UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

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

RESPONDENT INTUIT INC.'S REPLY BRIEF

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November 6, 2023

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GLOSSARY OF ABBREVIATIONS

Abbreviation	Meaning
ALJ	Administrative Law Judge
CC	Complaint Counsel
CCAB	Complaint Counsel's Answering Brief
CCB	Complaint Counsel's Post-Trial Brief
CCPC	Complaint Counsel's Proposed Conclusions of Law
CCPF	Complaint Counsel's Proposed Findings of Fact
CCRB	Complaint Counsel's Post-Trial Reply Brief
CRM	customer relationship management
ID	Initial Decision
IDF	Initial Decision Finding of Fact
RAB	Respondent's Appeal Brief
RB	Respondent's Post-Trial Brief
RPC	Respondent's Proposed Conclusions of Law
RPF	Respondent's Proposed Findings of Fact
RRB	Respondent's Post-Trial Reply Brief
RRC	Respondent's Replies to Complaint Counsel's Proposed Conclusions of Law
RRF	Respondent's Replies to Complaint Counsel's Proposed Findings of Fact
TY	Tax Year

INTRODUCTION

Seeking to satisfy *their* burden to prove that Intuit's ads were deceptive, CC consistently mischaracterize or disregard Intuit's arguments, the law, and the record. CC must take those impermissible steps because a simple truth dictates the result here: TurboTax Free Edition is advertised as a free product because it is a free product. Over *ten million* consumers use the product (widely recognized as best in the industry) every year to file their taxes for free. There is nothing deceptive about advertising a free product when it is free.

CC can argue that the ads are deceptive only by repeatedly ignoring the ads' disclosures. But reasonable consumers view the ads as they ran, and those ads expressly stated that a specific product (not all TurboTax) was free, that only some consumers could use it (often by stating "simple tax returns only"), and that consumers should see if they qualified at TurboTax.com. Thus, when a federal judge viewed the ads, he observed that they "don't say it is free to everybody and nobody thinks it is free to everybody," adding that the disclosure "is right there … it says 'TurboTax free edition, for simple tax returns only.'" RPF¶15. The record shows that reasonable consumers viewing the ads had the same reaction. And if they hadn't, Intuit's business model—building long-term brand loyalty by offering a top-notch free product—would have compelled Intuit to fix the ads. The outcome here should be no different than when a neutral judge fairly considered this record.

Instead, the steady march toward the Commission's preordained conclusion has called into question the FTC's adherence to the rule of law. CC's arguments, adopted largely verbatim by the ALJ, contravene legal precedent and the record, demonstrated partly by CC's consistent disregard of Intuit executives' testimony. Yet the ALJ largely accepted those erroneous arguments, despite his open skepticism about them during trial. Likewise, the proposed cease-and-desist order is both unnecessary and divorced from the evidence. The order also contradicts

the Commission's attempts to account for the modern digital marketplace in its enforcement actions, and the order's censoring of truthful free advertising will *harm* consumers. Those conclusions are especially clear considering the status quo is Intuit's consent order with 51 attorneys general.

ARGUMENT

I. CC REPEAT THE ALJ'S MISTAKES

A. CC Commit The Same Legal Errors As The ALJ

CC fail to justify any of the ALJ's three legal errors that Intuit identified (RAB.33-40).

1. CC would impose a baseless heightened disclosure requirement for "Free" claims

To reach their conclusion that the challenged ads were deceptive, CC (like the ALJ) proceed as though an advertiser's use of "free" triggers a heightened disclosure standard, under which the *respondent* must prove that an ad disclosed *every detail* of its offer. That standard lacks any legal basis. RAB.33-35. It is *CC's* burden, 16 C.F.R. §3.43(a), to prove that the ads were likely to deceive reasonable consumers, RAB.12. There is no exception for "free" claims, certainly when the advertised product *is* free. CC contend (CCAB.34-35) that the cases the ALJ cited—which all involved products that were advertised as "free" to everyone but *were not free for anyone*—are "on-point because Intuit's claims were false for most consumers." That is wrong (even putting aside that CC's concession that consumers *could* use the advertised products for free distinguishes this case from those cited). Intuit's "claim[]" (*id.*)—that specific advertised products were free and available *to qualifying consumers*—was in fact true no matter who saw or heard it. Nothing in Intuit's ads, therefore, had to be "disclaim[ed]" (CCAB.35).

CC also wrongly contend, like the ALJ, that ads for free products must enumerate "all" terms and conditions associated with a product. CCAB.35; ID.220. That contradicts FTC

guidance that ads need only disclose the "nature and relevance" of limitations, and that if details "are too complex to describe adjacent to the price claim, those details may be provided by using a hyperlink." GX316 at 10, A-8. CC's response—that the same guidance says "integral part[s] of a claim … should not be communicated through a hyperlink," CCAB.35—is a non-sequitur. What is "integral" is not "all terms and conditions," CCAB.35, but the "nature and relevance" of limitations, GX316 at 10, A-8. Moreover, CC have never specified the necessary details supposedly missing from the disclosures.

Finally, seeking to deny that the ALJ shifted their burden, CC quote *one* instance in which he referred to "proof" that Intuit's ads were likely to mislead, CCAB.35—ignoring the *multiple* instances (RAB.34-35) where he demanded "proof that [Intuit's ads were] *un*likely to mislead," ID.221 n.42 (emphasis added); *see* ID.195, 197, 203. Those instances show that the ALJ erroneously ignored that CC "have the burden of proof," 16 C.F.R. §3.43(a).

2. CC improperly analyze the ads piecemeal and from their subjective viewpoint

a. CC embrace the ALJ's piecemeal analysis (RAB.35-36) of the challenged ads. For example, CC pretend that the ads' qualifying language doesn't exist, in clear violation of "the principle that the Commission looks to the impression made by the advertisements as a whole." *American Home Products Corp. v. FTC*, 695 F.2d 681, 688 (3d Cir. 1982). Indeed, CC begin (CCAB.1) by excerpting from a challenged video ad the words "[a]t least your taxes are free" and one still-frame—omitting that those words followed a written disclosure (not pictured in CC's still-frame) stating that (1) the ad was for the "AbsoluteZero product only," (2) AbsoluteZero was "[f]or simple U.S. returns," and (3) consumers could "[s]ee offer details at TurboTax.com," RRF¶75. Nor is this an isolated instance: *Every* video ad CC quote contained some version of these three disclosures, disclosures CC *always* omit. CCAB.1-2, 13. Similarly,

CC quote (CCAB.13) a paid-search ad but omit its statement that "50 Million Americans Can File With TurboTax® Free Edition," which discloses that a specific product was free *and* that not all Americans could use it, CCPF¶445.

When CC do acknowledge the disclosures, they analyze each in isolation, contrary to the requirement to consider "the juxtaposition of various phrases" in "the entire document" that reasonable consumers see or hear, *Policy Statement on Deception*, 103 F.T.C. 174, 176 (1983); *accord S.C. Johnson & Son, Inc. v. Clorox Co.*, 241 F.3d 232, 238 (2d Cir. 2001). For instance, CC assert (CCAB.14-15) that the naming of a specific product *alone* is not "adequate[]" because it "doesn't convey the [offer's] terms" (*accord* ID.171). That never happened; Intuit's ads included additional disclosures that conveyed each offer's scope. Similarly, CC contend (CCAB.15-16) that saying "simple tax returns only" is "inadequa[te]" because consumers might not know what that phrase means. Apart from being wrong, RAB.16, this and the ALJ's similar assertion, ID.172, ignore that Intuit's ads contained additional disclosures. And the evidence shows that reasonable consumers who viewed the ads and their disclosures did not mistakenly believe that they could file for free. RAB.21-29.

Lastly, the ads from which CC selectively excerpt are unrepresentative and often not properly part of this case. Indeed, CC prominently cite an ad (RX200) from outside the period referenced in CC's complaint. RRF¶50. Like the ALJ, CC ignore this point. Meanwhile, the one search-result ad CC cite (CCAB.13) is nothing like any other search-result ad in the record. RPF¶¶266-269, 272-275.

b. Again repeating an ALJ error, CC analyze the ads from their subjective viewpoint, ignoring reasonable consumers' perspective. RAB.36-37. For instance, CC ignore evidence about the adequacy of Intuit's disclosures, including Peter Golder's analyses. Golder

determined that the challenged ads (1) communicated qualifications and other information in a manner consumers understand, and (2) appropriately directed consumers to the TurboTax website for more information. RPF¶¶239, 312-316; RRF¶¶693-694, 699, 702. And while CC do address Golder's analysis showing that Intuit's disclosures were comparable or superior to those in the ads of 18 benchmark companies, RPF¶¶234-237, 258-259, they incorrectly dismiss it as "speculative," CCAB.26. That benchmarking analysis was based on objective measurements of disclosures' size, duration, position, and format, RPF¶236. Contrary to CC's assertion that Golder's disclosure-benchmarking was "well-rebutted," CCAB.36, CC's expert effectively conceded that Golder's metrics are legally relevant because they come from FTC guidelines, RPF¶927. CC also fail to grapple with cases (RAB.14) approving disclosures smaller than other ad text.

3. CC's continued reliance on the deceptive-door-opener theory is misplaced

CC misstate Intuit's position concerning the deceptive-door-opener theory. Intuit does not seek to "change black-letter law" or "overturn decades of caselaw." CCAB.37-38. Intuit asks the Commission to apply the law correctly. The deceptive-door-opener cases that CC cite involved *actual doors*. The theory originated when a rental-car company misled consumers into visiting its brick-and-mortar facility. *See Resort Car Rental Systems, Inc. v. FTC*, 518 F.2d 962 (1975). The other cases concerned door-to-door salesmen who lied to get into consumers' homes. *See Encyclopaedia Britannica, Inc.*, 87 F.T.C. 421 (1976); *Grolier, Inc.*, 99 F.T.C. 379 (1982). Intuit has never argued that these cases were wrongly decided; they simply do not control.

It is *CC* who request new law in asking for such an application. No precedent supports CC's assertion that "[t]he [door-opener] doctrine applies … no matter the medium," CCAB.37

n.18. In fact, multiple cases indicate that the theory does *not* apply online. RAB.39. CC contend (CCAB.38) that those cases actually just "found as a factual matter that the challenged claims were not deceptive." But the *reason* those courts found no deception was because the relevant information was eventually disclosed on a webpage that "a customer sees before" purchasing the advertised product, *Washington v. Hyatt Hotels Corp.*, 2020 WL 3058118, at *5 (N.D. Ill. June 9, 2020); *see Harris v. Las Vegas Sands L.L.C.*, 2013 WL 5291142, at *5 (C.D. Cal. Aug. 16, 2013). That is inconsistent with the door-opener theory.

CC likewise fail to rebut Intuit's explanation of *why* the deceptive-door-opener theory does not apply here. As the ALJ stated, applying the theory here means "it doesn't matter what a consumer sees at the website" because all that would matter is that the ads "induced [consumers] to the website." RPF¶467. But unlike information accessible only at a brick-and-mortar location, information on a website is literally at consumers' fingertips. That means it *does* matter what a consumer sees at the website, because courts in deceptive-advertising cases must "consider[] other information readily available to the consumer," *Moore v. Trader Joe's Co.*, 4 F.4th 874, 882 (9th Cir. 2021); *see Bell v. Publix Super Markets, Inc.*, 982 F.3d 468, 477 (7th Cir. 2020). CC's attempt to cabin this precedent (CCAB.37-38) fails; the cases stand for "the *general principle* that deceptive advertising claims should take into account all the information available to consumers," *Moore*, 4 F.4th at 882 (emphasis added).

Next, CC fail to explain why the reasons the door-opener theory was rejected in *FTC v. DirecTV*, 2018 WL 3911196 (N.D. Cal. Aug. 16, 2018), do not apply here. CC note (CCAB.38) that "[t]he ALJ spent … three pages" on *DirecTV*. But those pages contain only unsupported distinctions and a conclusory recitation of the ALJ's flawed falsity holding. RAB.39-40.

CC further assert (CCAB.38) that rejecting the deceptive-door-opener theory here means accepting that any "deception caused by [Intuit's] ads could be cured at the website." Not so. Putting aside that there is no deception to cure, Intuit's argument is that the easily accessible TurboTax website (which consumers *had* to visit to use TurboTax) was incorporated into the challenged ads that invite and/or hyperlink consumers there. In fact, CC and the ALJ agreed that the website is "integrated into" the ads. CCPF¶455; IDF¶348. That proposition is unassailable given the requirement to consider all "information readily available to the consumer," *Moore*, 4 F.4th at 882; *accord Marksberry v. FCA US LLC*, 606 F.Supp.3d 1075, 1083 (D. Kan. 2022). And it is undisputed that consumers told to "see if you qualify" would have done just that on TurboTax.com.

Finally, CC are wrong that the TurboTax website is itself deceptive. CCAB.18-19. The site displays myriad disclosures before consumers must input any information. RPF¶469; *see* RPF¶¶372-452. CC's cherry-picked statements (CCAB.19) do not change that fact.

In sum, the deceptive-door-opener theory provides no basis to disregard the TurboTax website, and consideration of the website defeats CC's claim.

B. The Record, Properly Considered, Establishes That None Of The Challenged Ads Was Deceptive

1. No ad conveyed that "TurboTax is free"

CC are right that "Intuit advertises TurboTax Free Edition as free." CCAB.3. That is because Free Edition and the other free offers advertised were free. But the challenged ads did *not* convey, expressly or implicitly, that the entire product lineup under the brand TurboTax is free. RAB.12-17. CC's responses lack merit.

a. CC cannot redefine "express claims" to encompass "the functional equivalent of express claims" (CCAB.12). "Express claims are ones that *directly state* the representation at

issue." *Thompson Medical Co.*, 104 F.T.C. 648, 788 (1984) (emphasis added). As CC have conceded, no challenged ad directly stated the false or misleading message they allege. RPF¶¶302-308.

CC's lone cited case in support of their express-claim theory—*FTC v. Bronson Partners, LLC*, 564 F.Supp.2d 119 (D. Conn. 2008)—is inapposite. There, the defendants argued that an ad's weight-loss guarantee was actually just a "'satisfaction guarantee.'" *Id*. at 128. The court disagreed because the ad *expressly stated* that the product was "guaranteed to help you lose weight," and "the word 'satisfaction' appear[ed] nowhere." *Id*. Intuit's challenged ads nowhere stated that "TurboTax is free," CCAB.13. They stated the product name, that it was available to consumers who qualified based on the complexity of their taxes, and that further details were at TurboTax.com.

CC fare no better on their implied-claim theory. They cherry-pick words out of several ads—omitting their disclosures—and declare that those excerpts imply that "TurboTax is free." CCAB.13. But contrary to CC's misleading quotation of the FTC's *Policy Statement on Deception*, implied claims may *not* be discerned "through an examination of [a] representation" plucked out of an ad in isolation. CCAB.12 (quoting 103 F.T.C. at 176). CC omit the portion of the quoted sentence explaining that the Commission must examine "the entire document" and "the juxtaposition of various phrases in" it, 103 F.T.C. at 176.

b. CC fail to explain how reasonable consumers were likely to be deceived accounting for the challenged ads' disclosures. RAB.15-17.

First, the ads stated that a single product—not all TurboTax—was free. RAB.15. Citing a survey, CC respond (CCAB.14) that Intuit's product names "don't resonate with consumers beyond the TurboTax parent brand." But CC's reliance on that survey is absurd: It asked for the

brand advertised, to which the correct answer is TurboTax. RAB.23; *see* RRF¶¶609-610; Ryan (Intuit) Tr. 817-818. CC's reliance on testimonials and reviews naming "TurboTax" (CCAB.14) is similarly misplaced, as no testimonial or review suggested that any consumer believed "TurboTax" was the name of a specific product rather than the brand. CC's remaining argument—that the product name "arguably reinforces the 'free' claim," CCAB.15 (quoting ID.186)—is, as explained, nonsensical and contrary to unrebutted evidence, RAB.15; RPF¶319.

Second, the challenged ads' "simple tax returns only" (or similar) disclosure informed consumers that a product did not cover everyone's tax needs. This language did not "require [consumers] to understand" precisely what constituted a "simple" return (CCAB.15), because the language made clear that consumers might not qualify based on the complexity of their returns, RAB.16. The language conveyed, that is, the "nature and relevance" of the product's limitation, which is what FTC guidance states must be included on an ad's face, GX316 at A-8. CC are also wrong in asserting (CCAB.15) that "simple tax returns" lacks a consistent meaning. RAB.16, 19, 20-21. And while CC claim (CCAB.21) that the ALJ "appropriately discounted" the IRS documents Intuit introduced on this topic, he actually stated (erroneously) that there was not "*any* IRS evidence," ID.193 n.25 (emphasis added). Likewise, CC fail to distinguish cases holding that consumers are deemed as a matter of law to understand terms common in the relevant market (RAB.19); CC simply label the cases "inapposite" (CCAB.22), with no explanation. Lastly, CC are wrong that consumers do not understand "simple tax returns" (CCAB.17-18). They ignore the evidence showing otherwise, RAB.16, 21-24, 27-28, and their reliance on Nathan Novemsky's "survey" is misplaced, *infra* §I.B.2.b.

Third, the challenged ads' invitation for consumers to "see if you qualify" or "see details" at TurboTax.com further disclosed that a free product was not for everyone and directed

consumers to the website for additional information. RAB.17. CC's only response is that Novemsky's survey "measured all the information in the marketplace," including this language. Even putting aside that survey's myriad flaws, that is untenable. *Infra* §I.B.2.b.

2. CC are wrong that the record establishes that a significant minority of reasonable consumers was likely to be misled

CC state that whether ads were likely to deceive can be determined based exclusively on a "facial[]" analysis. CCAB.20. That is wrong; extrinsic evidence, if offered, must be considered. *Telebrands Corp.*, 140 F.T.C. 278, 334 (2005). Failing to do so here would be particularly improper, where the ads ran for *seven years*. There is thus abundant real-world evidence—including market research and Bruce Deal's detailed analysis of TurboTax's actual customers—that shows that the ads were not likely to deceive reasonable consumers.

a. CC fail to rebut evidence concerning reasonable consumers in the industry

CC offered no evidence about reasonable consumers in the tax-preparation industry, which dooms their claim because the ads must be considered from those consumers' perspective. RB.56. CC point (CCAB.21 n.10) to the Novemsky survey, Intuit documents, and selective consumer feedback. But none of that speaks to reasonable consumers' expectations about tax-preparation products. RPF¶¶481-484; RRF¶¶8, 490.

CC's response to Intuit's evidence is also unavailing. CCAB.21. Their contention that Intuit has not proven that consumers understand competitors' free offers is a red herring; the fact that the industry uses the term "simple tax returns" is itself evidence that consumers understand it. RPF¶¶482-483. Indeed, it strains credulity to suggest that the IRS and every major player in the online tax-preparation industry would consistently use a phrase that consumers do not understand. RPF¶¶56-59, 141-145. That is why consumers are deemed as a matter of law to understand such commonplace terms. RPC¶¶58-60. Moreover, CC have no response to the

unrebutted evidence that reasonable consumers seeing the challenged ads did not conclude "this is free for me." RPF¶¶483-489, 506, 513, 523-527. Rather, consumers at most believed they *might* qualify, and understood that they would need to determine if they did. RPF¶¶487, 506, 527.

As for the absence of meaningful negative consumer feedback—which further shows that a significant minority of consumers was unlikely deceived, RAB.24-26—CC contend that 200 complaints is "[f]ar from" miniscule, CCAB.30. But they do not explain how 200 complaints, from over six years, is anything *but* miniscule compared to the 86.4 million consumers who filed using TurboTax. RPF¶¶630-632. Nor do CC explain how Intuit could have engaged in a wide-ranging, multi-medium, multi-year deceptive marketing campaign without being overwhelmed with complaints. RPF¶¶625-626, 637, 639, 647. As CC's expert recognized, a hallmark of deceptive advertising is a substantial number of complaints. RPF¶¶624-625. Caselaw similarly recognizes that deception would be reflected in "data collected on pain points, consumer research, sales calls, closing rates, activation rates, and churn." *DirecTV*, 2018 WL 3911196, at *18. The lack of such evidence badly undermines CC's claim. CC also fail to address Intuit's arguments that the complaints they cite are irrelevant, unreliable, and unrepresentative of reasonable consumers. RPF¶¶633, 636, 917-918.

Next, CC criticize Golder's complaint-benchmarking analysis for excluding complaints made to Intuit directly and for including all Intuit Better Business Bureau complaints. CCAB.30-31. But far from skewing his results, those decisions render the analysis reliable, ensuring that Golder compared equivalent data sources and standardizing complaint rates. RRB.16; RRF¶¶722-723. Moreover, CC's speculation (CCAB.31) about reasons consumers

might not complain does not explain why, *controlling for that fact*, consumers complained less about Intuit than other companies. RPF¶¶638-640; RRF¶¶726-732.

CC's reliance (CCAB.31) on CRM and Bazaarvoice data fares no better, as those data, fairly read, show that consumers were *not* deceived, RPF¶654; RRF¶¶629-630, 633-662. Further, CC are wrong (CCAB.31-32) that Intuit was not barred at trial from rebutting their CRM evidence. As explained (RAB.26), the appendix from Erez Yoeli's previously excluded expert report was admitted over objection as a "summary exhibit" (GXD006), and Intuit was prevented from rebutting it. Either it should be disregarded or Intuit's supplemental expert report should be considered.

CC are also incorrect that Intuit wants to shift the burden to consumers. CCAB.22. Intuit points to evidence of what consumers *already* expect and how they *already* act. RPF¶¶471-473, 481-483, 485-488, 502-509, 514-518, 520-522. What CC call "baseless speculation" about consumers' high-involvement research process (CCAB.22) is actually uncontested evidence about reasonable consumers' behavior when selecting a tax-preparation product. RPF¶¶502-509, 513, 782, 891. And CC are wrong that consumers are likely to see only *deceptive* ads through their research; the record reflects numerous third-party websites disclosing Free Edition's qualifications. RPF¶¶432-433, 505-509.

Finally, CC shockingly argue that the Commission should cast aside the FTC's "Free Guides" because they supposedly "say nothing about consumer understanding of Intuit's free offers." CCAB.21. But of course those guides do not speak specifically to the challenged ads, instead recognizing more broadly that the "public understands" that free offers are usually qualified. RPF¶476. That that reality undermines CC's case is not grounds for ignoring it. Indeed, if the Free Guides must be ignored, then CC's entire case falls apart, as CC have

repeatedly argued that their case is an effort to "vindicate" (and their relief is based on) those guides. *E.g.*, CCB.68.

b. *CC's expansive reliance on Novemsky's survey is fatal to their case*

CC's continued reliance on Novemsky to support nearly every facet of their case underscores their failure to satisfy their burden of proof. Novemsky's survey is irrelevant and unreliable, and CC's defenses of it are meritless.

i. "Simple returns" results. CC's defense of Novemsky's decision to conceal Intuit's disclosures from survey participants—including the phrases "see details" or "see if you qualify at turbotax.com"—is his testimony about "consumers' tendency not to seek out additional information." CCAB.24. But Novemsky never tested that supposed tendency. RRB.54. He did not even give respondents the option to indicate they would visit the website. There is also no basis for believing (as Novemsky's survey assumes) that consumers would have seen "simple tax returns only" in isolation—the additional disclosures were next to the "simple returns" language so if consumers could see one, they could see the other. Moreover, Novemsky's opinion that consumers generally are lazy "misers" (CCAB.16) is wrong. Intuit presented survey evidence that consumers review at least three different information sources on average when researching tax-preparation products. RPF¶505.

Novemsky is not only incorrect about consumers' general tendencies, but he also ignores that the disclosure language he concealed specifically instructed consumers to seek additional information. Thus, contrary to CC's claims, it *does* "logically follow" that including the full disclosure "would materially alter [consumers'] perception of their qualification for 'simple returns.'" CCAB.24 (quoting ID.191-192). In particular, it would have stopped consumers from interpreting the phrase based on "preconceived ideas" (CCAB.24). RRF¶¶491-492.

It is no response for CC to hypothesize (CCAB.16) that "Novemsky's survey measured all the information in the marketplace," and thus accounted for the effect of "see if you qualify" or "see details at TurboTax.com." Novemsky could not have accounted for that effect because, again, he prevented consumers from seeking out additional information. To yield reliable results, a survey must "sufficiently approximate the manner in which consumers encountered the … products in the marketplace." *THOIP v. Walt Disney Co.*, 690 F.Supp.2d 218, 236 (S.D.N.Y. 2010). Indeed, the Ninth Circuit recently disregarded a survey about the phrase "Nature Fusion" because the survey (like Novemsky's) concealed disclosure language; given that "omission," the survey was not "instructive of how the 'reasonable consumer' underst[ood] the phrase … in the context of the products." *McGinity v. Procter & Gamble Co.*, 69 F.4th 1093, 1099 (9th Cir. 2023). A similar conclusion is compelled here.

ii. Improper survey design. CC miss the point in contending that "[u]naided surveys are reliable and broadly used," CCAB.24. Novemsky's failure was how he sought to use his unaided survey to test causation. RPF¶¶530-537. The ALJ correctly concluded that the survey cannot establish causation—i.e., the source of participants' beliefs—because "Novemsky did not expose the survey participants to any … marketing communications." ID.190-191. CC never engage with that reasoning, instead repeating their conclusory assertion that "Novemsky reliably tested" causation because participants identified ads as the source of their impressions. CCAB.25. That is wrong for the (unrebutted) reasons the ALJ and Intuit provided. ID.190-191; RPF¶¶530-540, 590-607; RRF¶¶558-571.[1]

[1] CC also waived their arguments that the ALJ erred by not filing exceptions. 16 C.F.R. §3.52(a)(1).

Next, CC assert that "the absence of a control group … does not make a survey unreliable" (CCAB.25). No one disputes that general assertion. The problem here (which CC never address) is that controls are necessary for perception surveys. RRF¶481; RPF¶530. None of the cases CC cite (CCAB.24-25) refutes that: Two cases concluded that the lack of controls went to "weight … rather than admissibility." *Clicks Billiards, Inc. v. Sixshooters, Inc.*, 251 F.3d 1252, 1262-1264 (9th Cir. 2001); *In re NJOY Inc.*, 120 F.Supp.3d 1050, 1077-1079 (C.D. Cal. 2015). The third provided examples of proper survey controls, including a fictitious control brand used "to identify 'noise.'" *American Dairy Queen Corp. v. W.B. Mason Co.*, 2022 WL 2760024, at *32 (D. Minn. July 14, 2022). Novemsky's survey employed nothing similar.

iii. Leading questions. CC dismiss evidence that Novemsky's participants were influenced by the survey questions, arguing "that 99% of respondents were not affected." CCAB.26. But CC ignore that respondents stated they were influenced by the questions *without prompting*. RRF¶¶523, 589. That is "strongly indicative of a more widespread" problem, RRF¶589; *see* RPF¶¶572-578, and belies CC's assertion that "Novemsky employed no 'loaded' questions," CCAB.26.

iv. Unrepresentative, biased survey population. CC downplay Novemsky's meager response rate by arguing that most participants were excluded because they "were not part of the target population." CCAB.26. But Novemsky cannot exclude roughly 85% of potential participants for failing to meet his constrained criteria, RPF¶541, yet still say his results apply to *all* taxpayers who do not qualify for free TurboTax offers, RRF¶511. Novemsky's broad exclusions mean that his sample was not representative of even that population. Moreover, Novemsky's survey sample depended on consumers accurately reporting their tax situation from

memory before they had even done their taxes. RRF¶512. CC did not establish that those screening questions yielded reliable results.

CC also have no defense of Novemsky's choice to focus on "Group A" respondents who had not used TurboTax in at least three years (possibly ever) and thus were unfamiliar with Free Edition's qualifications. First, CC point to results showing that respondents attributed their beliefs to TurboTax advertising. CCAB.27. But invoking Novemsky's results to justify his sampling choices is circular. Regardless, the ALJ correctly found those results unreliable, ID.190-191; *see* RPF¶¶530-537, 590-607. Next, CC theorize that Group A must have been familiar with TurboTax because the challenged ads were seen billions of times (CCAB.27). But that figure does not establish that *all* consumers saw the ads. The point—to which CC have no response—is that Group A is less likely than other respondents to have *seen or paid attention* to the challenged ads. RPF¶¶543-549. And for the Group A respondents who did pay attention, the ads were necessarily immaterial because they did not use TurboTax. Nor can CC bolster Group A by invoking Group B's results. CCAB.27-28. Group B merely reinforces the numerous design flaws in Novemsky's survey; it would otherwise make no sense for so many respondents who had previously paid to use TurboTax to indicate that they could use TurboTax for free. RRF¶486.

Finally, CC are wrong that a case permitting a survey to "disclose[] the FTC as its sponsor" justifies Novemsky's decision to tell consumers about the survey's purpose and then allow them to opt out. CCAB.28. In the case CC cite, the survey stated that it was "sponsored by" the Commission. CCRB, Attachment A at 9. That survey, unlike Novemsky's, included no self-aggrandizing references to the "nation's consumer protection agency" pursuing "its mission to protect consumers," nor disclosed the survey's target or the purpose of "investigat[ing] unfair

and deceptive conduct" (RPF¶556). As CC acknowledge (CCAB.28), caselaw holds that a survey's mere reference to class-action litigation "create[d] self-interest bias." Novemsky's inflammatory language is far worse.

c. *CC misconstrue the remaining extrinsic evidence*

CC's extrinsic-evidence arguments depend on mischaracterizing the record.

i. Intuit copy testing and market research. As an initial matter, CC offer no explanation for why the TY20 Net Promoter Score study fails to show that reasonable consumers were not likely to be deceived. Their response—attempting to distract with two excerpts—does not undermine the study's results showing that consumers were not mistaken about their ability to file for free. RAB.22; RPF¶¶714-721; RRF¶623. CC's failure to directly address this evidence reflects both their broader unwillingness (or inability) to engage with the record and the weakness of their case.

CC also misconstrue Intuit's copy testing and marketing research, citing them out of context or ignoring testimony about them. CCAB.28-30. As Intuit's executives testified, this material does not show that *any* consumers were likely deceived by the challenged ads, let alone a significant minority. Ryan (Intuit) Tr. 723-725, 735-740, 771-775; Rubin (Intuit) Tr. 1531-1535. For example, CC are wrong (CCAB.29) that the TY18 copy test shows that consumers think of "Free Edition" as "TurboTax." *Supra* pp.8-9. CC also assert (CCAB.29) that there is no evidence that the TY20 survey population was more likely to qualify for Free Edition, ignoring unrebutted testimony explaining exactly why that was the case, Ryan (Intuit) Tr. 736; RAB.23; RPF¶¶690-699. CC cannot prove their case by ignoring evidence they dislike.

CC also incorrectly argue that the TY22 copy test is "unreliable" because [redacted] and because Intuit did not "ask respondents [redacted] CCAB.29-30, 39. Setting aside that much the same can be said

of copy testing on which CC rely, the [redacted] is irrelevant because Intuit is not citing the TY22 test to prove that the ads *caused* respondents to do anything. Rather, the fact that the share of respondents who think they qualify for Free Edition accords with the share of the general population actually eligible is inconsistent with deception. CC cannot rely on some copy testing but discount others simply because they do not like the results.

ii. Consumer complaints and feedback. Intuit does not argue—as CC represent (CCAB.31-32)—that consumer satisfaction is a defense to liability. Intuit argues that the absence of a meaningful number of complaints (together with other consumer-experience data) demonstrates that a significant minority of consumers was unlikely to be deceived. RPF¶¶623-625, 639, 646; RAB.25. Intuit's executives and an expert all testified to that. RPF¶¶623-625, 647. And the cases CC rely on (CCAB.30) are inapposite because while CC may not need to "prove that every consumer actually relied upon the misrepresentations," CCRB.79, they do need to prove that a significant minority of reasonable consumers was likely to be deceived. Yet CC have no explanation for why a seven-year ad campaign with billions of impressions yielded *no* proof of actual deception. *Supra* pp.11-12. The answer is obvious: The ads were not deceptive.

iii. Consumer-experience data. CC incorrectly assert (CCAB.32) that TurboTax retention and abandonment rates are not evidence that reasonable consumers were not likely deceived. Low retention rates and higher-than-average abandonment rates would be expected if consumers felt deceived; the record reflects the opposite. RPF¶¶90-93, 624, 649-651, 656-658. CC's contrary arguments, supported only by their experts' unsubstantiated say-so, do not refute that. RRF¶¶727-730, 737, 841-843. Moreover, the evidence is consistent with Intuit's undisputed business incentives, which depend on long-term, retention-based growth. RPF¶¶83-87, 90, 109, 187; RRF¶615.

iv. Consumer deposition testimony. CC misrepresent the set of consumers deposed here. All were identified by CC in their initial disclosures as likely to support CC's case. RRF¶663. Intuit deposed a subset of them to show that even those consumers and their complaints did *not* support CC's case. *Id.* That so many of those consumers did not offer testimony in CC's favor, with many testifying they understood Free Edition's qualifications, cuts against finding that a significant minority of reasonable consumers (and these consumers were not reasonable) were likely deceived. RRB.16-17. And far from a "single example" of unhelpful testimony (CCAB.32), Intuit pointed to testimony undermining CC's claim from 12 different consumers, RAB.27; RRF¶¶664-675. CC's attempt to flip the burden to Intuit (CCAB.33) should also be rejected: CC had years to gather evidence from consumers to prove their case yet chose not to depose any consumers.

v. TY 2021 customer-base analysis. CC's purported "debunk[ing]" of Deal's analysis (CCAB.33) makes no sense. Their response is based on hypothetical assertions that their expert admits are "not ... very strong." RPF¶930. And CC's speculation that the ALJ found Deal's analysis lacking is unfounded; his analysis never mentions Deal. The only reasonable conclusion from that is that the ALJ either forgot Deal's testimony existed, or he intentionally did not mention it. Either way, it was error: The ALJ was required to explain why Deal's testimony warranted no weight, *Water Quality Insurance Syndicate v. United States*, 225 F. Supp. 3d 41, 79 (D.D.C. 2016).

vi. Additional expert analysis. CC wrongly say that John Hauser's Disclosure Efficacy Survey involved "two sets of equally flawed disclaimers," CCAB.33. The survey's revised ad conspicuously informed survey participants (verbally and in writing) that "Not all taxpayers qualify," and invited them to "See if [they] qualify at Vertax.com." RRF¶¶750-751.

Those disclosures were comparable to the ones Intuit used in Tax Year 2022—which copy testing establishes were not deceptive. *Id.* CC also incorrectly argue that the survey "proves the powerful impact of Intuit's 'free claims.'" CCAB.33. The survey estimated that only about one-third of participants would start in Free Edition—which is consistent with the percentage of taxpayers who qualify for Free Edition. RRF¶768.

II. THE PROPOSED ORDER IS UNWARRANTED AND INAPPROPRIATE

A. CC Do Not Show That Any Cease-And-Desist Order Is Warranted

CC fail to demonstrate the "cognizable danger of recurrent violation," *United States v. W. T. Grant Co.*, 345 U.S. 629, 633 (1953), required for *any* cease-and-desist order. They posit that Intuit's current ads are deceptive (CCAB.39), but the only evidence concerning those ads (the TY22 copy test) refutes that argument, and CC's effort to discard that evidence is unavailing, *supra* pp.17-18.

CC also falsely characterize Intuit's conduct as "voluntary discontinuance." CCAB.39-40. The binding consent order renders that doctrine inapplicable. *See Environmental Conservation Organization v. City of Dallas*, 529 F.3d 519, 528 (5th Cir. 2008). CC's other arguments regarding the consent order also fail. RAB.43.

Nor is Intuit's intent irrelevant (CCAB.40). "[T]he bona fides of the respondent's expressed intent to comply with the law in the future" *is* "relevant to … whether to issue an order." *Benco Dental Supply Co.*, 2019 WL 5419393, at *75 (F.T.C. Oct. 15, 2019). And Intuit's recognition that the challenged ads conveyed that Free Edition was free (CCAB.40) is not evidence of deception, including because Free Edition *is* free for all the people (millions each year) who use it. RRB.18-21.

B. CC Cannot Justify The ALJ's Order

Seeking to defend the proposed order's capaciousness, CC argue (CCAB.40-41) that it "straightforwardly" instructs Intuit to "meet[] certain conditions." That ignores that *those conditions* are opaque, RAB.43-44. Tellingly, CC do not defend the ALJ's contention that an ambiguous order is appropriate because it might later be clarified. ID.227-228. And CC are wrong (CCAB.41) that the consent order "give[s] Intuit an escape hatch." It imposes requirements that all 51 attorneys general determined ensure that consumers are not deceived—the fact that it does so clearly does not undermine its effectiveness. Nor do the consent order's specifications for space-constrained ads, or any of the other supposed "loopholes," justify the ALJ's order. RRB.72-75; RRF¶¶937-941. CC offered no evidence that six-second video ads need verbal disclosures to avoid deceiving consumers. Nor could they, as those ads displayed written disclosures nonstop (RX1483), consumers do not expect and would be overwhelmed by more information (RPF¶¶523-524), and it would be practically impossible to include the verbal disclosures CC demand (RRF¶938).

Rather than disputing the likely harm to consumers from the ALJ's order, CC repeat the ALJ's remarkable position that Intuit should stop advertising free TurboTax offers. CCAB.41. That would only harm consumers, leaving them unaware of the top-rated software they could use to file for free. RAB.45.

CC's defense of the ALJ's order's "fencing-in" relief (CCAB.41-42) also fails. CC point to no evidence concerning fenced-in products. Instead, after repeating arguments that Intuit already rebutted (RAB.45-46, RRB.84-85), CC claim that *allegations* against Intuit are "red flags" that Intuit failed to address. But CC ignore: changes made to TurboTax ads since those allegations (including changes the consent order required), that many of the allegations are unrelated to CC's claim, and that most allegations were found meritless or never proven.

Unsurprisingly, CC provide no authority for the proposition that entities have an obligation to change their conduct in response to unsubstantiated allegations.

Finally, CC are wrong (CCAB.42) that the proposed order is constitutional. That the compelled disclosure is less controversial than abortion does not mean it is "uncontroversial," *see National Association of Manufactures v. SEC*, 800 F.3d 518, 528-530 (D.C. Cir. 2015). Moreover, CC repeat—with no support—the ALJ's mistake of passing their burden of proof to Intuit, *NIFLA v. Becerra*, 138 S.Ct. 2361, 2377 (2018).

III. THE PROCEEDING IS UNCONSTITUTIONAL AND UNTIMELY

A. CC's Constitutional Arguments Fail

1. CC offer no meaningful response to *Williams v. Pennsylvania*, 579 U.S. 1 (2016), which shows that the Commissioners' exercise of both accusatory and adjudicative functions violates due process, RAB.47. Instead, CC suggest (CCAB.42-43) that *Williams* does not apply in agency adjudications. But the right to a fair trial "applies to administrative agencies which adjudicate as well as to courts." *Withrow v. Larkin*, 421 U.S. 35, 46 (1975). Because this proceeding does not satisfy *Williams*, it is unlawful.[2]

Regardless, *Withrow* recognized that "special facts and circumstances" may make "the risk of unfairness … intolerably high." 421 U.S. at 58. Intuit has pointed to the Commission's undefeated record before itself as such a fact. RAB.47. CC's conclusory response (CCAB.43) that this reflects only "[s]tatistics pertaining to a relatively small number of cases" lacks any explanation for such an egregious home-field advantage. The unfair playing field is confirmed by Chair Khan's participation despite Intuit's motion to disqualify, the denial of which taints the entire process as well as the Commission itself. RAB.48.

[2] If necessary, Intuit re-preserves its argument (RB.118) that *Withrow* was wrongly decided.

2. CC's attempts to defend the improper administrative adjudication of Intuit's private rights fall short. CC cite nothing to support their claim that this argument is waived, likely because 16 C.F.R. §3.51(b) provides that an argument is "waived" only if it "is not made a part of any exceptions filed with the Commission." That is not true of this argument. RAB.48. Meanwhile, CC's assertion (CCAB.43-44) that Intuit's private rights "do not include the right to deceive people" is meaningless. This proceeding is adjudicating *whether* Intuit's ads are deceptive; CC cannot avoid Article III simply by asserting that their claims are meritorious.

3. CC's invocation of *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), to defend the Commissioner's tenure protections is unavailing. *Humphrey's Executor* rested on the notion that "the FTC (as it existed in 1935) … exercis[ed] 'no part of the executive power.'" *Seila Law v. CFPB*, 140 S.Ct. 2183, 2198 (2020). Whatever the merits of the Supreme Court's understanding of the FTC's authority in 1935, *Seila Law* recognized that *Humphrey's Executor*'s characterization of the FTC "has not withstood the test of time." *Id.* at 2198 n.2. CC does not even argue the Commissioners' tenure protection complies with *Seila Law*. Additionally, CC's citation (CCAB.44) to *statutory* provisions to mitigate the *constitutional* consequences of the Commission's lack of bipartisanship is misplaced; in any statute-constitution conflict, the latter prevails. *Seila Law*, 140 S.Ct. at 2211.

As for the ALJ's tenure protection, *Jarkesy v. SEC*, 34 F.4th 446 (5th Cir. 2022) (subsequent history omitted), applies here, and CC make no contrary argument. Instead, they claim (CCAB.44) that *Jarkesy* is wrong because the rule against dual-layer tenure protection supposedly does not apply to "adjudicators." *Jarkesy* explained why that argument fails. 34 F.4th at 464-465.

4. Intuit previously explained why CC's response to Intuit's non-delegation argument fails. RRC¶¶74-75.

B. CC's Timeliness Arguments Are Baseless

The Supreme Court has repeatedly recognized the need to impose some temporal limitation on government actions. RAB.50. CC's claim (CCAB.46-47) that Intuit somehow misled the Commission by not disclosing the factual specifics of two cases—*Rothensies v. Electric Storage Battery Co.*, 329 U.S. 296, 301 (1946), and *Adams v. Woods*, 6 U.S. 336, 342 (1805)—is ludicrous. Each case addressed the inherent problems with never-ending windows for government action. CC fail to address those problems.

If CC are correct that laches does not apply to the government (CCAB.45), then the only timeliness constraint would be a borrowed statute of limitations. Thus, it is appropriate to apply a borrowed limitation even against the government. CC cite no binding authority holding otherwise.

Conversely, if no statute of limitations applies, laches must. RAB.49-50. CC distills Intuit's laches argument to the notion that the investigation took three years. CCAB.45. That characterization fails. During the three years, Intuit sought the FTC's guidance on how it should modify its ads. Rather than providing guidance, CC refused to discuss their allegations. RPF¶4. The FTC's refusal to engage while allowing multiple tax seasons to pass before bringing suit is exactly the kind of prejudicial delay that laches precludes.

CONCLUSION

The Commission should dismiss the complaint.

November 6, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

On November 6, 2023, I caused the foregoing document to be filed electronically using the FTC's E-Filing system, which will send notification of such filing to:

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