwise in the possession, custody, or control of Intuit or its employees or agents, and hence they will not be produced as part of Complaint Counsel's Responses.

Complaint Counsel further objects to the Request to the extent it encompasses documents outside the scope of discovery and/or irrelevant to this proceeding.

Subject to and without waiving the foregoing general and specific objections, Complaint Counsel will produce responsive, non-privileged documents that have not already been produced or made available to Intuit, and as to which collection and production would not pose an undue burden.

6. **Request for Production 6:** All DOCUMENTS discussing, analyzing, OR reviewing advertisements for “free” merchandise OR services by INTUIT OR ANY other company.

Response:

Complaint Counsel objects to the Request to the extent it seeks documents or information protected from discovery by the attorney-client privilege, the work product doctrine, the government deliberative process privilege, the law enforcement evidentiary or investigative file privilege, the common interest rule, the informant privilege, and/or any other applicable privilege of law. Complaint Counsel also objects to the Request to the extent it seeks documents or information that are outside of the scope of materials to be searched or produced by Complaint Counsel pursuant to the FTC’s Rules of Practice, 16 C.F.R. Parts 2, 3, and 4.

Complaint Counsel further objects to the extent the Request seeks documents that have been filed as exhibits, that are publicly available, that are in the possession, custody, or control of Intuit or Intuit’s counsel, or that Complaint Counsel has already provided to Intuit in this proceeding or the related federal court action. Complaint Counsel further objects to the Request to the extent it seeks documents or information outside the scope of discovery and/or not relevant to the claims or defenses in this matter. Complaint Counsel does not consider documents to be in its possession, custody, or control if they are, *inter alia*, located in the offices of Intuit, or otherwise in the possession, custody, or control of Intuit or its employees or agents, and hence they will not be produced as part of Complaint Counsel’s Responses.

Complaint Counsel further objects to the Request as overbroad and unduly burdensome. The Request seeks documents not just for Intuit’s “free” advertising, but “free” advertising of any company at any time. To require Complaint Counsel to produce records related to “free” advertising claims across the agency and across time would be immensely burdensome, is outside the scope of discovery, and is unlikely to

lead to any relevant or admissible evidence. Thus, Complaint Counsel will construe the Request to encompass documents related to Intuit's "free" advertising claims for TurboTax only. So construing the Request, subject to and without waiving the foregoing general and specific objections, Complaint Counsel will produce responsive, non-privileged documents that have not already been produced or made available to Intuit, and as to which collection and production would not pose an undue burden.

7. **Request for Production 7:** All DOCUMENTS relating to OR reflecting rules OR guides adopted, provided, OR administered by the FTC about how to evaluate ADVERTISEMENTS for "free" merchandise OR services.

Response:

Complaint Counsel objects to the Request to the extent it seeks documents or information protected from discovery by the attorney-client privilege, the work product doctrine, the government deliberative process privilege, the law enforcement evidentiary or investigative file privilege, the common interest rule, the informant privilege, and/or any other applicable privilege of law. Complaint Counsel also objects to the Request to the extent it seeks documents or information that are outside of the scope of materials to be searched or produced by Complaint Counsel pursuant to the FTC's Rules of Practice, 16 C.F.R. Parts 2, 3, and 4.

Complaint Counsel further objects to the extent the Request seeks documents that have been filed as exhibits, that are publicly available, that are in the possession, custody, or control of Intuit or Intuit's counsel, or that Complaint Counsel has already provided to Intuit in this proceeding or the related federal court action. Complaint Counsel does not consider documents to be in its possession, custody, or control if they are, *inter alia*, located in the offices of Intuit, or otherwise in the possession, custody, or control of Intuit or its employees or agents, and hence they will not be produced as part of Complaint Counsel's Responses. Complaint Counsel further objects to the Request to

the extent it seeks documents or information outside the scope of discovery and/or not relevant to the claims or defenses in this matter.

Complaint Counsel further objects to the Request as overly broad and unduly burdensome. The Request is not limited in time, and includes documents “relating to” guides, which could encompass documents from many decades, from across the entire agency. To identify such documents would be incredibly burdensome. Subject to and without waiving the foregoing general and specific objections, Complaint Counsel points Intuit to the following documents:

- Guide Concerning Use of the Word “Free” and Similar Representations, 16 C.F.R. § 251.1 (1971), regulatory text and record available at <https://www.ftc.gov/legal-library/browse/rules/guide-concerning-use-word-free-similar-representations> (superseding Guide Concerning Use of the Word “Free” and Similar Representations, 36 Fed. Reg. 21,517 (1953)).
- .com Disclosures: How to Make Effective Disclosures in Digital Advertising (Mar. 2013), available at <https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-staff-revises-online-advertising-disclosure-guidelines/130312dotcomdisclosures.pdf>.
- Enforcement Policy Statement in Regard to Clear and Conspicuous Disclosure in Television Advertising (Oct. 21, 1970), available at <https://www.ftc.gov/legal-library/browse/commission-enforcement-policy-statement-regarding-clear-conspicuous-disclosures-television>.
- FTC Statement on Deception, 103 F.T.C. 174 (1984) (appended to *In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110 (1984)), available at <https://www.ftc.gov/legal-library/browse/ftc-policy-statement-deception>.

8. **Request for Production 8:** All DOCUMENTS relating to OR reflecting policy discussions involving the FTC about ADVERTISEMENTS for “free” merchandise OR services.

Response:

Complaint Counsel objects to the Request to the extent it seeks documents or information protected from discovery by the attorney-client privilege, the work product doctrine, the government deliberative process privilege, the law enforcement evidentiary or investigative file privilege, the common interest rule, the informant privilege, and/or any other applicable privilege of law. Complaint Counsel also objects to the Request to the extent it seeks documents or information that are outside of the scope of materials to be searched or produced by Complaint Counsel pursuant to the FTC’s Rules of Practice, 16 C.F.R. Parts 2, 3 and 4. Complaint Counsel further objects to the Request to the extent it seeks documents or information outside the scope of discovery and/or not relevant to the claims or defenses in this matter.

Complaint Counsel further objects to the extent the Request seeks documents that have been filed as exhibits, that are publicly available, that are in the possession, custody, or control of Intuit or Intuit’s counsel, or that Complaint Counsel has already provided to Intuit in this proceeding or the related federal court action. Complaint Counsel does not consider documents to be in its possession, custody, or control if they are, *inter alia*, located in the offices of Intuit, or otherwise in the possession, custody, or control of Intuit or its employees or agents, and hence they will not be produced as part of Complaint Counsel’s Responses.

Complaint Counsel also objects to the Request as vague, as it is not clear what the scope of “involving the FTC” is. Complaint Counsel will construe the Request to encompass discussions the FTC actively participated in. Complaint Counsel further objects to this Request as overbroad and unduly burdensome, not proportional to the needs of the case, and unlikely to lead to admissible evidence. The Request seeks

documents about policy discussions from the FTC without any limits in scope as to time, offices within the FTC, or even the matter at hand involving Intuit. So construed, and subject to and without waiving the foregoing general and specific objections, Complaint Counsel directs Intuit to the following documents:

- Guide Concerning Use of the Word “Free” and Similar Representations, 16 C.F.R. § 251.1 (1971), regulatory text and record available at <https://www.ftc.gov/legal-library/browse/rules/guide-concerning-use-word-free-similar-representations> (superseding Guide Concerning Use of the Word “Free” and Similar Representations, 36 Fed. Reg. 21,517 (1953)).
- .com Disclosures: How to Make Effective Disclosures in Digital Advertising (Mar. 2013), available at <https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-staff-revises-online-advertising-disclosure-guidelines/130312dotcomdisclosures.pdf>.
- Enforcement Policy Statement in Regard to Clear and Conspicuous Disclosure in Television Advertising (Oct. 21, 1970), available at <https://www.ftc.gov/legal-library/browse/commission-enforcement-policy-statement-regarding-clear-conspicuous-disclosures-television>.
- FTC Statement on Deception, 103 F.T.C. 174 (1984) (appended to *In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110 (1984)), available at <https://www.ftc.gov/legal-library/browse/ftc-policy-statement-deception>.

9. **Request for Production 9:** All screenshots from the TURBOTAX WEBSITE captured using “SnagIt” OR ANY other screen capture software OR tool, whether referenced in the Second Declaration of Diana F. Shiller in the matter of FTC v. Intuit Inc., No. 3:22-cv-01973-CRB (N.D. Cal.), OR otherwise.

Response:

Complaint Counsel objects to the Request to the extent it seeks documents or information protected from discovery by the attorney-client privilege, the work product doctrine, the government deliberative process privilege, the law enforcement evidentiary or investigative file privilege, the common interest rule, the informant privilege, and/or any other applicable privilege of law. Complaint Counsel also objects to the Request to the extent it seeks documents or information that are outside of the scope of materials to be searched or produced by Complaint Counsel pursuant to the FTC's Rules of Practice, 16 C.F.R. Parts 2, 3, and 4. Complaint Counsel further objects to the extent the Request seeks documents that have been filed as exhibits, that are publicly available, that are in the possession, custody, or control of Intuit or Intuit's counsel, or that Complaint Counsel has already provided to Intuit in this proceeding or the related federal court action. Complaint Counsel does not consider documents to be in its possession, custody, or control if they are, *inter alia*, located in the offices of Intuit, or otherwise in the possession, custody, or control of Intuit or its employees or agents, and hence they will not be produced as part of Complaint Counsel's Responses.

Complaint Counsel also objects to the Request as overbroad and unduly burdensome. The Request is not limited in scope to Complaint Counsel's investigation of Intuit and could encompass captures of Intuit's website by any FTC staff at any point in time, unrelated to the facts and allegations at issue in this matter. Therefore, Complaint Counsel will construe the Request to encompass captures obtained as part of Complaint Counsel's investigation of and litigation against Intuit in this matter. So construing the Request, subject to and without waiving the foregoing general and specific objections, Complaint Counsel will produce responsive, non-privileged documents that have not already been produced or made available to Intuit, and as to which collection and production would not pose an undue burden.

10. **Request for Production 10:** All DOCUMENTS that support OR relate to the allegation in Paragraph 43 of the COMPLAINT that “the term ‘simple tax returns’ is not understood by many consumers.”

Response:

Complaint Counsel objects to the Request to the extent it seeks documents or information protected from discovery by the attorney-client privilege, the work product doctrine, the government deliberative process privilege, the law enforcement evidentiary or investigative file privilege, the common interest rule, the informant privilege, and/or any other applicable privilege of law. Complaint Counsel also objects to the Request to the extent it seeks documents or information that are outside of the scope of materials to be searched or produced by Complaint Counsel pursuant to the FTC’s Rules of Practice, 16 C.F.R. Parts 2, 3, and 4. Complaint Counsel further objects to the extent the Request seeks documents that have been filed as exhibits, that are publicly available, that are in the possession, custody, or control of Intuit or Intuit’s counsel, or that Complaint Counsel has already provided to Intuit in this proceeding or the related federal court action. Complaint Counsel does not consider documents to be in its possession, custody, or control if they are, *inter alia*, located in the offices of Intuit, or otherwise in the possession, custody, or control of Intuit or its employees or agents, and hence they will not be produced as part of Complaint Counsel’s Responses.

Subject to and without waiving the foregoing general and specific objections, Complaint Counsel points Intuit to the following documents:

- GX 302, ¶ 4.3 & 29-34 (Professor Nathan Novemsky finding that a “substantial portion of the taxpayers who are not eligible to use TurboTax Free Edition under Intuit’s criteria (and hence, do not have a ‘simple U.S. return,’ as Intuit uses the term) believe that their returns are ‘simple’ and therefore have the misimpression their returns meet TurboTax’s definition of a ‘simple U.S. return.’)

- GX 313, ¶ 22. (Professor Nathan Novemsky finding that “even accounting for possible inflation of 10%, the TurboTax Perception Survey would still show significant number of consumers, approximately 45% of consumers in Group A and 18% of consumers in Group B, who did not have what Intuit considered a ‘simple return’ having the misimpression that they did have a ‘simple return.’”)

Subject to and without waiving the foregoing general and specific objections

Subject to and without waiving the foregoing general and specific objections, Complaint Counsel will produce any additional responsive documents that have not already been produced or made available to Intuit, and as to which collection and production would not pose an undue burden.

11. **Request for Production 11:** All DOCUMENTS related to the “early testing” performed by Professor Nathan Novemsky and referenced in ¶ 9 of the Second Declaration of Nathan Novemsky in *FTC v. Intuit Inc.*, No. 3:22-cv-01973-CRB (N.D. Cal.).

Response:

Complaint Counsel objects to the Request to the extent it seeks documents or information protected from discovery by the attorney-client privilege, the work product doctrine, the government deliberative process privilege, the law enforcement evidentiary or investigative file privilege, the common interest rule, the informant privilege, and/or any other applicable privilege of law. Complaint Counsel also objects to the Request to the extent it seeks documents or information that are outside of the scope of materials to be searched or produced by Complaint Counsel pursuant to the FTC’s Rules of Practice, 16 C.F.R. Parts 2, 3 and 4. Complaint Counsel further objects to the extent the Request seeks documents that have been filed as exhibits, that are publicly available, that are in the possession, custody, or control of Intuit or Intuit’s counsel, or that Complaint Counsel has already provided to Intuit in this proceeding or the related federal court action. Complaint Counsel does not consider documents to be

in its possession, custody, or control if they are, *inter alia*, located in the offices of Intuit, or otherwise in the possession, custody, or control of Intuit or its employees or agents, and hence they will not be produced as part of Complaint Counsel's Responses.

Subject to and without waiving the foregoing general and specific objections, Complaint Counsel will produce responsive, non-privileged documents that have not already been produced or made available to Intuit, and as to which collection and production would not pose an undue burden.

12. **Request for Production 12:** All DOCUMENTS consulted, relied upon, OR cited in drafting the First AND Second Declarations of Nathan Novemsky in FTC v. Intuit Inc., No. 3:22-cv-01973-CRB (N.D. Cal.).

Response:

Complaint Counsel objects to the Request to the extent it seeks documents or information protected from discovery by the attorney-client privilege, the work product doctrine, and/or any other applicable privilege of law. Complaint Counsel also objects to the Request to the extent it seeks documents or information that are outside of the scope of materials to be searched or produced by Complaint Counsel pursuant to the FTC's Rules of Practice, 16 C.F.R. Parts 2, 3 and 4. Complaint Counsel further objects to the extent the Request seeks documents that have been filed as exhibits, that are publicly available, that are in the possession, custody, or control of Intuit or Intuit's counsel, or that Complaint Counsel has already provided to Intuit in this proceeding or the related federal court action. Complaint Counsel does not consider documents to be in its possession, custody, or control if they are, *inter alia*, located in the offices of Intuit, or otherwise in the possession, custody, or control of Intuit or its employees or agents, and hence they will not be produced as part of Complaint Counsel's Responses.

Subject to and without waiver of the foregoing specific and general objections, the Complaint Counsel will produce non-privileged documents responsive to this Request.

13. **Request for Production 13:** All DOCUMENTS relating to OR reflecting ANY votes taken by ANY current OR former Commissioners of the Federal Trade Commission regarding TURBOTAX.

Response:

Complaint Counsel objects to the Request to the extent it seeks documents or information protected from discovery by the attorney-client privilege, the work product doctrine, the government deliberative process privilege, the law enforcement evidentiary or investigative file privilege, and/or any other applicable privilege of law. Complaint Counsel also objects to the Request to the extent it seeks documents or information that are outside of the scope of materials to be searched or produced by Complaint Counsel pursuant to the FTC's Rules of Practice, 16 C.F.R. Parts 2, 3 and 4. Complaint Counsel further objects to the extent the Request seeks documents that are publicly available or that are in the possession, custody, or control of Intuit or Intuit's counsel. Complaint Counsel does not consider documents to be in its possession, custody, or control if they are, *inter alia*, located in the offices of Intuit, or otherwise in the possession, custody, or control of Intuit or its employees or agents, and hence they will not be produced as part of Complaint Counsel's Responses. Complaint Counsel further objects to the Request to the extent it seeks documents or information outside the scope of discovery and/or not relevant to the claims or defenses in this matter.

Complaint Counsel further objects to the Request as overbroad and unduly burdensome to the extent it seeks documents relating to or reflecting Commissioner votes related to TurboTax without limiting the scope to only this matter. Complaint Counsel will construe the Request to encompass documents related to and reflecting Commissioner votes to approve the administrative complaint and related federal court complaint for a temporary restraining order and preliminary injunctive relief in this matter. Subject to and without waiver of the foregoing specific and general objections, the Complaint Counsel directs Intuit to the following documents:

- Regarding the March 28, 2022 Commission Vote:
 - March 28, 2022 Administrative Part 3 Complaint, public redacted version available at https://www.ftc.gov/system/files/ftc_gov/pdf/D09408IntuitP3Complaint.pdf.
 - March 29, 2022 FTC Press Release “FTC Sues Intuit for Its Deceptive TurboTax “free” Filing Campaign,” available at <https://www.ftc.gov/news-events/news/press-releases/2022/03/ftc-sues-intuit-its-deceptive-turbotax-free-filing-campaign>.
- Regarding the August 19, 2022 Commission Vote:
 - August 19, 2022 Commission Order Returning Matter to Adjudication and Setting a New Hearing Date, available at https://www.ftc.gov/system/files/ftc_gov/pdf/D09408%20Commission%20Order%20Returning%20Matter%20to%20Adjudication%20and%20Setting%20New%20Hearing%20Date%20etc.%20-%20August%2019%2C%202022.pdf.
 - August 23, 2022 FTC Press Release “FTC Lifts Stay on Intuit Administrative Proceeding,” available at <https://www.ftc.gov/news-events/news/press-releases/2022/08/ftc-lifts-stay-intuit-administrative-proceeding>.

14. **Request for Production 14:** All COMMUNICATIONS OR documents reflecting COMMUNICATIONS between anyone at the Federal Trade Commission and ANY nonparty regarding the allegations in this PROCEEDING, the subject matter of this PROCEEDING, INTUIT, OR the PROCEEDING itself, including members of Congress, their staffs, the IRS, the media, customers, competitors, OR other government agencies.

Response:

Complaint Counsel objects to the Request to the extent it seeks documents or information protected from discovery by the attorney-client privilege, the work product doctrine, the government deliberative process privilege, the law enforcement evidentiary or investigative file privilege, the common interest rule, the informant privilege, and/or any other applicable privilege of law. Complaint Counsel also objects to the Request to the extent it seeks documents or information that are outside of the scope of materials to be searched or produced by Complaint Counsel pursuant to the FTC's Rules of Practice, 16 C.F.R. Parts 2, 3 and 4. Complaint Counsel further objects to the extent the Request seeks documents that have been filed as exhibits, that are publicly available, that are in the possession, custody, or control of Intuit or Intuit's counsel, or that Complaint Counsel has already provided to Intuit in this proceeding or the related federal court action. Complaint Counsel does not consider documents to be in its possession, custody, or control if they are, *inter alia*, located in the offices of Intuit, or otherwise in the possession, custody, or control of Intuit or its employees or agents, and hence they will not be produced as part of Complaint Counsel's Responses. Complaint Counsel further objects to the Request to the extent it seeks documents or information not outside the scope of discovery and/or relevant to the claims or defenses in this matter.

Complaint Counsel further objects to the Request as overbroad and unduly burdensome, and not proportional to the needs of the case. The Request encompasses "anyone at the Federal Trade Commission," covering hundreds of individuals. It also is not limited to this matter, but includes any communications about Intuit, regardless of the time of the communication or the subject of the communication. Complaint Counsel will construe the Request as encompassing communications or documents reflecting communications of Complaint Counsel and FTC staff assisting with this investigation where such communications are related to this proceeding or the allegations in this

proceeding with nonparties. So construing the Request, subject to and without waiver of the foregoing specific and general objections, the Complaint Counsel will produce non-privileged documents responsive to this Request.

Respectfully submitted,

Dated: September 9, 2022

/s/ Rebecca Plett

Roberto Anguizola, IL Bar No. 6270874

Rebecca Plett, VA Bar No. 90988

James Evans, VA Bar No. 83866

Federal Trade Commission

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**Counsel Supporting the Complaint
Federal Trade Commission**

CERTIFICATE OF SERVICE

I hereby certify that on September 9, 2022, I caused the foregoing Complaint Counsel’s Responses and Objections to Intuit’s First Set of Requests for Production of Documents, and the BCP Production Requirements, to be served via email on:

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Attorneys for Respondent, Intuit Inc.

/s/ Rebecca Plett
Rebecca Plett

Exhibit E

PUBLIC

WILMERHALE

September 16, 2022

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

Complaint Counsel:

I write regarding your Responses and Objections to Respondent Intuit's First Set of Requests for Production of Documents, dated September 9, 2022. For the reasons articulated below, some of the FTC's responses and objections lack clarity and require further elucidation so that Intuit can better understand Complaint Counsel's positions. We ask that you either supplement your Responses and Objections to address the concerns outlined below or otherwise respond in writing with the requested information by September 22, 2022. We are also available to meet and confer about these issues early next week.

To start, many of your responses prompt the same questions. First, it is unclear what steps Complaint Counsel have taken (or plan to take) to search for responsive documents. In order to facilitate an efficient meet-and-confer process, please provide the following information for each Request for which you have agreed to produce materials: (a) a description of how you intend to search for responsive documents; (b) a list of the individuals and central repositories you intend to search for responsive documents and a description of how you plan to search; and (c) the timetable on which you intend to produce documents.

Second, most of your responses include an objection "to the extent [the Request] seeks documents or information protected from discovery by the attorney-client privilege, the work product doctrine, the government deliberative process privilege, the law enforcement evidentiary or investigative file privilege, the common interest rule, the informant privilege, and/or any other applicable privilege of law."¹ You also raise a substantively identical general objection. However, you have not articulated the basis for the assertion of any privilege, nor have you stated whether you intend to withhold any documents on the basis of one or more of these privileges. Intuit is entitled to sufficient information to allow it to assess the merit of your privilege assertions. This is particularly true with respect to any document you intend to withhold based on deliberative process privilege, as that privilege must be assessed as to "each document" and "is a qualified privilege which can be overcome by a sufficient showing of need," which must be separately

¹ The Response to RFP No. 12 includes substantially similar language, but omits "the deliberative process privilege, the law enforcement evidentiary or investigative file privilege, the common interest rule, [and] the informant privilege." The Response to RFP No. 13 likewise includes similar language, but omits "the common interest rule, [and] the informant privilege."

Rebecca Plett
September 16, 2022
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assessed “[e]ach time the deliberative process privilege is asserted.” *Moore v. Valder*, 2001 WL 37120629, at *2 (D.D.C. July 31, 2001) (citing *Wolfe v. Dept. of Health and Human Services*, 839 F.2d 768, 884 (D.C. Cir. 1988) (en banc)); *In re Sealed Case*, 121 F.3d 729, 737-38 (D.C. Cir. 1997)). Accordingly, we expect that you will promptly provide a privilege log for any document you withhold on the basis of a claim of privilege. Please confirm that is the case.

I. Request Nos. 1 and 3

RFP No. 1 requested “[a]ll DOCUMENTS OR COMMUNICATIONS reviewed, consulted, considered, OR relied upon in drafting the COMPLAINT,” and RFP No. 3 requested “[a]ll DOCUMENTS reviewed OR consulted in the drafting of ANY interrogatory response.” You object to both requests to the extent they seek documents protected by any privilege; that blanket objection is unclear for the reasons explained above.

You also object to both requests as overly broad but did not adequately explain that assertion. As to RFP No. 1, you provide no explanation for this objection at all. And as to RFP 3, you claimed that the request is “overbroad to the extent it seeks documents Complaint Counsel may have reviewed, but that were not relevant to the Interrogatory Responses or that Complaint Counsel did not rely on in drafting the Interrogatory Responses.” But Intuit is entitled to the production of documents that “may be reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to [its] defenses,” *see* 16 C.F.R. §§ 3.31(c)(1), 3.37(a). If a document was reviewed or consulted when drafting the Complaint or an interrogatory response, it seems likely that its production would lead to the discovery of relevant information, even if it was not ultimately relied on when drafting the response.

Next, you object to RFP No. 1 as unduly burdensome, again without explanation. It is hard to understand how it would be unduly burdensome for you to identify and produce the documents that you reviewed, consulted, considered, or relied upon in drafting the complaint. Such documents presumably are already accessible and readily available to you, since you considered them only a short while ago. Nonetheless, if you still believe that searching for those documents would be unduly burdensome, please provide a particularized explanation of the specific burden that would be imposed by RFP No. 1. We are willing to consider a reasonable proposal to mitigate any such burden, if one actually exists.

Finally, you object to RFP No. 1 because of the purportedly inaccurate definition of the term “COMPLAINT,” taking issue with whether the complaint was “filed” versus “issued.” These kinds of semantic games are inconsistent with good faith responses to discovery. In any event, the FTC’s own website expressly recognizes that “the FTC *files* a complaint under its administrative process.”² If you are genuinely confused, “COMPLAINT” should be interpreted as, “The Part 3 Administrative complaint issued against Intuit.”

² FTC, *Legal Library: Adjudicative Proceedings*, <https://www.ftc.gov/legal-library/browse/cases-proceedings/adjudicative-proceedings>.

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Thus, your willingness to produce “all nonprivileged documents supporting the allegations in the complaint” and “documents relied upon in drafting the Interrogatory Responses” is insufficient. These requests sought a broader universe of documents and, as explained above, you have not provided any justifiable basis for narrowing the requests.

II. Request No. 2

RFP No. 2 requested “[a]ll DOCUMENTS that contradict ANY allegation in the COMPLAINT.” You object that this Request required you “to draw legal conclusions about whether documents contradict allegations in the complaint.” But the term “contradict” is not a legal term, and whether a document contradicts or undermines a factual statement is itself a factual determination because it can be made “without significantly implicating [any] governing legal principles.” *Otto v. City of Boca Raton*, 41 F.4th 1271, 1283 (11th Cir. 2022) (citations and quotations omitted).

You further represent that you are not aware of any documents that contradict any allegations in the complaint. However, it is not clear what, if anything, you did to reach that conclusion, particularly in light of your objection. Please provide us the efforts taken or that you will take to conduct a reasonable search for responsive documents.

III. Request No. 4

RFP No. 4 requested “[a]ll notes, recordings, logs, OR other DOCUMENTS relating to interviews conducted with nonparties regarding the allegations in this PROCEEDING, the subject matter of this PROCEEDING, INTUIT, OR the PROCEEDING itself.” You object to RFP No. 4 as overbroad and state that you “will construe the Request to encompass the documents related to the current proceeding.” Please confirm that you will construe this request to encompass all documents “reasonably expected to yield information relevant” to this proceeding, 16 C.F.R. § 3.31(c), rather than only documents prepared in the course of this proceeding. *See, e.g., In re 1-800 Contacts, Inc.*, 2016 WL 6609774, at *4 (F.T.C. Oct. 28, 2016) (“The showing of relevance required under Rule 3.36 is not whether Complaint Counsel has reviewed or relied upon the requested material. Rather ... [it] is whether the requested material may be reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent.”). It is possible, if not likely, that there are notes, recordings, logs, and other documents relating to interviews conducted before the start of this proceeding that are relevant to this proceeding, for example those that communicate consumer impressions regarding “free” advertisements. Because this Request encompasses those documents, they should be produced along with documents prepared with this specific proceeding in mind.

IV. Request No. 5

RFP No. 5 requested “[a]ll DOCUMENTS produced in response to ANY subpoena issued in this PROCEEDING OR produced voluntarily by ANY nonparty that relates to the allegations in this PROCEEDING.” You object to this Request to the extent “it seeks documents or

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information protected from discovery” by various privileges. But the request asks for documents produced by nonparties to which those privileges would not attach. For example, documents produced by nonparties to this proceeding, which Complaint Counsel do not represent, cannot be protected by the attorney-client privilege. Please confirm that you do not intend to withhold documents produced by nonparties as privileged.

You further object to RFP No. 5 because it purportedly “encompasses documents outside the scope of discovery and/or irrelevant to this proceeding.” But the request itself is limited to documents produced by nonparties “that relate[] to the allegations in this proceeding.” Please clarify whether you intend to withhold any documents that “relate to the allegations in this proceeding” because you nonetheless believe they are “outside the scope of discovery and/or irrelevant.” If so, please identify the documents that you believe relate to the allegations in this proceeding that are outside the scope of discovery or irrelevant.

V. Request No. 6

RFP No. 6 requested “[a]ll DOCUMENTS discussing, analyzing, OR reviewing advertisements for ‘free’ merchandise OR services by INTUIT OR ANY other company.” You object to the request as overbroad and unduly burdensome, but you provide no explanation other than a conclusory assertion that “produc[ing] records related to ‘free’ advertising claims across the agency and across time would be immensely burdensome.” For instance, you provide no information as to how many claims related to “free” advertising the agency has handled or how many documents might exist with respect to those claims. Because the Commission’s analysis of “free” advertising claims, and the consistency of its evaluation with respect to Intuit, is a central issue in this case, we are entitled to responsive documents beyond those related to Intuit’s free advertising claims. To the extent you believe this request would impose an undue burden after assessing how many responsive documents are likely to exist, please provide a particularized explanation of the specific burden that would be imposed by RFP No. 6. We are willing to consider a reasonable proposal to mitigate any such burden.

VI. Request Nos. 7 and 8

RFP No. 7 requested “[a]ll DOCUMENTS relating to OR reflecting rules OR guides adopted, provided, OR administered by the FTC about how to ADVERTISEMENTS for ‘free’ merchandise or services.” RFP No. 8 requested “[a]ll DOCUMENTS relating to OR reflecting policy discussions involving the FTC about ADVERTISEMENTS for ‘free’ merchandise OR services.” The central claim in the Complaint is that Intuit’s “free” advertising is deceptive, and Complaint Counsel have asserted (albeit counterfactually) that this case is being brought to “vindicate” the Free Guides. Thus, contrary to your suggestion that the request may encompass “documents or information outside the scope of discovery and/or not relevant to the claims or defenses in this matter,” the documents sought are plainly relevant as they may rebut assertions being made by Complaint Counsel.

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You also object to these requests to the extent they are protected by various privileges, including the deliberative process privilege. It is not clear, however, why the qualified deliberative process privilege would prevent the production of these documents given their significance to this proceeding. Moreover, the deliberative process privilege applies only to documents that are “pre-decisional.” *Abteu v. U.S. Dep’t of Homeland Sec.*, 808 F.3d 895, 898 (D.C. Cir. 2015). Any documents discussing guides, rules, or policy after a policy decision has already been made would be post-decisional and not protected by the privilege. To the extent you claim that the deliberative process privilege justifies withholding any documents, you should identify those documents in a privilege log as outlined in the RFP instructions.

You further object to these requests as overly broad and unduly burdensome. Again, you do not explain how or why searching for responsive documents would impose an undue burden, particularly given that the requested documents are directly related to the allegations in the Complaint. To the extent you believe the request is overbroad and unduly burdensome, you should explain your reasoning. We are willing to consider a reasonable proposal to mitigate any such burden.

Finally, seemingly ignoring that RFP Nos. 7 and 8 also request all documents *relating* to FTC advertising guidance for free products and services or *relating* to policy discussions about these advertisements, you identify only four responsive documents. Those four documents are themselves either guidance or policy statements. You have not offered any justification for limiting your response to those four documents or explained what actions, if any, you took to search for responsive documents. Please provide that information so that Intuit may assess the sufficiency of Complaint Counsel’s response.

VII. Request No. 9

RFP No. 9 requested “[a]ll screenshots from the TURBOTAX WEBSITE captured using ‘SnagIt’ OR ANY other screen capture software OR tool, whether referenced in the Second Declaration of Diana F. Shiller in the matter of FTC v. Intuit Inc., No. 3:22-cv-01973-CRB (N.D. Cal.), OR otherwise.” You object to RFP No. 9 as overbroad and unduly burdensome and propose limiting the request to “captures obtained as part of Complaint Counsel’s investigation of and litigation against Intuit in this matter.” To start, you do not explain when you consider Complaint Counsel’s investigation to have begun or what time period would be covered by the investigation and litigation. And you offer no explanation for why it would be unduly burdensome to identify and produce screen captures that are otherwise relevant to this matter even if they predate Complaint Counsel’s investigation and litigation against Intuit. Please clarify whether you will produce all screenshots in Complaint Counsel’s possession relevant to this proceeding, regardless of whether they were captured during the undefined investigation and litigation period. To the extent you maintain that searching for those documents would be unduly burdensome, we are willing to consider a reasonable proposal to mitigate any such burden.

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VIII. Request Nos. 10 and 11

RFP No. 10 requested “[a]ll DOCUMENTS that support OR relate to the allegation in Paragraph 43 of the COMPLAINT that ‘the term ‘simple tax returns’ is not understood by many consumers.” And RFP No. 11 requested “[a]ll DOCUMENTS related to the ‘early testing’ performed by Professor Nathan Novemsky and referenced in ¶ 9 of the Second Declaration of Nathan Novemsky in FTC v. Intuit Inc., No. 3:22-cv-01973-CRB (N.D. Cal.).”

Subject to your other objections, you agree to produce responsive, non-privileged documents “as to which collection and production would not pose an undue burden.” Again, you do not explain how or why searching for responsive documents would impose an undue burden, particularly given that the requested documents are directly related to the allegations in the Complaint. To the extent you believe these requests are unduly burdensome, please provide a particularized explanation of the burden that would be imposed by RFP Nos. 10 and 11. We are willing to consider a reasonable proposal to mitigate any such burden.

IX. Request No. 13

RFP No. 13 requested “All DOCUMENTS relating to OR reflecting ANY votes taken by ANY current OR former Commissioners of the Federal Trade Commission regarding TURBOTAX.” Your substantive response to that request consisted solely of identifying four publicly available webpages and is wholly deficient. At a minimum, Intuit has the right to understand what steps you took to search for responsive documents. As it stands, it is not clear whether Complaint Counsel performed any search. Moreover, your August 26, 2022 letter accusing Intuit of gaining access to non-public FTC information and/or documents suggests that there are responsive documents in Complaint Counsel’s possession, custody, or control related to or reflecting Commissioner votes related to TurboTax. If that is not the case, you should say so.

You also object to this request because it seeks documents outside the scope of discovery or that are not relevant to this proceeding. But any documents responsive to the request would be relevant to Intuit’s Third Affirmative Defense that “[t]he Complaint is invalid because the Commission did not vote in favor of the final Complaint,” and to Intuit’s Sixth Affirmative Defense that “[t]hese administrative proceedings violate Intuit’s Fifth Amendment Due Process right to adjudication before a neutral arbiter because of prejudgment on the merits.” To the extent you nonetheless believe documents responsive to this Request are not relevant, please explain the justification for your position.

X. Request No. 14

RFP No. 14 requested “[a]ll COMMUNICATIONS OR documents reflecting COMMUNICATIONS between anyone at the Federal Trade Commission and ANY nonparty regarding the allegations in this PROCEEDING, the subject matter of this PROCEEDING, INTUIT, OR the PROCEEDING itself, including members of Congress, their staffs, the IRS, the media, customers, competitors, OR other government agencies.” For the same reasons articulated with respect to RFP No. 13, many of the objections to RFP No. 14 are unexplained and misplaced.

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For example, you object that the request seeks irrelevant information, without articulating how communications about “the allegations in this PROCEEDING, the subject matter of this PROCEEDING, INTUIT, OR the PROCEEDING itself” would not be relevant. To the extent you believe documents responsive to this Request are not relevant, please explain the justification for your position.

Similarly, it is unclear how any of the privileges listed in your response would apply to communications or documents reflecting communications between the FTC and non-parties. As a general matter, none of those privileges would apply to communications with nonparties. Please confirm that you do not intend to withhold communications with nonparties as privileged or, if the Complaint Counsel do intend to withhold documents on that basis, that all such records will be reflected on Complaint Counsel’s privilege log.

You further object to RFP No. 14 as overbroad and unduly burdensome to the extent the request is “not limited to this matter, but includes any communications about Intuit, regardless of the time of the communication or the subject of the communication.” You state that you “will construe the Request as encompassing communications or documents reflecting communications of Complaint Counsel and FTC staff assisting with this investigation where such communications are related to this proceeding or the allegations in this proceeding with nonparties.” But you provide no explanation for why it would be unduly burdensome to identify, collect, and produce relevant documents from others at the FTC that have had responsive documents or communications. Indeed, it seems likely that FTC staff who are not currently assigned to “assist[] with this investigation” may have responsive documents in their possession, as the staffing on this matter has changed multiple times. For example, it is clear that the files of Fran Kern, Colin Hector, and Ian Barlow should be searched, even though they are not currently assisting with the investigation or litigation. We also understand that Tej Srimushnam had many communications with outside parties and those must be searched too. So should documents and communications possessed by Lois Greisman, Samuel Levine, and Will Maxson. It should be straightforward to identify others on the FTC staff who also would have had responsive communications. To the extent you nonetheless believe this request to be unduly burdensome, please explain the justification for your position. We are also willing to consider a reasonable proposal to mitigate any such burden.

Sincerely,

/s/ David Z. Gringer

cc: Roberto Anguizola, Esq., Federal Trade Commission
James Evans, Esq., Federal Trade Commission

Exhibit F

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Subject: RE: D09408 - Complaint Counsel's Responses and Objections to Interrogatories and Supplemental Initial Disclosures

From: Anguizola, Roberto <ranguizola@ftc.gov>

Sent: Friday, September 30, 2022 5:17 PM

To: Woodman, Derek <Derek.Woodman@wilmerhale.com>

Cc: Plett, Rebecca <rplett@ftc.gov>; Evans, James <jevans1@ftc.gov>

Subject: RE: D09408 - Complaint Counsel's Responses and Objections to Interrogatories and Supplemental Initial Disclosures

EXTERNAL SENDER

Derek,

We can discuss this in more detail during our upcoming meet and confer.

We can send you a list of FTC employees whose documents we are searching. Before we do that, I want assurances that Intuit will reciprocate by providing a similar list. I don't think anything in the Part 3 Rules requires such a list but we can consider doing that if both sides agree to exchange similar lists.

Complaint Counsel intends to search and produce responsive non-privileged documents in the possession, custody, or control of the Division of Marketing Practices ("Division"), the division of the Commission's Bureau of Consumer Protection that investigated this matter and is handling the prosecution of this action. *See* 16 C.F.R. 3.31(c)(2). We don't intend to "search for materials generated and transmitted between complaint counsel and non-testifying Commission employees." *Id.* We do intend to produce communications between Division staff and external sources to the extent they are responsive and not privileged. For example, we have produced such documents and will continue to do so on a rolling basis.

Have a wonderful weekend. We look forward to conferring on Monday.

Best regards,

Roberto Anguizola
Federal Trade Commission
FTC BCP/DMP, CC-8602
Org 1144, Mailstop CC-6316
600 Pennsylvania Ave., NW
Washington, DC 20580
Cell: (202) 256-0452 (preferred)
Telephone: (202) 326-3284
E-mail: ranguizola@ftc.gov

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From: Woodman, Derek <Derek.Woodman@wilmerhale.com>
Sent: Friday, September 30, 2022 4:21 PM
To: Anguizola, Roberto <ranguizola@ftc.gov>
Cc: Plett, Rebecca <rplett@ftc.gov>; Evans, James <jevans1@ftc.gov>; Perkins, Vinecia <Vinecia.Perkins@wilmerhale.com>; Salinas, Andres C. <Andres.Salinas@wilmerhale.com>; Todd, Spencer L. <Spencer.Todd@wilmerhale.com>; Berteaud, Joss <Joss.Berteaud@wilmerhale.com>; Chapin, Benjamin <Benjamin.Chapin@wilmerhale.com>; Dillaway, Molly <Molly.Dillaway@wilmerhale.com>; Jacob, Reade <Reade.Jacob@wilmerhale.com>; Mackey, Katherine <Katherine.Mackey@wilmerhale.com>; Martin, Shelby L. <Shelby.Martin@wilmerhale.com>; Silos, Phoebe <Phoebe.Silos@wilmerhale.com>; Bridge, Charles <Charles.Bridge@wilmerhale.com>; Davis, Eleanor <Eleanor.Davis@wilmerhale.com>; Milici, Jennifer <Jennifer.Milici@wilmerhale.com>; Paikin, Jonathan <Jonathan.Paikin@wilmerhale.com>; Gringer, David <David.Gringer@wilmerhale.com>
Subject: RE: D09408 - Complaint Counsel's Responses and Objections to Interrogatories and Supplemental Initial Disclosures

Roberto,

You did not respond to our request to provide the names of the FTC employees whose documents you are searching, or to confirm whether you will be producing and/or logging (1) communications and other materials sent to and from the Commissioners or the Commissioners offices; (2) communications and other materials sent between FTC counsel or other FTC legal staff that reflect conversations with third parties; and (3) communications and other materials that otherwise reflect information from external sources that are not known to Intuit.

Are you able to provide written answers to either of those questions before our call on Monday?

Best,
Derek

Derek A. Woodman | WilmerHale
+1 202 663 6980 (t)

From: Anguizola, Roberto <ranguizola@ftc.gov>
Sent: Thursday, September 29, 2022 1:07 PM
To: Woodman, Derek <Derek.Woodman@wilmerhale.com>
Cc: Plett, Rebecca <rplett@ftc.gov>; Evans, James <jevans1@ftc.gov>; Perkins, Vinecia <Vinecia.Perkins@wilmerhale.com>; Salinas, Andres C. <Andres.Salinas@wilmerhale.com>; Todd, Spencer L. <Spencer.Todd@wilmerhale.com>; Berteaud, Joss <Joss.Berteaud@wilmerhale.com>; Chapin, Benjamin <Benjamin.Chapin@wilmerhale.com>; Dillaway, Molly <Molly.Dillaway@wilmerhale.com>; Jacob, Reade <Reade.Jacob@wilmerhale.com>; Mackey, Katherine <Katherine.Mackey@wilmerhale.com>; Martin, Shelby L. <Shelby.Martin@wilmerhale.com>; Silos, Phoebe <Phoebe.Silos@wilmerhale.com>; Bridge, Charles <Charles.Bridge@wilmerhale.com>; Davis, Eleanor <Eleanor.Davis@wilmerhale.com>; Milici, Jennifer <Jennifer.Milici@wilmerhale.com>; Paikin, Jonathan <Jonathan.Paikin@wilmerhale.com>; Gringer, David <David.Gringer@wilmerhale.com>
Subject: RE: D09408 - Complaint Counsel's Responses and Objections to Interrogatories and Supplemental Initial Disclosures

EXTERNAL SENDER

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Derek,

Thank you for your latest email. I am available to meet and confer at 3pm ET on Monday on the topics set forth in your message.

As indicated during our last meet and confer, we don't believe that exchanging prolix letters is a productive or efficient way to resolve discovery disputes. Instead, engaging in problem solving dialogue during a telephone or Zoom meet and confer has proven to be more efficient and productive in my experience. In this case, it has often led to a better understanding of our respective positions and resulted in helpful compromise. We will continue to engage with you in that manner. Nothing in the rules require us to engage in extensive letter writing before meeting and conferring. We have no choice but to use our limited resources in a judicious and efficient manner. Engaging in over-length letter writing on an almost daily basis (as the defense team has done) is wasteful. It also detracts from our ongoing efforts to produce responsive documents to Intuit in a timely manner.

Setting arbitrary deadlines of your own choosing is also not productive and you have no basis to hold us to the dates below. As we indicated during our meet and confer, our team is working diligently to search, review, and produce responsive documents in accordance with our discovery obligations. To the extent your message suggests otherwise, we respectfully disagree.

Regards,

Roberto Anguizola
Federal Trade Commission
FTC BCP/DMP, CC-8602
Org 1144, Mailstop CC-6316
600 Pennsylvania Ave., NW
Washington, DC 20580
Cell: (202) 256-0452 (preferred)
Telephone: (202) 326-3284
E-mail: ranguizola@ftc.gov

From: Woodman, Derek <Derek.Woodman@wilmerhale.com>

Sent: Wednesday, September 28, 2022 11:20 PM

To: Plett, Rebecca <rplett@ftc.gov>; Anguizola, Roberto <ranguizola@ftc.gov>; Evans, James <jevans1@ftc.gov>

Cc: Perkins, Vinecia <Vinecia.Perkins@wilmerhale.com>; Salinas, Andres C. <Andres.Salinas@wilmerhale.com>; Todd, Spencer L. <Spencer.Todd@wilmerhale.com>; Berteaud, Joss <Joss.Berteaud@wilmerhale.com>; Chapin, Benjamin <Benjamin.Chapin@wilmerhale.com>; Dillaway, Molly <Molly.Dillaway@wilmerhale.com>; Jacob, Reade <Reade.Jacob@wilmerhale.com>; Mackey, Katherine <Katherine.Mackey@wilmerhale.com>; Martin, Shelby L. <Shelby.Martin@wilmerhale.com>; Silos, Phoebe <Phoebe.Silos@wilmerhale.com>; Bridge, Charles <Charles.Bridge@wilmerhale.com>; Davis, Eleanor <Eleanor.Davis@wilmerhale.com>; Milici, Jennifer <Jennifer.Milici@wilmerhale.com>; Paikin, Jonathan <Jonathan.Paikin@wilmerhale.com>; Gringer, David <David.Gringer@wilmerhale.com>

Subject: RE: D09408 - Complaint Counsel's Responses and Objections to Interrogatories and Supplemental Initial Disclosures

Counsel,

We appreciate your willingness to meet and confer about your discovery responses. But given the compacted discovery schedule in this proceeding, we think we should try to move those discussions ahead as quickly as possible. To that end,

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we are available to meet and confer this Friday. If there's no time on Friday that works for you, we can also be available at 3pm ET on Monday.

We also have responses to a few of the points discussed during our meet and confer yesterday:

- As a general matter, we reiterate our view that the most effective way to meet and confer is to exchange our positions beforehand so that we can discuss them during our meeting. We have attempted to facilitate productive and efficient conversations by providing letters stating our positions and responding to yours. To date, you have largely ignored those letters, and during yesterday's calls you stated that you do not intend to respond to them going forward. We encourage you to reconsider that position so that we can streamline our discussions and avoid unnecessarily long calls like our last two meet and confers. We do not consider your position to allow for good faith meet and confers as the Part 3 rules require.
- During yesterday's meet and confer, when asked when you would be producing documents in response to Intuit's requests, you indicated that you were working to produce documents but would not provide a definitive date. That is not tenable. To date, Complaint Counsel have only produced a single set of documents responsive to only 3 of Intuit's 14 requests. Forty days have passed since Intuit served its discovery requests, and 19 days have elapsed since Complaint Counsel served its responses and objections. Given the truncated nature of this proceeding, the relative paucity of documents that Complaint Counsel need to review and produce, and the fundamental unfairness associated with the fact that you have had access to the materials Intuit is seeking for years while Intuit will have it for only a short time before the evidentiary hearing, it is not reasonable for Intuit to wait several months to receive documents responsive to its requests. That is especially true for the documents that Intuit has been requesting since Complaint Counsel's initial disclosures in April and that should be readily available to Complaint Counsel and easy to produce. Those documents include Category J of Complaint Counsel's initial disclosures and documents related to Professor Novemsky's surveys. Your failure to produce Professor Novemsky's documentation is particularly serious because you have relied on Professor Novemsky's survey results in a dispositive motion but refused to produce much of the underlying data. There is no burden associated with your doing so, Professor Novemsky should have these materials and there is no possible privilege or FTC rule preventing their immediate disclosure. Producing this material should not require any "reprioritizing" of Intuit's other requests.
 - Please confirm that Complaint Counsel will provide the documents included in Category J of Complaint Counsel's initial disclosures and any documents related to Professor Novemsky's surveys by Wednesday, October 5.
 - Please also confirm that Complaint Counsel will substantially complete its production of documents responsive to Intuit's First Set of Requests for Production by Friday, October 14.
 - If necessary, Intuit is prepared to seek relief to ensure that it receives responsive documents under a reasonable time frame in light of the other deadlines in this case.
 - You have suggested that some of the delay in your production is due to a purported need to redact documents reflecting another target of the FTC's investigations. You proposed that Intuit agree to receive these materials on an outside attorneys' eyes only basis. Intuit does not agree. Moreover, we are skeptical that it is appropriate to redact this information. Among other reasons, it may reveal the basis for a selective prosecution defense, or other investigative improprieties that warrant relief.
- We also discussed the documents that you intend to search when responding to Intuit's Requests for Production. We appreciate that you provided us with a summary of the types of people whose documents you intend to search. However, we are entitled to a full list of the individuals whose documents you intend search for responsive documents. Please provide us with this list by Friday, September 30 at 5 p.m. ET. To be clear, that list should include at minimum everyone at the FTC who has ever worked on this case or any related

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investigations, including but not limited to Lois Greisman, Will Maxon, all of you, Tej Srimushnam, Colin Hector, and Ian Barlow.

- You also indicated that pursuant to 16 C.F.R. § 3.31(c)(2), you would not search or produce internal emails between team members, other than emails to and from testifying witnesses on your team. To be clear, Intuit believes that given its affirmative defenses and the serious concerns it has about the fairness of this proceeding, there is sufficient “good cause” for Intuit to obtain these materials. However, at present, Intuit is seeking only that you search and produce (or if withheld on privilege grounds, list on a privilege log) (1) communications and other materials sent to and from the Commissioners or the Commissioners offices; (2) communications and other materials sent between FTC counsel or other FTC legal staff that reflect conversations with third parties; and (3) communications and other materials that otherwise reflect information from external sources that are not known to Intuit.

We ask that you provide written responses to these specific points prior to any meet and confer, and no later than Friday, September 30 at 5pm ET. We are also available to discuss these issues further at our upcoming meet and confer.

Finally, we would also like to memorialize a couple of the issues discussed yesterday:

- In response to Intuit’s concerns about the timeliness of Complaint Counsel’s productions, and recognizing that it is often necessary to serve additional discovery requests after receiving initial discovery responses, you stated that you would not object to the timeliness of discovery requests we serve after October 14, 2022.
- You stated that you will send us a draft of proposed stipulations for us to consider by next Friday, October 7. Because the stipulations were in part meant to address your objections and responses to Intuit’s Requests for Admission, you recognized that the deadline for a motion to compel related to those Requests would be timely if filed after the parties discussions broke down.

Best,
Derek

Derek A. Woodman | WilmerHale

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From: Plett, Rebecca <rplett@ftc.gov>

Sent: Wednesday, September 28, 2022 12:24 PM

To: Woodman, Derek <Derek.Woodman@wilmerhale.com>; Anguizola, Roberto <ranguizola@ftc.gov>; Evans, James <jevans1@ftc.gov>

Cc: Perkins, Vinecia <Vinecia.Perkins@wilmerhale.com>; Salinas, Andres C. <Andres.Salinas@wilmerhale.com>; Todd, Spencer L. <Spencer.Todd@wilmerhale.com>; Berteaud, Joss <Joss.Berteaud@wilmerhale.com>; Chapin, Benjamin <Benjamin.Chapin@wilmerhale.com>; Dillaway, Molly <Molly.Dillaway@wilmerhale.com>; Jacob, Reade <Reade.Jacob@wilmerhale.com>; Mackey, Katherine <Katherine.Mackey@wilmerhale.com>; Martin, Shelby L. <Shelby.Martin@wilmerhale.com>; Silos, Phoebe <Phoebe.Silos@wilmerhale.com>; Bridge, Charles <Charles.Bridge@wilmerhale.com>; Davis, Eleanor <Eleanor.Davis@wilmerhale.com>; Milici, Jennifer <Jennifer.Milici@wilmerhale.com>; Paikin, Jonathan <Jonathan.Paikin@wilmerhale.com>; Gringer, David <David.Gringer@wilmerhale.com>

Subject: RE: D09408 - Complaint Counsel's Responses and Objections to Interrogatories and Supplemental Initial Disclosures

EXTERNAL SENDER

Derek,

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Thank you for taking the time to meet with us yesterday regarding Complaint Counsel's initial disclosures. We are available early next week to meet and confer about Complaint Counsel's interrogatory responses and objections and responses and objections to Intuit's requests for production. We are generally free after 3:00 pm ET on Monday, between 12:30-1:30 ET on Tuesday, and between 11:00-2:00 ET on Wednesday. Let us know if any of those times work for you.

Best,
Rebecca

From: Woodman, Derek <Derek.Woodman@wilmerhale.com>

Sent: Thursday, September 22, 2022 5:17 PM

To: Plett, Rebecca <rplett@ftc.gov>; Anguizola, Roberto <ranguizola@ftc.gov>; Evans, James <jevans1@ftc.gov>

Cc: Perkins, Vinecia <Vinecia.Perkins@wilmerhale.com>; Salinas, Andres C. <Andres.Salinas@wilmerhale.com>; Todd, Spencer L. <Spencer.Todd@wilmerhale.com>; Berteaud, Joss <Joss.Berteaud@wilmerhale.com>; Chapin, Benjamin <Benjamin.Chapin@wilmerhale.com>; Dillaway, Molly <Molly.Dillaway@wilmerhale.com>; Jacob, Reade <Reade.Jacob@wilmerhale.com>; Mackey, Katherine <Katherine.Mackey@wilmerhale.com>; Martin, Shelby L. <Shelby.Martin@wilmerhale.com>; Silos, Phoebe <Phoebe.Silos@wilmerhale.com>; Bridge, Charles <Charles.Bridge@wilmerhale.com>; Davis, Eleanor <Eleanor.Davis@wilmerhale.com>; Milici, Jennifer <Jennifer.Milici@wilmerhale.com>; Paikin, Jonathan <Jonathan.Paikin@wilmerhale.com>; Gringer, David <David.Gringer@wilmerhale.com>

Subject: RE: D09408 - Complaint Counsel's Responses and Objections to Interrogatories and Supplemental Initial Disclosures

Rebecca,

We are available at 2 p.m. ET on Tuesday to meet and confer. I'll send an invite.

Best,
Derek

Derek A. Woodman | WilmerHale

+1 202 663 6980 (t)

From: Plett, Rebecca <rplett@ftc.gov>

Sent: Thursday, September 22, 2022 11:46 AM

To: Woodman, Derek <Derek.Woodman@wilmerhale.com>; Anguizola, Roberto <ranguizola@ftc.gov>; Evans, James <jevans1@ftc.gov>

Cc: Perkins, Vinecia <Vinecia.Perkins@wilmerhale.com>; Salinas, Andres C. <Andres.Salinas@wilmerhale.com>; Todd, Spencer L. <Spencer.Todd@wilmerhale.com>; Berteaud, Joss <Joss.Berteaud@wilmerhale.com>; Chapin, Benjamin <Benjamin.Chapin@wilmerhale.com>; Dillaway, Molly <Molly.Dillaway@wilmerhale.com>; Jacob, Reade <Reade.Jacob@wilmerhale.com>; Mackey, Katherine <Katherine.Mackey@wilmerhale.com>; Martin, Shelby L. <Shelby.Martin@wilmerhale.com>; Silos, Phoebe <Phoebe.Silos@wilmerhale.com>; Bridge, Charles <Charles.Bridge@wilmerhale.com>; Davis, Eleanor <Eleanor.Davis@wilmerhale.com>; Milici, Jennifer <Jennifer.Milici@wilmerhale.com>; Paikin, Jonathan <Jonathan.Paikin@wilmerhale.com>; Gringer, David <David.Gringer@wilmerhale.com>

Subject: RE: D09408 - Complaint Counsel's Responses and Objections to Interrogatories and Supplemental Initial Disclosures

EXTERNAL SENDER

PUBLIC

Derek,

We are available to meet and confer early next week. Tuesday afternoon at 2:00 pm ET works best for us, but we're pretty free all afternoon that day.

Thanks,
Rebecca

From: Woodman, Derek <Derek.Woodman@wilmerhale.com>

Sent: Wednesday, September 21, 2022 7:47 PM

To: Plett, Rebecca <rplett@ftc.gov>; Anguizola, Roberto <ranguizola@ftc.gov>; Evans, James <jevans1@ftc.gov>

Cc: Perkins, Vinecia <Vinecia.Perkins@wilmerhale.com>; Salinas, Andres C. <Andres.Salinas@wilmerhale.com>; Todd, Spencer L. <Spencer.Todd@wilmerhale.com>; Berteaud, Joss <Joss.Berteaud@wilmerhale.com>; Chapin, Benjamin <Benjamin.Chapin@wilmerhale.com>; Dillaway, Molly <Molly.Dillaway@wilmerhale.com>; Jacob, Reade <Reade.Jacob@wilmerhale.com>; Mackey, Katherine <Katherine.Mackey@wilmerhale.com>; Martin, Shelby L. <Shelby.Martin@wilmerhale.com>; Silos, Phoebe <Phoebe.Silos@wilmerhale.com>; Bridge, Charles <Charles.Bridge@wilmerhale.com>; Davis, Eleanor <Eleanor.Davis@wilmerhale.com>; Milici, Jennifer <Jennifer.Milici@wilmerhale.com>; Paikin, Jonathan <Jonathan.Paikin@wilmerhale.com>; Gringer, David <David.Gringer@wilmerhale.com>

Subject: RE: D09408 - Complaint Counsel's Responses and Objections to Interrogatories and Supplemental Initial Disclosures

Counsel,

Please find attached correspondence concerning the consumer complaints identified in Complaint Counsel's revised and supplemental initial disclosures.

Best,
Derek

Derek A. Woodman | WilmerHale

+1 202 663 6980 (t)

From: Plett, Rebecca <rplett@ftc.gov>

Sent: Monday, September 19, 2022 5:18 PM

To: Woodman, Derek <Derek.Woodman@wilmerhale.com>; Anguizola, Roberto <ranguizola@ftc.gov>; Evans, James <jevans1@ftc.gov>

Cc: Perkins, Vinecia <Vinecia.Perkins@wilmerhale.com>; Salinas, Andres C. <Andres.Salinas@wilmerhale.com>; Todd, Spencer L. <Spencer.Todd@wilmerhale.com>; Berteaud, Joss <Joss.Berteaud@wilmerhale.com>; Chapin, Benjamin <Benjamin.Chapin@wilmerhale.com>; Dillaway, Molly <Molly.Dillaway@wilmerhale.com>; Jacob, Reade <Reade.Jacob@wilmerhale.com>; Mackey, Katherine <Katherine.Mackey@wilmerhale.com>; Martin, Shelby L. <Shelby.Martin@wilmerhale.com>; Silos, Phoebe <Phoebe.Silos@wilmerhale.com>; Bridge, Charles <Charles.Bridge@wilmerhale.com>; Davis, Eleanor <Eleanor.Davis@wilmerhale.com>; Milici, Jennifer <Jennifer.Milici@wilmerhale.com>; Paikin, Jonathan <Jonathan.Paikin@wilmerhale.com>; Gringer, David <David.Gringer@wilmerhale.com>

Subject: RE: D09408 - Complaint Counsel's Responses and Objections to Interrogatories and Supplemental Initial Disclosures

EXTERNAL SENDER

PUBLIC

Derek,

Thank you for reaching out to clarify. The Supplemental Consumer Sentinel Contact List and Supplemental Category L Sentinel Complaints are intended to supplement, not replace, last week's Consumer Sentinel Contact List and Category L Sentinel Complaints. These are complaints received after the end date of complaints from our previous lists.

We are providing this information on "individual[s] likely to have discoverable information relevant to the allegations of the Commission's complaint," because we are required to. Rule 3.31.

Thanks,
Rebecca

From: Woodman, Derek <Derek.Woodman@wilmerhale.com>

Sent: Monday, September 19, 2022 5:11 PM

To: Plett, Rebecca <rplett@ftc.gov>; Anguizola, Roberto <ranguizola@ftc.gov>; Evans, James <jevans1@ftc.gov>

Cc: Perkins, Vinicia <Vinicia.Perkins@wilmerhale.com>; Salinas, Andres C. <Andres.Salinas@wilmerhale.com>; Todd, Spencer L. <Spencer.Todd@wilmerhale.com>; Berteaud, Joss <Joss.Berteaud@wilmerhale.com>; Chapin, Benjamin <Benjamin.Chapin@wilmerhale.com>; Dillaway, Molly <Molly.Dillaway@wilmerhale.com>; Jacob, Reade <Reade.Jacob@wilmerhale.com>; Mackey, Katherine <Katherine.Mackey@wilmerhale.com>; Martin, Shelby L. <Shelby.Martin@wilmerhale.com>; Silos, Phoebe <Phoebe.Silos@wilmerhale.com>; Bridge, Charles <Charles.Bridge@wilmerhale.com>; Davis, Eleanor <Eleanor.Davis@wilmerhale.com>; Milici, Jennifer <Jennifer.Milici@wilmerhale.com>; Paikin, Jonathan <Jonathan.Paikin@wilmerhale.com>; Gringer, David <David.Gringer@wilmerhale.com>

Subject: RE: D09408 - Complaint Counsel's Responses and Objections to Interrogatories and Supplemental Initial Disclosures

Counsel,

Please clarify whether the Supplemental Consumer Sentinel Contact List and Supplemental Category L Sentinel Complaints are intended to replace the contact list and consumer complaints identified last week in Complaint Counsel's revised initial disclosures, or if these consumers and complaints are being added to that set. As stated last week, we believe that many of the consumers and complaints already identified in Complaint Counsel's disclosures should be removed, and expanding that list would impose additional burdens on the parties.

Best,
Derek

Derek A. Woodman | WilmerHale
+1 202 663 6980 (t)

From: Plett, Rebecca <rplett@ftc.gov>

Sent: Monday, September 19, 2022 3:23 PM

To: Gringer, David <David.Gringer@wilmerhale.com>; Paikin, Jonathan <Jonathan.Paikin@wilmerhale.com>; Woodman, Derek <Derek.Woodman@wilmerhale.com>; Milici, Jennifer <Jennifer.Milici@wilmerhale.com>

Cc: Anguizola, Roberto <ranguizola@ftc.gov>; Evans, James <jevans1@ftc.gov>; Perkins, Vinicia <Vinicia.Perkins@wilmerhale.com>; Salinas, Andres C. <Andres.Salinas@wilmerhale.com>; Todd, Spencer L. <Spencer.Todd@wilmerhale.com>; Berteaud, Joss <Joss.Berteaud@wilmerhale.com>; Chapin, Benjamin <Benjamin.Chapin@wilmerhale.com>; Dillaway, Molly <Molly.Dillaway@wilmerhale.com>; Jacob, Reade <Reade.Jacob@wilmerhale.com>; Mackey, Katherine <Katherine.Mackey@wilmerhale.com>; Martin, Shelby L. <Shelby.Martin@wilmerhale.com>; Silos, Phoebe <Phoebe.Silos@wilmerhale.com>; Bridge, Charles <Charles.Bridge@wilmerhale.com>; Davis, Eleanor <Eleanor.Davis@wilmerhale.com>

Subject: D09408 - Complaint Counsel's Responses and Objections to Interrogatories and Supplemental Initial Disclosures

EXTERNAL SENDER

Counsel,

You will shortly receive via Accellion Complaint Counsel's Responses and Objections to Intuit's First Set of Interrogatories. The transmission will also include a Supplemental Consumer Sentinel Contact List and Supplemental Category L Sentinel Complaints of our initial disclosures.

The PDF of Supplemental Category L is password protected. The password is: L5yP\$bT49

Sincerely,

Rebecca Plett (she/her) | Attorney | Federal Trade Commission
Bureau of Consumer Protection | Division of Marketing Practices
CC-8505 | Org 1144 | Mail Stop CC-6316
600 Pennsylvania Avenue, NW
Washington, DC 20580
Tel: (202) 326-3664
rplett@ftc.gov

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Pages 1 - 47

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Charles R. Breyer, Judge

FEDERAL TRADE COMMISSION,)
)
Plaintiff,)
)
VS.)
)
INTUIT, INC.,)
)
Defendant.)
_____)

NO. C 22-01973 CRB

San Francisco, California
Thursday, April 21, 2022

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

For Plaintiff:

FEDERAL TRADE COMMISSION
Bureau of Consumer Protection,
Division of Marketing Practices, CC 8602
Org Code 1144, Mailstop CC-5201
600 Pennsylvania Avenue, NW
Washington, D.C. 20580

BY: **ROBERTO ANGUIZOLA, ATTORNEY AT LAW**
JAMES E. EVANS, ATTORNEY AT LAW

For Defendant:

WILMER, CUTLER, PICKERING, HALE
& DORR LLP
1875 Pennsylvania Ave., NW
Washington, D.C. 20006

BY: **SETH P. WAXMAN, ATTORNEY AT LAW**
JONATHAN E. PAIKIN, ATTORNEY AT LAW

(APPEARANCES CONTINUED ON THE FOLLOWING PAGE)

REPORTED BY: Marla F. Knox, CSR No. 14421, RPR, CRR, RMR
United States District Court - Official Reporter

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APPEARANCES: (CONT'D)

For the Defendant:

WILMER, CUTLER, PICKERING, HALE
& DORR LLP
7 World Trade Center
250 Greenwich Street
New York, New York 10007

BY: DAVID Z. GRINGER, ATTORNEY AT LAW

WILMER, CUTLER, PICKERING, HALE
& DORR LLP
2600 El Camino Real - Suite 400
Palo Alto, California 94306

BY: SONAL N. MEHTA, ATTORNEY AT LAW

PROCEEDINGS

1 Thursday - April 21, 2022

10:25 a.m.

2 P R O C E E D I N G S

3 ---000---

4 **THE CLERK:** Court is now in session. The Honorable
5 Charles R. Breyer is presiding. You may be seated.

6 Our court reporter can't be in two places at once.

7 **THE COURT:** She can't?

8 **THE CLERK:** She is appearing by phone. She went from
9 Zoom to phone.

10 **THE COURT:** Apparently we don't have an in-person
11 court reporter, but we have a remote court reporter. We will
12 see how remote it is in a minute.

13 But I would appreciate if the parties, when they address
14 the Court or each other, identify themselves and so we will
15 have a record of it.

16 Why are all the lights out in this courtroom? What is
17 going on?

18 **THE CLERK:** I think it's for effect because it was a
19 little too bright.

20 **THE COURT:** I like a little sunshine. Sunshine in the
21 judicial process, isn't that -- doesn't that just make
22 everyone's day?

23 **THE CLERK:** Okay, let me call the case, Judge.

24 **THE COURT:** Apparently I'm like an airline. Masks are
25 optional, so I leave it up to you. Except if you are not

PROCEEDINGS

1 vaccinated, please wear a mask.

2 **THE CLERK:** Calling civil action C22-1973 Federal
3 Trade Commission versus Intuit, Inc.

4 Counsel, please state your appearances in the microphone
5 for the Court. Thank you.

6 **MR. ANGUIZOLA:** Good morning, Your Honor, I am Roberto
7 Anguizola on behalf of the Federal Trade Commission, and with
8 me is co-counsel James Evans.

9 **THE COURT:** Good morning.

10 **MR. WAXMAN:** Good morning, Your Honor, I'm Seth Waxman
11 representing Intuit. And with me at counsel table are my
12 colleagues Sonal Mehta, David Gringer and Jonathan Paikin.

13 **THE COURT:** Good morning. And Counsel can remain
14 seated unless you want to come up to the podium. Not
15 necessary. But make sure your remarks are before a microphone.

16 So this matter is on based upon the FTC's request for
17 injunctive relief, and it was initially filed -- well, I don't
18 have the date of its filing -- but about two weeks ago; is that
19 correct?

20 **MR. ANGUIZOLA:** March 28th, Your Honor.

21 **THE COURT:** March 28th. And it was assigned at that
22 time to Judge Davila that related to this Court.

23 And the question -- the initial question was when to
24 conduct the hearing on the proposed injunctive relief.

25 The hearing I think was scheduled -- originally scheduled

PROCEEDINGS

1 for April 18th; is that right or am I off on that?

2 **MR. ANGUIZOLA:** It was originally scheduled for
3 March -- no, April 14th.

4 **THE COURT:** April 14th.

5 **THE CLERK:** Counsel, please don't forget to state your
6 name.

7 **THE COURT:** Yeah, state your name.

8 And if my memory services me correctly, it's like
9 April 15th is when taxes are due or was there some extension to
10 April 18th? I couldn't quite figure out what day tax day is.
11 It will live in infamy. What day is tax day?

12 **MR. ANGUIZOLA:** Your Honor, this is Roberto Anguizola.
13 And tax day this year was Monday April 18th.

14 **THE COURT:** Oh, so it was the IRS, Internal Revenue
15 Service, they gave you a weekend to collect your assets. Yes.

16 **MR. WAXMAN:** I think it was -- this is Seth Waxman
17 speaking. I think it was the confluence of tax day and Good
18 Friday.

19 **THE COURT:** Ah, okay.

20 **MR. WAXMAN:** That led --

21 **THE COURT:** There you go. Sorry. Exactly. Yeah, I'm
22 sure that's correct. I'm sure that's correct. So that's fine.
23 But anyway you know, it was the 18th.

24 You know, the way it hit me was actually in Mr. Waxman's
25 brief was, you got to have an emergency of some weight in order

PROCEEDINGS

1 to invoke the injunctive powers of the Court and not
2 basically -- an injunction is not to disrupt a satisfactory
3 status quo.

4 In other words, I can understand that an injunctive relief
5 can be given to stop a particular harm when the particular harm
6 is a serious particular harm that is about to occur.

7 But the way I looked at it -- and you can correct me --
8 the FTC can correct me if I'm wrong -- was that this is a harm
9 that was, quote, known -- a potential harm -- I'm not passing
10 judgment on the merits of whether it is a harm or not -- but it
11 was a -- it was known to the FTC for a considerable period of
12 time, and they didn't seek injunctive relief until shortly
13 before tax day.

14 And after all, I mean, we know what the case is about.
15 The case is about filing for taxes.

16 So it is a particular -- it is a particular remedy geared
17 to a particular time of the year that is of significance here.

18 And so when I got it, I looked at it and thought why wait?
19 What was the -- what was the reason for waiting?

20 Because the problem is if we wait on something like this,
21 first of all, if there is harm, much of it is accrued.

22 And secondly, it becomes in and of itself entirely
23 disruptive to a company that is operating a particular way.

24 Third, it probably minimizes -- has a minimal impact on
25 damages if there are damages because it is -- you wait so late.

PROCEEDINGS

1 So, the FTC did respond and their response was -- well,
2 let's see, how should I put it? How about this: They were
3 simply out lawyered in this case. They were out lawyered in
4 that they waited, waited for responses and they weren't
5 forthcoming; and ultimately there were -- they were unable to
6 arrive at a disposition. And so time elapsed -- time passed
7 and here we are.

8 And it really wasn't their fault because they operated in
9 good faith trying to achieve a result. They thought they were
10 going to achieve a result or didn't -- I don't know -- and --
11 and time passes, which, of course, happens. I understand that.

12 And it is not -- it is not the sort of thing where I would
13 say that, you know, somebody is operating in good faith and
14 somebody is operating in bad faith.

15 I don't know that I need to get into that because the fact
16 of the matter is regardless of whose fault it was, here we are.
17 Here we are.

18 And -- and the request for emergency relief is -- it is
19 basically mooted, notwithstanding the merits of the situation.

20 Now, I haven't heard from you. And I'm quite sure the FTC
21 wants to respond to this, so I will, of course, listen. But
22 I'm giving you my impression after reading hundreds of pages of
23 argument on this subject.

24 So, go ahead. Come on up, if you would like.

25 **MR. ANGUIZOLA:** Good morning again. Again,

PROCEEDINGS

1 Your Honor, Roberto Anguizola, for the record, on behalf of the
2 U.S. FTC.

3 **THE COURT:** Right.

4 **MR. ANGUIZOLA:** And here we are. The reason why it
5 was appropriate for an emergency before tax day -- and I don't
6 want to spend a lot of time on that because here we are after
7 tax day -- can be found in -- before I get into this, I want to
8 address a housekeeping matter, which is that a lot of the
9 material -- I think a lot of the material is under seal here,
10 and I think it is difficult for me to address your very
11 specific questions about the timing and whether this matters
12 without referring to that material.

13 And I don't know whether there is anybody in the courtroom
14 that should not be hearing this information. So that's a
15 question that I pose to Intuit's Counsel.

16 **THE COURT:** Well, I don't want a secret hearing. I
17 mean, this is a public proceeding.

18 **MR. ANGUIZOLA:** Okay.

19 **THE COURT:** You know, just -- and really, all I do
20 generally seal is personal identification information, privacy
21 concerns and so forth.

22 In terms of overall strategy and so forth, I'm not so
23 inclined to -- to somehow burden a party with trying to make an
24 argument when, in fact, the argument is based on under seal
25 documents. I doubt if Intuit has a problem with that.

PROCEEDINGS

1 **MR. WAXMAN:** Your Honor, Seth Waxman for Intuit.

2 **THE COURT:** Yes.

3 **MR. WAXMAN:** I don't see -- if we are talking about
4 the issues of exigency, nothing has been filed addressed under
5 seal. Some confidential business documents have been filed
6 under seal. And, of course, Your Honor received a sealed
7 filing yesterday.

8 But, on the question of what the exigency is or isn't, I
9 just can't imagine any confidential company information being
10 relevant.

11 **THE COURT:** Well, okay. Give your free-wheeling
12 argument and let me hear it.

13 **MR. ANGUIZOLA:** Okay. With your permission, I will,
14 Your Honor.

15 So our case was filed March 28th. And that's important
16 because if you -- if the Court looks at Government Exhibit 298,
17 at Intuit FFA-FTC 105770, it -- it's a chart that maps out
18 Intuit's season and when most -- most consumers purchase
19 products -- tax preparation products from Intuit.

20 And the biggest point -- the peak of the season is the two
21 weeks prior to the tax day.

22 And so, you mentioned earlier that we got out lawyered and
23 maybe we got snookered by the company and its lawyers, but it
24 became clear to us that Intuit wanted to delay this case until
25 after tax day. That became clear to us --

PROCEEDINGS

1 **THE COURT:** When did that become clear to you?

2 **MR. ANGUIZOLA:** It became clear to us around March.

3 **THE COURT:** Well, become clear to me -- if it's true,
4 if they did -- and I'm not commenting on whether they did or
5 not -- it would occur to me much earlier than that, I would
6 think that knowing that April 15th or 18th is tax day, knowing
7 that -- and after all, the FTC does have a calendar. We know
8 that -- I would think that if I was in defense strategy here
9 having embarked upon a particular marketing plan that was set
10 well in advance of tax day, that maybe they don't want any
11 disruption in their marketing plan because it is geared to the
12 generation of income given that they know that most people,
13 myself included, file around April 15th.

14 That's when we owe the government some money. Much rather
15 have the money in my pocket than Uncle Sam's pocket.

16 So I --

17 **MR. ANGUIZOLA:** Yes, Your Honor --

18 **THE COURT:** I mean, really, it seems to me it is sort
19 of a -- somewhat naive, if I may use that word without the
20 pejorative effect, to think that of course they want to run it
21 out.

22 Their strategy, whether legal or not legal or whether
23 appropriate or inappropriate -- and I'm not passing judgment on
24 that -- it is their strategy. And they want to keep it in
25 effect without a disruption. And so I think that was obvious

PROCEEDINGS

1 pre-March, wasn't it?

2 And by the way, you had conversations with them before
3 that time. So, I don't know what those conversations were, but
4 my guess is that that they didn't -- they didn't bring about
5 the changes that you thought appropriate in your duty as a
6 member of the FTC staff in a timely manner and that unfolded.

7 But it was somewhat predictable given that there is an
8 inertia of a company to try to change things at a particular
9 time when their income, their revenues, depend upon a plan.

10 **MR. ANGUIZOLA:** And that's correct. And that's --
11 obviously our position and hope was that the TRO hearing would
12 happen well in advance of -- with enough advance to prevent the
13 greatest harm, which is the two weeks prior to tax day.

14 I want to address where we are now, which is --

15 **THE COURT:** Okay.

16 **MR. ANGUIZOLA:** -- after tax day.

17 **THE COURT:** Yeah.

18 **MR. ANGUIZOLA:** If you turn to that same document,
19 Intuit 10577 at Government Exhibit 298, there is still harm to
20 be had.

21 So between now and the automatic extension date for --
22 for -- filing an -- a late tax return, which consumers can do
23 between now and October, Intuit as of tax year 2019 generated
24 \$35 million of revenue from consumers in that category.

25 And so even though we can agree to disagree on how naive

PROCEEDINGS

1 we were and the timing and whether the Defense Counsel out
2 lawyered us, there is still harm occurring now.

3 And we filed a third declaration of FTC investigator Diana
4 Shiller -- it is Government Exhibit 319 at docket 57-3 -- which
5 demonstrates that the advertising at issue, the deceptive free
6 claims that are at the core of this case, are still being made
7 by Intuit as part of their post-season strategy.

8 So, yes, we -- we wish that we could have prevented the
9 harm that would have happened at the peak, but there is still a
10 lot of harm that can be prevented now.

11 **THE COURT:** Okay. So let's move on. Let's move on to
12 your argument. Tell me -- let's assume that, you know, bygones
13 be bygones, and there are certain changes -- it is a clean
14 slate.

15 You come in -- let's say you just discovered this. Who
16 cares. You come in and you say, you know, Judge, between
17 April 15th and October 15th, if that's the date, you know, this
18 tool, this method, is going to be disseminated to prospective
19 filers; and we feel -- the FTC feels that the representations
20 or the method by which filers are advised as to the mechanics
21 of how the system works is unfair -- is unfair, inappropriate.

22 And it is inappropriate in the following way: It entices
23 or encourages or represents to a taxpayer that he or she will
24 have paid free service when, in fact, the reality is they will
25 not or the reality is that they will be so deeply involved in

PROCEEDINGS

1 the filing system that they will at that point elect to pay
2 compensation to Intuit as distinct from disassociating itself
3 from the website.

4 I think those are the arguments that I sort of got --

5 **MR. ANGUIZOLA:** And that's correct. And that
6 behavior, despite the fact that Intuit has knowledge of this
7 action and very well knows that the FTC's concerns with it and
8 should know the illegality of it, the deception that is
9 happening, they -- the very next day after tax day -- if you
10 look at Shiller declaration. It is on the docket 57-3 at
11 paragraph 14 -- she has an image of a blog published by
12 TurboTax. "Did you miss the tax deadline?"

13 And then there is a representation "you can start for
14 free." And when you click that, if you go to paragraph 15, you
15 land on the TurboTax website. And there is the free claims,
16 "free, zero, zero, zero."

17 The truth of the matter is -- and we have laid this out in
18 our matter -- two-thirds of American consumers are ineligible
19 to file for free using TurboTax. And that's deception.

20 Intuit's answer is: Well, we tell them "simple returns
21 only" or something of that ilk.

22 And we have conducted a survey to determine is that a good
23 disclaimer. And we have consulted with Professor Novemsky from
24 Yale University at GX -- Government Exhibit 302.

25 His survey shows that 55 percent of consumers that have

PROCEEDINGS

1 not -- have not used TurboTax in the past -- he refers to that
2 as group A -- 55 percent of those people think that they have a
3 simple tax return even though they would -- based on the
4 questions in the survey they would be ineligible.

5 So the majority of consumers or at least a significant
6 minority, which is the standard, go in and don't understand
7 that disclaimer. And that disclaimer contradicts the -- the
8 very claim even if it was understood.

9 It is also confusing because we have laid out how -- the
10 disclaimer itself -- Intuit's definition of what "simple tax
11 return" means changes from year to year to year.

12 So I -- shortly after filing this case, I received an
13 e-mail from a consumer saying "Yes, I got snookered this year
14 because last year I had unemployment benefits and last year a
15 simple return under Intuit's definition would include
16 unemployment." And he was able to file for free.

17 This year, simple return means something else, and it is
18 not included. So this year he went in; entered all the data;
19 wasted his time and ended -- faced with a decision, "Do I now
20 start all over or do I pay and stop wasting my time?"

21 And the harm that happens is you create -- they are
22 creating a marketplace where the consumers don't -- you know,
23 they think it is a dishonest marketplace, and this is
24 ultimately what we are trying to avoid here.

25 So the conduct is ongoing. And now they have -- they have

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1 had a chance to correct it and they haven't.

2 **THE COURT:** Well, is your quarrel -- I'm trying to
3 figure out exactly what your quarrel is with.

4 Are you saying they shouldn't say "simple" because
5 "simple" is one of those terms that means -- it is in the eye
6 of the beholder; that something is either simple. Something to
7 one person may seem simple, to the other person may be
8 complicated. And therefore, it is not a defining term that
9 would give guidance to a person to understand that he or she
10 would not be required to pay a fee for the services that are
11 rendered.

12 It is just not -- it is not exact enough. And, in fact,
13 it is misleading in that -- in that it just has too many things
14 in the common parlance of its understanding that would pull
15 people in and that's why it's deceptive.

16 **MR. ANGUIZOLA:** Well, it begins with the use of the
17 word "free." Simple return is a --

18 **THE COURT:** Well, free -- listen, I have no problem
19 with the word "free." My problem is with the word "simple."

20 I mean, free is free. Free means no paying. Do not pay
21 and don't have to pay. That's what free means. It doesn't
22 mean anything else. It doesn't mean sort of free. Pay a
23 dollar, \$10, \$20. Free is free.

24 But that's not -- is that the deception? Are you saying
25 it is really not free? It is not free in the sense that they

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1 charge? And, therefore, it is not free.

2 **MR. ANGUIZOLA:** It is not free --

3 **THE COURT:** But they come back and they say: Look, we
4 didn't say our system is free to everybody. We said it's free
5 if the return is a simple return. That's what we said.

6 Now, so the deception, I think, at one level has to be
7 with the term "simple" and not "free," I think.

8 Have I got it wrong? Tell me I got it wrong.

9 **MR. ANGUIZOLA:** I don't think --

10 **THE COURT:** What?

11 **MR. ANGUIZOLA:** I don't think you have it exactly,
12 right. The deception --

13 **THE COURT:** Okay.

14 **MR. ANGUIZOLA:** -- begins with the word "free," and
15 then there are different variations of their ad.

16 So the question is: Is there some language that modifies
17 the claim free and -- in other words, a disclaimer? And is
18 that disclaimer clear and conspicuous?

19 So the Novemsky survey went to the question of whether the
20 disclaimer "simple return" is clear. It is not clear. People
21 don't understand what that means, and it is a -- and it is a
22 moving goalpost because Intuit changes it all the time.

23 **THE COURT:** I understand that argument.

24 **MR. ANGUIZOLA:** It is also not --

25 **THE COURT:** Why am I wrong in saying the confusion

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1 arises out of the term "simple?" It doesn't arise out of the
2 term "free."

3 Free gets you there. Free gets you in the door. But
4 there is a disclaimer. They don't say it is free to everybody,
5 and nobody thinks it is free to everybody.

6 **MR. ANGUIZOLA:** The survey data shows otherwise,
7 Your Honor, but you are not completely wrong for all of the
8 ads.

9 **THE COURT:** Well, okay. That is virtue.

10 **MR. ANGUIZOLA:** But what -- part of the issue deals
11 with conspicuousness. So if we turn back to the television ads
12 that they have now pulled -- conveniently pulled at the end of
13 the season when they knew that they were going to get sued --
14 and you can call that shrewd and good lawyering -- but that's
15 what they did.

16 In those ads simple return is a blurry microprint at the
17 end of the ad at the bottom. Sometimes they have a voiceover.
18 They say 30, 40 times or however many times. And so in that
19 instance it is not conspicuous.

20 They get closer -- even if they were able to argue that in
21 some of the space constrained ads or in some of the internet
22 ads, that they get closer to simple returns -- return -- the
23 simple return disclaimer being conspicuous, it is not clear.
24 And that's where the Novemsky survey illustrates that it is not
25 a good disclaimer because people don't understand what they

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1 mean.

2 So there are two problems. One, in a lot of the ads, the
3 ads that started the case, it is not conspicuous at all.

4 So the consumer will just take in the promise that it is
5 going to be free without ever seeing the disclaimer.

6 And then the second problem is even when consumers can see
7 and comprehend that there is a disclaimer, they don't
8 understand what that means. And it contradicts the central
9 claim, which is that is free.

10 So there is -- there are those two distinctions, and there
11 is -- it is a moving target. There's different kinds of ads,
12 but even the current ads that they are running have a problem
13 because that disclaimer is just not clear. It is not
14 understood.

15 **THE COURT:** All right. Well, let me hear from
16 Mr. Waxman, unless you just want to submit it?

17 **MR. WAXMAN:** Your Honor, Seth Waxman for Intuit. I
18 mean, I -- no, I don't want to, of course, just submit it.

19 I do want to address the merits and particularly this
20 issue of the confusion involving "simple" on a going forward
21 basis, but I think I need to say a few things in response to
22 misrepresentations that were made before.

23 This notion that we have tried to snooker the FTC is so
24 utterly false, and the paper trail -- there is an exhaustive
25 paper trail that will demonstrate some of which is already in

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1 the record.

2 This investigation was begun in a very public way three
3 tax seasons ago. Every single time there was a request for
4 production of documents, witnesses, et cetera, we have provided
5 them with alacrity.

6 We have attempted to, over the course of those years, make
7 changes -- the screen that you were just shown is from the 2019
8 tax year. We have made any number of changes to the ads that
9 they claim were deceptive in an effort to satisfy them.

10 We have asked them -- in fact, literally, quote, begged
11 the FTC since they filed its -- sent its draft complaint to us
12 almost a year ago to explain to us what it is -- on what basis
13 they believe these ads are deceptive.

14 These are ads that say very prominently -- you can see in
15 the screen you just saw on the very first line -- "for simple
16 returns only" which is hyperlinked. When you click on that
17 hyperlink, it tells you exactly who qualifies and who doesn't.

18 It then says -- right after "for simple returns only",
19 quote, "see if you qualify at turbotax .com."

20 And when you go to turbotax .com, you get a screen, which
21 was also displayed by Mr. Evans, that has the tile of things
22 saying: "Tell us about you." Do you --

23 **THE COURT:** Why don't you walk me through this? Walk
24 me through this in terms of a current -- I mean, current as of
25 today, a year or so --

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1 **MR. WAXMAN:** Yeah.

2 **THE COURT:** Here is -- let's -- let's talk about what
3 we are going to talk about. I'm not concerned about the past,
4 though I think it is entirely appropriate for you to respond.
5 For the record and so forth --

6 **MR. WAXMAN:** I understand. There is one more thing I
7 do want to say.

8 **THE COURT:** Go ahead because I don't want to cut you
9 off.

10 **MR. WAXMAN:** We have asked them over and over and over
11 again in the past year to tell us what is still objectionable
12 about the changed ads, none of which are running.

13 They have told us repeatedly: "We are not going to get
14 into that with you."

15 We went to them in November and said, look, let's get an
16 agreement on some -- what it is that you want so we can do this
17 before tax season.

18 We are a consumer product company. We don't want to be on
19 the wrong side of the government. We rely on repeat business.

20 If there is something that is confusing to a significant
21 part of the population, we want to conclude it; and we were
22 told repeatedly "We are not willing to discuss that."

23 "We are not willing to discuss that."

24 The very first time we heard anything was about two weeks
25 before the hearing before the complaint was filed when we met

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1 first with the Career Chief and then with the Chair of the
2 Commission who told us what it is that she still found
3 objectionable.

4 And that very day we wrote to her and said: Look, we will
5 pull all of the television, video, Facebook, online ads; okay.
6 And in response to that a few days later we got this lawsuit.

7 Now, this lawsuit is a request not that Your Honor decide
8 the merits of whether what we are doing on a going forward
9 basis is -- does or doesn't violate the FTC Act.

10 They have noticed this under Section 5 for a hearing in
11 September. The FTC is going to decide that issue.

12 They filed a complaint with you seeking only the following
13 relief: A temporary restraining order and a preliminary
14 injunction pending the September hearing to prevent us from
15 running the ads which had already stopped.

16 They now have, not in any pleading, a new exigency, which
17 as it turns out that some people missed the filing deadline and
18 they have to file by October.

19 And so their request here today is that you enter a 14-day
20 temporary restraining order and then have some hearing on a
21 preliminary injunction based on a showing that utterly does not
22 exist.

23 I mean, as Your Honor stated at the outset, preliminary
24 injunctive relief is -- as the Supreme Court has explained, is
25 extraordinary and a drastic remedy. And what is extraordinary

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1 about this case is how completely insubstantial the
2 Government's papers are.

3 They have attached -- we have some testimony today from my
4 colleague about somebody who supposedly called him to say he
5 was snookered. We have a complaint, a temporary restraining
6 order, and a reply brief that doesn't attach or reference a
7 single consumer declaration.

8 They have represented that of the tens of millions of
9 people who use TurboTax, both the free edition and the various
10 paid editions, they have received 23 complaints about the
11 advertisements.

12 We don't have those complaints. We don't know whether a
13 single one of those complaints has to do with some
14 misconception about whether you could or couldn't file for
15 free.

16 The only thing they have produced -- although we have
17 declarations and declarations and declarations saying that they
18 had to spend years talking with experts and consultants about
19 surveys -- what we have is some gossamer survey that was done
20 the week before -- start to finish the week before they filed
21 their complaint that purports to test whether people who see
22 the ads, which are not running anymore, believe that everyone
23 can file for free.

24 And yet, the survey did not show any one of the challenged
25 ads to anybody. It just asked people: If you were told that

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1 it's free if you file a simple return, do you think your return
2 is simple?

3 And so that survey says nothing whatsoever about the
4 challenge in this case, which is that our ads were deceptive.

5 It doesn't say anything about the ads at all because not
6 one person was shown any of these ads. And that is the sum and
7 substance of the Government's representations here.

8 And it requires not only a denial of the TRO and the
9 preliminary injunction but dismissal because that is the only
10 relief that is requested.

11 Now, the Government --

12 **THE COURT:** Are you then -- let me try to posit a bit.
13 Are you saying that those ads that have been pulled, if that's
14 the right word, discontinued, in light of FTC concerns and
15 discussion and so forth, is that as to that category of ads,
16 they will not be disseminated, published, going forward?

17 So there really isn't the -- the prospect of a, quote,
18 continued -- merits aside -- a continuing harm?

19 So this -- you are saying this motion has to fail for a
20 variety of reasons but one of which is there isn't an ad out
21 there that we are publishing that is the subject of a complaint
22 by the FTC.

23 We don't even know exactly what they are talking about.
24 They haven't viewed -- criticized or put into the record a
25 present ad that would be susceptible of that interpretation.

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1 And secondly, there is no consumer evidence, if I can use
2 that term, to show that there is a deception or a confusion as
3 it relates to that particular ad. Is that a fair summary?

4 **MR. WAXMAN:** Yes. Yes, it is even better than that
5 because although they have no evidence whatsoever that the --
6 that the television, video and online ads -- that we have
7 represented will not ever run again. We aren't even
8 planning -- we have undertaken not to run any television or
9 video or online ads until next tax season, which would be after
10 the FTC conducts its Section 5 hearing and makes a ruling.

11 **THE COURT:** So then what is the -- what is your
12 response to the -- to the question: Between now and
13 October 15th, how then is Intuit or TurboTax, whatever you want
14 to call yourselves, how are you presenting the product to the
15 public effective on April 18th to December -- to October? How
16 is it being shown to the public?

17 **MR. ANGUIZOLA:** Right. So it is shown to the public
18 on our website. And Your Honor can -- we have invited
19 Your Honor on paper and now orally to go to www.turbotax.com,
20 which is what the previous ad said you should do to see if you
21 qualify, and you can see for yourself that it makes lavishly,
22 promiscuously clear that it has four different editions.

23 There is a free edition, which 14 million people use each
24 year, totally for free; and that the free edition is for simple
25 returns only, which is a hyperlinked statement. And when you

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1 go to the hyperlink, it will give you the list of eligibility
2 for filing for free.

3 And it then says: To see if you qualify, go to
4 turbotax.com. And when you go to turbotax .com, you will
5 see -- Mr. Evans put it up on the page -- a display of tiles
6 that says tell me about -- tell us about yourself to decide
7 which edition you should use.

8 And if you click on, for example, "I sold stocks. I have
9 a rental property. I have childcare expenses. I -- I have
10 donated more than \$300 in charitable contributions," it
11 automatically tells you that you cannot use the free edition.
12 You have to use either basic or one of the other higher-grade
13 things.

14 And so, leaving aside the complete absence of proof -- the
15 complaint in this case addressed three or four TV ads.

16 The very first time that we were told in a meeting with
17 Chair Lina Khan what it was that the Commission still thought
18 was misleading, that very day we undertook to pull the ads, and
19 the ads have been pulled since then.

20 They are now saying: Well, we ran into court asking for a
21 TRO and a PI because tax day was coming. They now say: Well,
22 some people, some very small percentage of people, missed the
23 deadline and they are on extension.

24 And it's true that none of the ads that are in our
25 complaint are running anymore, but you can still -- and you can

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1 look at the latest declaration from their paralegal -- if you
2 Google "online free tax" --

3 **THE COURT:** Isn't my answer to it: Okay, I'm going to
4 allow you to amend your complaint. Go amend your complaint and
5 gear it towards -- I'm not granting the TRO. I'm not granting
6 the preliminary injunction. Times have changed.

7 We are now talking about those people who are going to
8 take advantage of the April 18th to October 15th extension.

9 If -- if you feel that there are deceptive ads out there
10 now, put them in your amended complaint and then we will talk
11 about it. They will either be there or they won't.

12 I mean, I don't, like, to know really what to do in the
13 sense that I'm not going to do what they want to do basically
14 because I think it is moot. And I'm not passing any judgment
15 on the merits. But it is moot.

16 I mean, I don't think it is appropriate for a Court to
17 say: Well, it is moot. But let me tell you how I really feel.
18 I like to do that but --

19 (Laughter)

20 **THE COURT:** -- I'm not supposed to. I'm not supposed
21 to do that, so I'm not going to do that.

22 But I think that because they are talking about, one, a
23 serious matter. I don't treat this as not a serious matter.
24 Two, that people should have an opportunity to come to court,
25 the Government included if, in fact, they feel that they have a

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1 basis for it. So I ask you, Mr. Waxman, what is wrong with
2 that?

3 **MR. WAXMAN:** I think if Your Honor were to dismiss the
4 complaint and deny the relief and give them the opportunity,
5 which they have in any event to file a new complaint; and they
6 can file a complaint with a TRO that not only says that these,
7 you know, Google and Bing hits are misleading but actually
8 adduce a modicum of evidence that would allow Your Honor to --

9 **THE COURT:** They have to.

10 **MR. WAXMAN:** Yeah.

11 **THE COURT:** I mean, whether --

12 **MR. WAXMAN:** So --

13 **THE COURT:** It is not Sunday school. You know, I
14 mean, they have to follow the rules. So let me ask -- this is
15 fabulous to have in-live, person-to-person argument in the
16 courtroom -- but I want to ask the FTC.

17 So, what is wrong with that? In other words, I simply
18 dismiss -- I deny your request for injunctive relief. I
19 dismiss with leave to amend. I think I dismiss with leave to
20 amend. I don't think I simply -- I don't know how else you get
21 to a leave to amend unless it is dismissed. Give me your
22 views. Come on up. We will chance it.

23 **MR. ANGUIZOLA:** This is Roberto Anguizola. They are
24 mischaracterizing the complaint. So --

25 **THE COURT:** Okay.

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1 **MR. ANGUIZOLA:** The complaint -- they would like the
2 Court to believe that the complaint was only about television
3 ads. And it is correct. We highlighted the television ads
4 because at the time that the complaint was filed the television
5 ads were ongoing, and the television ads were particularly
6 egregious.

7 But from the very get-go, if you look at paragraph 30 of
8 the complaint -- I believe it is docket 1 -- it says: Intuit
9 has employed ads including via television, YouTube and other
10 social media marketing the premium version of TurboTax
11 including but not limited to those in the absolute zero and
12 free, free, free campaigns. They have pulled the free, free,
13 free campaigns.

14 We were looking at ads beyond television. It's in black
15 and white in paragraph 30. We were looking at ads beyond those
16 particular television campaigns.

17 Then if we turn to paragraph 126, reads: The FTC has
18 reasons to believe that Defendant is violating or is about to
19 violate laws enforced by the Commission.

20 And 126(c) says: Intuit has continued engaging in many of
21 the challenged acts and practices even after learning it was
22 the subject of Government investigations; and (d), during the
23 pendency of the FTC's investigation, Intuit has continued its
24 deceptive free advertising which is ongoing.

25 Then, Count One -- again, none of -- that all envisions a

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1 situation where there is harm at the time a complaint is filed
2 and there is harm beyond television and there is harm that --
3 there is a belief that it is going to keep going on.

4 Then Count One is not limited to television. I'm not
5 going to read it, but it -- it deals with -- it is broader than
6 television.

7 It deals with instances in connection with advertising,
8 marketing, promotion, offering for sale or sale of online tax
9 preparation products or services including through the means
10 described in paragraphs 16 through 126.

11 That is beyond television. The paragraphs 16 through 126
12 deal with the website. They deal with social media. They do
13 deal with television.

14 So what they did was take out a subsegment of it, and now
15 they would like the Court to believe that our complaint doesn't
16 cover the ongoing conduct.

17 \$35 million of revenue between now and October maybe is a
18 drop in the bucket for Intuit, but in my career at the FTC,
19 most of my cases involve harm that is far less than that. And
20 it still merits --

21 **THE COURT:** Your argument is your complaint is
22 adequate in that regard and that there is no necessity of
23 amending your complaint because it stands for and accuses
24 Intuit of engaging in deceptive practices, which are ongoing.

25 **MR. ANGUIZOLA:** Correct.

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1 **THE COURT:** And there is a real harm because of the
2 existence of post-April filers.

3 I don't think that they missed the deadline. I have
4 been -- my tax accountant says: No, you are not missing a
5 deadline. You are taking advantage of a different date.

6 So it is not that. It is another way -- assuming one
7 qualifies, it is another way of collecting revenue under the
8 law. So you are saying that is ongoing -- your complaint is
9 adequate.

10 **MR. ANGUIZOLA:** That's correct.

11 **THE COURT:** What about Mr. Waxman's point, you know,
12 you don't have anyone complaining here basically? What are you
13 talking about? You know, is this just a theory that people
14 don't understand it because if they didn't understand it, you
15 know, why -- how many clients do you have in roughly in the
16 last year? How many people?

17 **MR. ANGUIZOLA:** So in the last tax season 14 million
18 people filed for free.

19 **THE COURT:** No. But the whole thing.

20 **MR. ANGUIZOLA:** The whole thing is -- free is the
21 biggest category.

22 **THE COURT:** Yeah.

23 **MR. ANGUIZOLA:** But I don't know, maybe 40, 50 million
24 people use it.

25 **THE COURT:** Out of there -- out of there, there would

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1 be a substantial number of people who have -- if it is true --
2 have a level of dissatisfaction with the way the product is
3 being presented to them.

4 And Mr. Waxman's point, as I understand it, is it's not
5 there and that's a pretty good indication, isn't it, that it is
6 not -- that it is not deceptive?

7 People come in, after all, and they look at cans of food
8 on Safeway counters which say "all natural," and they say wait,
9 a minute the propellant that takes out -- that's not all
10 natural. I mean, they say: What are you supposed to assume,
11 that, like, Old Faithful is propelling the material out?

12 And I get those. I get: Is all butter all butter? Is
13 all natural all natural? What does that mean? I never quite
14 got it.

15 But I think the saying is that people aren't shy about
16 grievances that they have if they feel they have been deceived
17 and especially within the context of where they are paying
18 money and required by law to pay money.

19 So if they think that they have been hoodwinked, where are
20 those declarations?

21 **MR. ANGUIZOLA:** A couple things on that. He has
22 misstated the evidence. So we decided to proceed more
23 efficiently here and conduct a survey rather than rely on
24 consumer declarations.

25 And according to the survey, 52.7 percent of people in

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1 group A, they mistakenly think that they can file for --
2 TurboTax for free.

3 So those -- there is a significant minority -- I would say
4 majority -- but the standard is significant minority that are
5 under the misimpression they can file for free even though the
6 people that were surveyed would not have been eligible for
7 that.

8 And when they are asked what was the source of that
9 belief, 46 percent stated they received that belief based on
10 TurboTax advertisements; and 46.9 received that misimpression
11 from the TurboTax website. And if we combine the source of
12 the -- the ads and the website causing the confusion, it goes
13 up to 72.3 percent.

14 And these are people that are ineligible and they are
15 saying: Why am I confused? Because I either saw an ad or I
16 went to the website.

17 And Professor Novemsky explains why he didn't do a
18 traditional copy-test in this case. And the reason for that
19 is: First, he thought it was appropriate to do a perception
20 survey because the ads have been running for so long and
21 have -- and the deception has been so pervasive that he wanted
22 to know am I dealing with a pool of people where a traditional
23 copy-test which is designed to just test particular claims in a
24 particular ad -- is the pool of people so confused, through no
25 fault of their own and they are identifying Intuit, TurboTax,

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1 as the source of that confusion -- is that group so confused
2 that we can't do a traditional copy-test?

3 And that's why they didn't do that and they went with this
4 perception survey, which is powerful in and of itself.

5 Defendants didn't copy-test or if they did copy-test, they
6 didn't provide it to the FTC and haven't provided it to the
7 Court.

8 And the reason for that, I suspect, that they probably did
9 a perception survey -- they have no -- they can do that through
10 a consulting expert -- and decided that a copy-test was not
11 appropriate. So you don't have copy tests from either side.

12 And to go -- in terms of the consumer complaints, we have
13 the declaration of Diana Shiller, which is at docket 12-655,
14 where she summarizes the consumer complaints; and there is many
15 more than what they -- what they describe.

16 As of March 28, 2022, the FTC had received 571 consumer
17 complaints about free TurboTax.

18 From January 1, 2021 to March 28, 2022, the FTC received
19 152 complaints.

20 She summarizes the 57 complaints that have been filed from
21 November 1, 2021 to March 28, 2022; 55 of the 57 consumers
22 thought that they could file for free; 23 of the 57 consumers
23 mentioned they saw advertising indicating that their tax filing
24 would be free; and 54 to 57 consumers paid TurboTax when they
25 thought their filing -- even though they initially went there

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1 because they thought the filing was going to be for free.

2 Traditionally the consumer complaints that we receive are
3 the tip of the iceberg.

4 I have done cases with zero consumer complaints. You
5 don't need consumer complaints, but there is a lot of them and
6 we did a survey instead.

7 The ads covered by the current complaint are ongoing as of
8 a couple days ago and --

9 **THE COURT:** Can you run me through one of these ads --

10 **MR. ANGUIZOLA:** Sure.

11 **THE COURT:** -- on my computer here or whatever it is
12 called?

13 **MR. ANGUIZOLA:** Sure.

14 **THE COURT:** It is nice to talk about it.

15 **MR. ANGUIZOLA:** Yeah.

16 **THE COURT:** It is also nice to see it, so --

17 **MR. ANGUIZOLA:** You just go to --

18 **THE COURT:** Here we go, [www.turbotax .com](http://www.turbotax.com).

19 **MR. ANGUIZOLA:** And one thing that is missing is this
20 is a deceptive door opener case. And so what that means is
21 there are ads disseminated all over the internet, all over
22 social media. They have stopped television. But up until the
23 eve of the filing of this case television and even after that,
24 they could not --

25 **THE COURT:** Well, I watched the Super Bowl. I think

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1 there were some ads in there.

2 **MR. ANGUIZOLA:** And they had ads -- they had an ad
3 that violated -- that covered --

4 **THE COURT:** I have no comment on --

5 **MR. ANGUIZOLA:** -- during the Academy Awards.

6 **THE COURT:** -- what happened with the Super Bowl.

7 The 49ers should have been in that. I mean, that was the
8 violation in the Super Bowl.

9 **MR. ANGUIZOLA:** So if you turn to paragraph 6 of the
10 Shiller declaration, docket 57-3, there is an example of a
11 Google ad. File an extension for free. Free tax filing.

12 **THE COURT:** Okay.

13 **MR. ANGUIZOLA:** So that's on the screen. That's one
14 example. That's ongoing. That one is April 19th. That's the
15 same day that she filed her declaration.

16 **MR. WAXMAN:** I'm sorry. What paragraph is that?

17 **MR. ANGUIZOLA:** Paragraph 6, docket 57-3.

18 If we turn to paragraph 8, there is a TurboTax banner ad
19 in the Milwaukee Journal Sentinel. That was as of April 14th.
20 That one is before the deadline.

21 If we go to paragraph 10 and then scroll down, scroll down
22 further, there is an example of a Facebook ad. Then
23 paragraph --

24 **MR. WAXMAN:** Excuse me. That is not an ad that is
25 running and you know it.

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1 **MR. ANGUIZOLA:** That is an ad from the Facebook --

2 **MR. WAXMAN:** -- library.

3 **MR. ANGUIZOLA:** Right.

4 **THE COURT:** I'm sorry. What is the distinction?

5 I'm --

6 **MR. WAXMAN:** It is an ad from the past that has been
7 documented.

8 **THE COURT:** Oh, okay. No, no, I get it.

9 **MR. WAXMAN:** -- in a library of prior publications.

10 **MR. ANGUIZOLA:** I think Facebook pulled the ads from
11 the past. It has the recent ones. But even if they are not on
12 Facebook, they are on Google. They are on Apple News.

13 **THE COURT:** Well, what I'm asking you for is this, if
14 you can show me an ad that was running as of April 18th or
15 19th; and I can look at it and I can understand what you are
16 complaining about. That's all I need to see.

17 **MR. ANGUIZOLA:** So paragraph 9 is an April 18th --

18 **THE COURT:** Now, looking at this one -- looking at
19 this one as an example it says -- so maybe I am taking the air
20 out of Mr. Waxman's presentation -- but it says "TurboTax free
21 edition, for simple tax returns only*"

22 That's what it is. Okay, and it's your position that
23 that's not explanatory enough that that's -- that's an
24 inadequate disclosure.

25 **MR. ANGUIZOLA:** That's correct.

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1 **THE COURT:** That's an inadequate disclosure. If I'm
2 there, I see this ad and I say: Oh, boy, free, great. So then
3 I see TurboTax free edition. That is fabulous. For simple tax
4 returns only. Oh, I say: What does that mean? I don't
5 understand what that means.

6 What then do I do as a consumer? What is my
7 responsibility as a consumer to do anything with respect to
8 this ad, which tells me that it is limited to simple tax
9 returns?

10 **MR. ANGUIZOLA:** The problem is that the consumers --
11 the survey results don't show that the consumers don't know
12 that what means. They think they know what it means, and they
13 think their returns are simple even when they are not simple by
14 Intuit's definition.

15 And so if you -- they are making a zero or free claim --
16 if you scroll down, James, I think one of the things that is
17 missing and that is more prominent on the screen if you look at
18 the language underneath the file date to file, it says free
19 in -- that's more prominent.

20 It is zero, zero, zero, which is the same as free; and the
21 only disclaimer is "for simple tax returns only" and consumers
22 believe that their returns are simple even when they are not.

23 **THE COURT:** So your statement is the disclaimer is
24 meaningless?

25 **MR. ANGUIZOLA:** Exactly.

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1 **THE COURT:** So you can put anything in that
2 disclaimer, like "just kidding" or "it only works if you are a
3 lifelong Libertarian." Whatever it says you think the
4 disclaimer is irrelevant to the infraction; that is, the wrong
5 that has been committed.

6 So your suggestion to me -- I can stop -- Judge, just
7 stop. Once they say "free, free, free," they are on the hook.
8 Doesn't make any difference what we say underneath.

9 **MR. ANGUIZOLA:** There may be instances that --

10 **THE COURT:** When you say "simple tax return," which I
11 always thought the problem is that people don't understand what
12 "simple" means. Simple to one person isn't simple to another.

13 That is the deception; that people will think that
14 "simple" means something which it doesn't mean which it -- like
15 somebody says: Oh, well, I have a -- I have some interest. I
16 have a government loan or I have got unemployment benefits or
17 dat, dat, dat. Nothing is simpler than that.

18 And they say: Oh, no, no, no, we think that is simple but
19 it is not actually simple.

20 So the term "simple" doesn't -- doesn't appropriately
21 elucidate, appropriately encompass the disclaimer that ought to
22 be considered by the consumer when the consumer gets on this
23 website. That's the FTC's --

24 **MR. ANGUIZOLA:** That's absolutely correct.

25 **THE COURT:** Well, then I think I can try to figure it

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1 out from that point.

2 **MR. ANGUIZOLA:** And we lay out the FTC black letter
3 law on disclaimers, when they are appropriate.

4 If the disclaimer -- first of all, Intuit came into it
5 backward. They looked at the .com disclosure guide and found
6 instances where the FTC says "for certain disclaimers you can
7 use a hyperlink."

8 What they didn't -- what they omitted, and they omitted to
9 file this with the Court, were the first ten pages of the guide
10 that talk about instances where the disclaimer -- the
11 information that is being disclaimed is so central to the claim
12 such as where you have cost information that you can't --

13 **THE COURT:** So the disclaimer you would actually
14 entertain, it would be a disclaimer in this ad which would say
15 "TurboTax free edition but probably not for you."

16 **MR. ANGUIZOLA:** That would be one -- there is -- and
17 our order doesn't --

18 **THE COURT:** I mean, that would certainly be fair.

19 **MR. ANGUIZOLA:** Our proposed order is not
20 prescriptive. They can certainly come up with a different way
21 to do it, but this is from the part of the guides on . com
22 disclosures that they omitted.

23 Disclosures that are an integral part of a claim or
24 inseparable from it should not be communicated through a
25 hyperlink. Instead, they should be placed on the same page and

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1 immediately next to the claim and be sufficiently prominent so
2 that the claim and the disclosure are read at the same time.

3 **THE COURT:** Why isn't that this? I mean, it is right
4 there; isn't it? I mean, it is right under the word "free,
5 free, free" or "zero, zero, zero," it says "TurboTax free
6 edition, for simple tax returns only."

7 **MR. ANGUIZOLA:** We go back to simple tax --

8 **THE COURT:** I understand that. They are saying the
9 disclosure is inadequate.

10 **MR. ANGUIZOLA:** That's correct.

11 **THE COURT:** It should say "but not for you." Okay. I
12 got it. I understand. It seems like we are rewriting the
13 issues of disclosure.

14 **MR. ANGUIZOLA:** Your Honor, if I may, Your Honor,
15 first of all --

16 **THE COURT:** I will return to you.

17 **MR. ANGUIZOLA:** I had one more --

18 **THE COURT:** Well, then go right ahead and then I will
19 give it to Mr. Waxman. We have plenty of time.

20 **MR. ANGUIZOLA:** At paragraph 15, this is the latest
21 ad, and that one is squarely dealing with the people that
22 missed tax day.

23 And Your Honor more correctly described it as you get an
24 automatic extension, so it is not that you are in violation but
25 there is that group of people. And this conduct from now until

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1 October is going to generate \$35 million of revenue.

2 And this is a problem. When they click on "start for
3 free," then you can turn to paragraph 15, and you get right
4 back to a free claim and an inadequate disclaimer that doesn't
5 do its job.

6 **THE COURT:** The disclaimer in the one you just showed
7 me is a hyperlink which says "simple tax refund only."

8 **MR. ANGUIZOLA:** Right. And hyperlinking is not
9 recommended for essential claims involving costs.

10 **THE COURT:** No. The irony is in this case, of course,
11 I have already ruled that the hyperlink for the arbitration
12 clause was inadequate.

13 And the Circuit in its wisdom reversed me. And then, of
14 course, Intuit came in and said: Oh, by the way, we don't want
15 arbitration. But that's not this case.

16 **MR. WAXMAN:** You wouldn't know it isn't this case
17 since 60 paragraphs of this complaint are complaining about the
18 IRS free file program, which the FTC well knows both Intuit and
19 H&R Block withdrew from following the 2019 tax year. But
20 nonetheless, we are subjected to pages and pages of allegations
21 about it.

22 But let's look at the examples that he just gave. And,
23 Your Honor, I think net-net the best thing to do is for you to
24 just follow those links.

25 Let's look at them in reverse order. The one that he

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1 identified on paragraph 15, it has: Did you miss the deadline?
2 And it says, you know -- the very next page.

3 **THE COURT:** Put it up on the board here so I can see
4 it, please. Thank you. Okay.

5 **MR. WAXMAN:** I don't think I can stay at the mic
6 and -- so here is one that -- this is actually one that is
7 still running. It is on a blog. It is not a video ad or
8 anything.

9 It says: Did you miss the deadline? And then right
10 underneath it -- if you just scroll up the page, Mr. Evans --
11 it says: I clicked on -- no, down, I'm sorry -- I clicked on
12 the affiant, the start for free button and it directed me to
13 the page following, which is on the next page.

14 And this I think is important because this is exactly what
15 happens. It says: Let's find the right tax solution for you.

16 And if you click on "I donated \$300 or more," you will see
17 that it tells you right off the bat you can't use for free.

18 If you click on "I own a home" or "I have rental income"
19 or "I sold stocks" or "I am self-employed," it tells you just
20 by clicking on the information -- the tabs that they are asking
21 for -- which product is available or not available.

22 If we go back to the ad that my friend was referencing, I
23 think it was paragraph -- I think it was paragraph 9, yes, 9
24 where Your Honor pointed out that in the ad -- or this is an
25 e-mail -- it says TurboTax free edition for simple tax returns

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1 only, asterisk.

2 Now, my friend and the affiant didn't bother to display
3 for Your Honor the rest of the page which has the asterisk.
4 And the asterisk says -- I guess I have lost this already on my
5 telephone -- the asterisk says --

6 **THE COURT:** Well, can you do it?

7 **MR. WAXMAN:** Yeah. "Simple" --

8 **THE COURT:** Give it to somebody under --

9 **MR. WAXMAN:** Not under 70.

10 **THE COURT:** Okay.

11 (Laughter)

12 **MR. WAXMAN:** The asterisk at the bottom of the page
13 says "a simple tax return is form 1040 only."

14 "Situations covered in TurboTax free edition, TurboTax
15 live basic and TurboTax live full service basic are the
16 following: W2 income, limited interest and dividend income
17 reported on a 1099 INT, claiming the standard deduction, earned
18 income credit, child tax credits, and student loan interest
19 deduction."

20 Those are the instances, the asterisk, that explains to
21 you what a simple tax return is.

22 Now, on this notion that -- it is difficult to unscramble
23 all this. Professor Novemsky's one-week survey which showed
24 nobody any of these ads, either the ones that are now in
25 response to a Google search request or the TV video ads,

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1 purports to answer the question whether people are confused
2 when they see the ads about whether they can or can't file for
3 free.

4 And what Professor Novemsky basically said is: I'm not
5 going to show anybody the ads. I'm just going to collect a
6 bunch of people who say they have never used the TurboTax
7 product and just ask them the question: Do you think you file
8 a simple tax return; so just like you and I were sitting in a
9 cafe on Market Street and just asked everybody who walked by.

10 The question is whether these ads are deceptive. The word
11 that Your Honor pointed to -- the only thing that could be
12 deceptive is some understanding about what "simple" means.

13 Now, "simple" is how the California Franchise Tax Board
14 describes its free filing surveys for simple returns only. And
15 we have that in the record in this case.

16 It is also exactly the same terminology that Intuit's
17 commercial competitors -- H&R Block, TaxSlayer and TaxEdge --
18 all use the term "for simple returns only."

19 And in the outset of this investigation three years ago,
20 we changed it to say "simple returns only." We hyperlinked it.

21 If you go to any of these websites and you follow the
22 Google hit and you click on the TurboTax file for free thing,
23 you will see pop up what I just read you. This is available
24 only for the following types of categories.

25 We added the words "visit turbotax .com to see if you

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1 qualify;" and if you click on that hyperlink, it gives you this
2 menu of things where you can say -- you know, if you click "I
3 own a home" or if you click "I made more than \$300 in
4 charitable contributions" or "I sold stocks" or "I had rental
5 income," you don't qualify.

6 I mean, this isn't a case in which they are entitled to
7 extraordinary preliminary injunctive relief pending a hearing
8 that they themselves have set in which they just say "this is
9 confusing."

10 You need -- in order to have a drastic or extraordinary
11 remedy of preliminary injunctive relief pending their merits
12 hearing, you not only need evidence. They need to carry their
13 burden that the evidence shows that they are likely to succeed
14 on the merits. And they have nothing.

15 I just want to correct two things. My friend said: Oh,
16 well, there were 571 complaints. That is a typo and they well
17 know that. It was 57 total of which 23 related to the ads.
18 But we don't know what people -- why they were complaining
19 about the ads; 571 is just the typo. Otherwise, the numbers
20 don't add up.

21 Second of all, they say: Well, you know, Professor
22 Novemsky didn't really think that he could properly do a
23 copy-test by which they mean how people the ads that they are
24 claiming are irretrievably deceptive to a reasonable person.
25 And they say we didn't do that either. I don't know what they

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1 are talking about.

2 We provided them long before they filed the lawsuit a
3 survey and report done by a woman named -- I forget her first
4 name but her last name is Kirk Fair, who the FTC routinely uses
5 as its own expert in these cases, who did a copy-test result
6 (sic) and reported that people were not confused. The level of
7 confusion was minuscule.

8 And this notion that oh, well, we couldn't do it because
9 so many people have some preconception about what a simple tax
10 return is -- I mean, it is just ridiculous.

11 **THE COURT:** Thank you. Anything further?

12 **MR. ANGUIZOLA:** If you go to the website and you look
13 at the information after that asterisk, it is not clear and
14 conspicuous. It is in mouse print. And a consumer that
15 scrolls through is not going to see that especially in light of
16 the more prominent free claim that happens above.

17 I think also a consumer is not necessarily going to go
18 through the little cards and know to pick those when there is a
19 big prominent claim that says "free" and they can click on an
20 orange button that says "file for free."

21 There is no typo. There is -- there were different date
22 ranges that the investigator provided in the declaration.

23 So the 571 consumer complaints deal with a different date
24 range than the 57.

25 **THE COURT:** Thank you. Submitted. Thank you.

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1 **MR. ANGUIZOLA:** Thank you, Your Honor.

2 **MR. WAXMAN:** Thank you.

3 (Proceedings adjourned at 11:38 a.m.)

4 ---oOo---

5
6 **CERTIFICATE OF REPORTER**

7 I certify that the foregoing is a correct transcript
8 from the record of proceedings in the above-entitled matter.

9
10 DATE: Wednesday, April 27, 2022

11
12
13 *Marla Knox*
14 _____

15 Marla F. Knox, CSR No. 14421, RPR, CRR, RMR
16 United States District Court - Official Reporter
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PUBLIC**CERTIFICATE OF SERVICE**

I hereby certify that on October 6, 2022, I caused the foregoing document to be filed electronically using the FTC's E-Filing system, which will send notification of such filing to:

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The Honorable D. Michael Chappell
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I further certify that on October 6, 2022, I caused the foregoing document to be served via email to:

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Dated: October 6, 2022

Respectfully submitted,

/s/ Molly Dillaway
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