

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

**In the Matter of:**

**Intuit Inc.**, a corporation.

**Docket No. 9408**

**RESPONDENT’S REQUEST FOR LEAVE TO FILE REPLY  
IN SUPPORT OF MOTION FOR DISCOVERY PURSUANT TO RULE 3.36**

Pursuant to Rule 3.22(d) of the Commission’s Rules of Practice, 16 C.F.R. § 3.22(d), Respondent Intuit Inc. respectfully seeks leave to file a short reply brief in support of its Rule 3.36 motion. Intuit’s proposed reply brief, conditionally filed with this motion, complies with Rule 3.22’s timing and word-count requirements.

Rule 3.22(d) permits reply briefs “in circumstances where the parties wish to draw the Administrative Law Judge’s ... attention to recent important developments or controlling authority that could not have been raised earlier in the party’s principal brief.” 16 C.F.R. § 3.22(d). Here, Intuit seeks to respond to three discrete points raised in Complaint Counsel’s opposition brief that Intuit could not reasonably have anticipated—and thus could not have addressed in its motion.

Complaint Counsel’s arguments are unexpected because they fail to address relevant issues and contradict Complaint Counsel’s own prior positions. *First*, Intuit seeks to respond to Complaint Counsel’s argument that Intuit’s requests are overbroad and not reasonably particular. Intuit explains in the reply how it would address those burden concerns and also explains that Complaint Counsel mischaracterize the requests to wrongly create the appearance of burden

where there is none. *Second*, Intuit wishes to rebut Complaint Counsel’s argument that the requests are not relevant. Instead of addressing relevance, Complaint Counsel focuses on a red herring concerning the merits of Intuit’s defenses. *Third*, Intuit moves to respond to Complaint Counsel’s argument that the documents sought can be obtained through other means—which directly contradicts Complaint Counsel’s own suggestion that Intuit file a Rule 3.36 motion because the documents were not otherwise available.

Intuit respectfully submits that these unexpected and inconsistent arguments should not be left unaddressed. *See* CC’s Request for Reply Br. to Resp.’s Opp. to CC’s Mot. to Disregard and Strike, *Matter of 1-800 Contacts, Inc.*, 2017 WL 2459062, at \*1 (F.T.C. May 30, 2017) (seeking leave to file reply to permit complaint counsel to “respond to two factual misstatements brought to light for the first time in Respondent’s Opposition,” which “could not have been addressed in” complaint counsel’s principal brief and “should not go un rebutted”); Order Denying CC’s Mot. to Disregard and Strike, *Matter of 1-800 Contacts, Inc.*, 2017 WL 2459061, at \*1 (F.T.C. May 31, 2017) (granting leave to file reply).

For these reasons, Intuit respectfully requests the Court’s leave to file the proposed reply brief.

Dated: October 26, 2022

Respectfully submitted,

WILMER CUTLER PICKERING HALE  
AND DORR LLP

/s/ David Z. Gringer

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**In the Matter of:**

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MOTION FOR DISCOVERY PURSUANT TO RULE 3.36**

Pursuant to Rule 3.22(d) of the Commission's Rules of Practice, 16 C.F.R. § 3.22(d), Respondent Intuit Inc. respectfully submits this reply in support of its motion pursuant to Rule 3.36.

*First*, Complaint Counsel ("CC") provide no support for their assertion (at 6-8) that Intuit's requests are overbroad and not stated with reasonable particularity. To start, CC's opposition is focused on hypothetical burdens that have not actually materialized and that Intuit has not had an opportunity to address through a meet and confer process. Intuit has no intention of imposing unreasonable burdens, and if burdens were identified and explained, Intuit is willing to cooperate in good faith to minimize them. Moreover, any supposed burdens would not fall on CC, but rather on the Commission, which has not engaged with Intuit nor appeared here. CC has no standing to assert burdensomeness objections on behalf of someone else. *See Gulf Coast Energy LLC v. Bank of Am. Corp.*, 2014 WL 12616133, at \*1 (S.D. Tex. Dec. 2, 2014) ("a party does not have standing to quash a non-party subpoena on the basis that the non-party would be subjected to an undue burden").

CC's privilege concerns are overblown. Contrary to CC's apparent position that any and all internal documents possessed by the Commissioners or the Secretary are privileged, *see Opp.*

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6-7, communications with third parties are not. Other responsive documents, such as documents related to Chair Khan's Twitter account, are not subject to privilege. Further, CC seem to ignore that deliberative process is a qualified privilege, and refusing to produce a log would turn it into an absolute one hiding documents that may well be properly discoverable. To the extent a log is overly burdensome, that could be the subject of discussion and may be addressed by use of a categorical privilege log.

Nor is the use of "all documents" in Intuit's requests impermissible. CC have routinely used the "all documents" formulation when requesting documents from Intuit. *See, e.g.*, Gringer Decl. Ex. A (CC First Set of RFPs), Requests 2-7, 15, 18-20, 22, 25. CC also ignores the contexts where the "all documents" requests are narrow, such as the requests for "All DOCUMENTS sufficient to show who operates Char Lina Khan's Twitter account." *See Streamlight, Inc. v. Gindi*, 2018 WL 8967042, at \*2 (E.D.N.Y. Apr. 23, 2018) (requests for "all documents" concerning certain specific narrow topics are "reasonable" and "narrowly tailored"). Because Intuit does not know what documents exist, it often cannot identify responsive documents with more specificity. Intuit expects to engage in a good faith meet and confer with the subpoenaed parties to obtain relevant documents while minimizing burden.

CC's suggestion that the requests are overbroad because they lack a time period is also wrong. As CC recognize, many of the requests are inherently time limited. For example, Intuit seeks documents relating to the FTC's recent decision to update its .com Disclosures, to Chair Khan's tweets relating to Intuit, and to the treatment of Intuit's Rule 2.31 motion. And, again, Intuit is willing to discuss ways to cabin its requests to specific date ranges to minimize any burden actually raised by the subpoena recipients. As just one example, requests relating to the FTC's Free Guide and .com Disclosures could be temporally limited to the period immediately before and during the FTC's investigation into Intuit.

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*Second*, CC are also wrong that the documents sought are not reasonably expected to yield relevant information. To start, CC do not seriously dispute that many of Intuit's requests are relevant. *See* Opp. 2 (Intuit's requests concerning FTC's guidance and ability to seek monetary relief are "arguably related to the Complaint's claims").

CC's relevance objection essentially boils down to CC's *belief* that Intuit's defenses are not valid. Opp. 4. But "in evaluating whether discovery material is relevant to a claim or defense, the Court does not assess the ultimate merits of the claim or defense, but only whether the material tends to make the existence of any fact that is of consequence to the determination of the claim more or less probable." *Manzo v. County of Santa Clara*, 2019 WL 2866047, at \*2 (N.D. Cal. July 3, 2019). Also, Intuit filed its answer over six months ago. A motion to strike would be "disfavored," *Dura Lube Corp.*, 1999 WL 33577395, at \*1 (F.T.C. Aug. 31, 1999), and the time to file a motion to strike has long since passed, *see MSPA Claims 1, LLC v. Covington Specialty Ins. Co.*, 2021 WL 1390371, at \*2 (S.D. Fla. Apr. 13, 2021).<sup>1</sup> CC also filed a motion for summary decision, but did not move on the affirmative defenses. Needless to say, CC's opposition to a discovery motion is not an appropriate forum for adjudicating the merits of Intuit's defenses.

CC are also wrong that Intuit has failed to articulate how the requests are relevant to its defenses. As stated in the motion, the discovery sought directly bears on Intuit's affirmative defense regarding prejudgment. Mot. 5. CC's own discussion of the evidence related to Intuit's prejudgment defense refutes any notion that Intuit relies on just a "conclusory statement." Opp.

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<sup>1</sup> "Without a Rule of Practice governing motions to strike," the Commission and this Court "have sought guidance from Federal Rule of Civil Procedure 12(f) and cases which have construed Rule 12(f)." *Matter of Dura Lube Corp.*, 1999 WL 33577395, at \*1 (F.T.C. Aug. 31, 1999); *see also, e.g., Matter of 1-800 Contacts, Inc.*, 2017 WL 511541, at \*2 (F.T.C. Feb. 1, 2017) (citing Rule 12(f) as authority permitting Commission to strike respondents' affirmative defenses).

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6. Intuit should be provided an opportunity to develop those defenses, and Rule 3.36 provides the only avenue to do so.

*Third*, contrary to CC’s bald assertion (at 8), Intuit cannot obtain the documents sought through other means.<sup>2</sup> Even CC recognize that Intuit is not otherwise able to obtain the records sought—instead arguing that the few public documents available are sufficient to satisfy Intuit’s requests and that all remaining documents might be privileged. *See id.* But as explained above, those privilege concerns are overstated. Even if that were not the case, the potential that responsive documents would be privileged does not establish that the documents can be obtained through other means. Indeed, as to many of the requests, CC informed Intuit that it is unable to provide documents and affirmatively suggested Intuit file the present motion. *See Woodman Decl.* ¶¶ 8-9.

#### **I. CONCLUSION**

An order should issue authorizing the subpoenas attached to the motion as Exhibits A and B.

Dated: October 26, 2022

Respectfully submitted,

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/s/ David Z. Gringer  
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<sup>2</sup> CC emphasize that they have produced “over 7,000 documents to Intuit.” But thousands of those documents are screenshots from Intuit’s website or of its advertising produced in response to just 3 of Intuit’s 36 requests. CC have not produced any documents responsive to 30 of Intuit’s requests, including requests that relate to the documents requested in these proposed subpoenas.

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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**

**DECLARATION OF DAVID GRINGER IN SUPPORT OF RESPONDENT'S  
REPLY IN SUPPORT OF MOTION FOR DISCOVERY PURSUANT TO RULE 3.36**

I, David Z. Gringer, declare as follows:

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

2. I submit this declaration in support of Intuit's Reply in Support of Motion for Discovery Pursuant to Rule 3.36, filed herewith on October 26, 2022.

3. Attached hereto as Exhibit A is Complaint Counsel's First Requests for Production of Documents to Intuit Inc., dated September 12, 2022.

4. If the Commission or the Secretary were to identify and explain unreasonable burdens imposed by the document requests in the subpoenas Intuit seeks to issue to them, Intuit is willing to meet and confer in good faith to minimize those burdens. To date, no one (including Complaint Counsel) has expressed to me or any of my colleagues any concerns about any burden associated with Intuit's requests.

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

Executed on this 26th day of October, 2022, in New York, NY.

By: /s/ David Z. Gringer  
David Z. Gringer

# EXHIBIT A

UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION

**In the Matter of:**  
  
**Intuit Inc.**, a corporation.

**Docket No. 9408**

**COMPLAINT COUNSEL’S FIRST REQUESTS FOR PRODUCTION OF DOCUMENTS TO INTUIT INC.**

Pursuant to Rule 3.37 of the Federal Trade Commission’s Rules of Practice for Adjudicative Proceedings, Complaint Counsel requests that Respondent Intuit Inc. (“Intuit”) produce the items and documents specified below.

**INSTRUCTIONS**

**1. Response; objections: Within 21 days of service** of this request, you are required to: (1) confer about the format for the production of electronically stored information; and (2) serve a written response to this request on Complaint Counsel stating, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for the objection shall be stated. If objection is made to part of an item or category, the part shall be specified and inspection permitted of the remaining parts. The response may state an objection to a requested form for producing electronically stored information. If you object to a requested form - or if no form was specified in the request - you must state the form you intend to use. Within five days of serving your objections, if any, to this request you shall meet and confer with Complaint Counsel to attempt to resolve such disputes.

**2. Time, Place, and Manner for Production:** Electronic copies of the items requested below are to be produced by **Tuesday, October 11, 2022**, by transmitting them to Complaint Counsel via secure file transfer. When you are ready to transmit the items requested below, please email Complaint Counsel at: [ranguizola@ftc.gov](mailto:ranguizola@ftc.gov); [jevans1@ftc.gov](mailto:jevans1@ftc.gov); and [rplett@ftc.gov](mailto:rplett@ftc.gov), and we will send you an invitation to transmit the items via the FTC secure file transfer system. All items requested must be produced as they were kept in the usual course of business or must be organized and labeled to correspond to the categories in this request. If production of the requested items at the time, place, and manner set forth above is not possible, please contact Complaint Counsel Roberto Anguizola at (202) 326-3284, James Evans at (202) 326-2026, or Rebecca Plett at (202) 326-3664, **no later than Friday, October 7,**

2022, to discuss an alternate time, place, or manner for production of the requested items.

3. **Applicable Time Period:** Unless otherwise specified, the time period covered by each request below shall be from November 1, 2020, through the date of your complete compliance with these requests. Documents originating before this period but referring or relating to actions or conduct within the period should be included in your production response(s). If after the date of production, you become aware of additional responsive documents, you should produce those documents to Complaint Counsel.

4. If any documents responsive to a document request have been previously produced to the Commission during the course of its investigation, *In re Intuit* Matter No. 1923119, you shall identify the document(s) previously provided and the date of submission instead of re-submitting the document(s). Identification shall be by Bates number if the documents were so numbered when submitted, or by author, date, and subject matter if not so numbered, and shall specify to which request(s) they are responsive. Documents that may be responsive to more than one request need not be submitted more than once; however, your response shall indicate, for each document submitted, each document request to which the document is responsive.

5. A complete copy of each document should be submitted even if only a portion of the document is within the terms of the document request. The document shall not be edited, cut, or expunged and shall include all covering letters and memoranda, transmittal slips, appendices, tables, or other attachments.

6. If any of the responsive documents are in the form of ESI, please produce these documents in their existing, native formats.

7. If any requested material is withheld based on a claim of privilege, submit, together with such claim, a schedule of items withheld that states individually for each item withheld: (a) the nature of the document; (b) the identity of the person who created the document; (c) the identity of the person to whom the document was directed; (d) the subject matter of the document; (e) the date of the document; (f) the identity of all parties who executed the document; (g) the nature of the privilege which you claim; and (h) the custodian of the document.

8. As used herein, the singular form of a noun or pronoun shall be considered to include within its meaning the plural form of the noun or pronoun

so used, and vice versa; the use of the masculine form of a pronoun shall be considered to include also within its meaning the feminine form of the pronoun so used, and vice versa; the use of any tense of any verb shall be considered to include within its meaning all other tenses of the verb so used; and the use of “and” shall be considered to include “or,” and vice versa.

## DEFINITIONS

Notwithstanding any definition below, each word, term, or phrase used in these requests is intended to have the broadest meaning permitted under the Federal Trade Commission’s Rules of Practice.

1. “**Advertisement**” or “**Advertising**” or “**Ad**” means any written or verbal statement, illustration, or depiction that promotes the sale or use of a good or service or is designed to increase consumer interest in a brand, good, or service. Advertising media covered by this definition includes but is not limited to: packaging and labeling; promotional materials; print, including direct mail; television, including short form TV ads and infomercials; radio; video advertisements, including YouTube ads and ads disseminated through streaming services, and internet, social media, and other digital content, including banner advertisements and web pages, mobile networks and applications.

2. “**Any**” shall be construed to include the word “**all**,” and the word “**all**” shall be construed to include the word “**any**.”

3. “**Company**,” “**You**,” or “**Your**” means **Intuit Inc.**, its wholly or partially owned subsidiaries, unincorporated divisions, joint ventures, operations under assumed names, and affiliates, and all directors, officers, members, employees, agents, consultants, and other persons working for or on behalf of the foregoing.

4. “**Document**” or “**Documents**” are synonymous in meaning and equal in scope to the usage of the terms as defined by 16 C.F.R. 3.34(b), and includes, without limitation, the complete original and any non-identical copy (whether different from the original because of notations on the copy or otherwise), regardless of origin or location, of any written, typed, printed, transcribed, filmed, punched, or graphic matter of every type and description, however and by whomever prepared, produced, disseminated or made, including, but not limited to, any advertisement, book, pamphlet, periodical, contract, correspondence, communication, file, invoice, memorandum, note, telegram, report, record, handwritten note, working paper, routing slip, chart, graph, paper, index, map, tabulation, manual, guide, outline, script, abstract, history, calendar, diary, journal, agenda, minute, code book, or label. “Document” shall also include electronically stored information (“ESI”). ESI means

the complete original and any nonidentical copy (whether different from the original because of notations, different metadata, or otherwise), regardless of origin or location, of any electronically created or stored information, including, but not limited to, electronic mail, instant messaging, videoconferencing, and other electronic correspondence (whether active, archived, or in a deleted items folder), word processing files, spreadsheets, databases, and sound recordings, whether stored on cards, magnetic or electronic tapes, disks, computer files, computer or other drives, cell phones, Blackberry, PDA, or other storage media, and such technical assistance or instructions as will enable conversion of such ESI into a reasonably usable form.

5. “**Each**” shall be construed to include “**every**,” and “**every**” shall be construed to include “**each**.”

6. “**Relating to**” or “**Regarding**” means discussing, describing, reflecting, referring, containing, analyzing, studying, reporting, commenting, evidencing, constituting, setting forth, considering, recommending, concerning, or pertaining to, in whole or in part.

7. “**TurboTax**” means any income tax preparation product or service offered by Intuit using the TurboTax brand or mark.

## DOCUMENTS REQUESTED

Produce the following Documents:

1. A copy of each unique TurboTax advertisement that uses or used any of the following words: “free,” “zero,” “\$0,” “no cost,” or “gratis.”
2. All documents relating to any aspect of the creation, development, approval, modification, execution, or evaluation of any advertisement responsive to Request for Production 1, including client briefs, creative briefs, research analyses, point of views, story boards, call reports, meeting reports, or other contact reports.
3. All documents relating to the advertising and marketing strategy associated with any advertisement responsive to Request for Production 1.
4. All documents relating to data on, or analysis of, consumer perception, comprehension, or recall (including copy tests, focus groups, marketing or consumer surveys and reports, penetration tests, recall tests, audience reaction tests, a/b tests, multivariate tests, and communication tests) of any advertisement responsive to Request for Production 1.

5. All documents, without regard to the applicable time period, relating to the TurboTax "Power of Free" advertising campaign.

6. All documents, without regard to the applicable time period, relating to TurboTax Super Bowl advertisements that used any of the following words: "free," "zero," "\$0," "no cost," or "gratis."

7. All documents relating to the creation, content, placement, use, approval, modification, or rejection of any disclaimers or disclosures used in any advertisement responsive to Requests for Production 1.

8. For any advertisement responsive Request for Production 1, documents sufficient to show the beginning and ending dates of dissemination, audience size, and the times and locations the ads were disseminated.

9. For print ads responsive Request for Production 1, produce documents sufficient to show every publication in which the ads were disseminated.

10. For video, television and radio ads responsive Request for Production 1, documents sufficient to show every network, system, streaming service, or station in which the ads were disseminated.

11. For internet ads responsive Request for Production 1, documents sufficient to show the platform used (e.g., mobile, desktop); its successfulness in driving traffic to the TurboTax website (e.g., click-through rates per ad, keyword or campaign; traffic and cost statistic per ad, keyword or campaign; impressions; quality scores; cross device conversion rates); and the URL of the landing page each advertisement directed the consumer to.

12. For any advertisement responsive Request for Production 1, documents sufficient to identify the cost of each advertisement.

13. For any advertisement responsive Request for Production 1, documents sufficient to identify the revenue directly or indirectly derived from each advertisement.

14. Documents relating to the return on investment (ROI) or monetization of TurboTax advertisements that use or used any of the following words: "free," "zero," "\$0," "no cost," or "gratis" or customers acquired by the company through such ads.



15. All documents regarding the use of the phrase “simple U.S. tax returns” in TurboTax advertisements, including on websites.
16. Copies of all materially different consumer-facing popups or websites describing Intuit’s eligibility restrictions for using a TurboTax product or service for free.
17. Copies of all materially different websites that include the terms “for simple U.S. returns only,” “for simple returns,” “simple tax returns,” or “see why it’s free.”
18. All documents relating to data on, or analysis of, consumer perception, comprehension, or recall (including copy tests, focus groups, marketing or consumer surveys and reports, penetration tests, recall tests, audience reaction tests, a/b tests, multivariate tests, and communication tests) about the cost of TurboTax products or services.
19. All documents related to complaints or negative feedback from consumers or potential consumers who expected to file their taxes for free using TurboTax but were not eligible to do so.
20. All documents related to employee complaints or negative employee feedback regarding the TurboTax advertisements that use the terms “free,” “zero,” “\$0,” “no cost,” or “gratis.”
21. Documents sufficient to show each different customer service script or frequently asked questions (FAQs) used by the company to communicate with consumers or potential consumers who expected to file their taxes for free using TurboTax but were not eligible to do so, and the time period during which each script or FAQ was used.
22. All data pertaining to customers and potential customers who interacted with a free TurboTax offer or product or service, as contained in your customer relationship management database (“CRM”), or any database(s) used to maintain customer and potential customer information, feedback, complaints and/or sales.
23. The schema for any CRM or other database containing the data requested in Request for Production 22, including tables, fields, and relationships between tables and fields used in those databases.
24. Data related to negative consumer feedback or complaints about free offers pertaining to TurboTax, including data that is not captured in your CRM.

25. All documents related to any arbitration filed against Intuit related to free offers pertaining to TurboTax.

Dated: September 12, 2022

Respectfully submitted,

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Rebecca Plett  
James Evans

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Federal Trade Commission  
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### CERTIFICATE OF SERVICE

This is to certify that on September 12, 2022, I caused the foregoing Complaint Counsel’s First Requests for Production of Documents to Intuit Inc., to be served via email on:

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/s/ Rebecca Plett  
Rebecca Plett

**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 REQUEST FOR LEAVE TO FILE REPLY  
IN SUPPORT OF MOTION FOR DISCOVERY PURSUANT TO RULE 3.36**

Upon consideration of Respondent’s Request for Leave to File Reply in Support of Motion for Discovery Pursuant to Rule 3.36:

IT IS HEREBY ORDERED that Respondent’s request for leave to file the proposed reply brief is GRANTED, and that the conditionally filed reply brief is deemed filed.

ORDERED:

\_\_\_\_\_  
D. Michael Chappell  
Chief Administrative Law Judge

Date: \_\_\_\_\_

**CERTIFICATE OF SERVICE**

I hereby certify that on October 26, 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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Washington, DC 20580

I further certify that on October 26, 2022, I caused the foregoing document to be served via email to:

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Dated: October 26, 2022

Respectfully submitted,

/s/ Molly Dillaway  
Molly Dillaway  
*Counsel for Intuit Inc.*