

**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 APPEAL BRIEF

HOWARD M. SHAPIRO
JONATHAN E. PAIKIN
JENNIFER MILICI
DANIEL S. VOLCHOK
DEREK A. WOODMAN
WILMER CUTLER PICKERING
HALE AND DORR LLP
2100 Pennsylvania Avenue NW
Washington, DC 20037
(202) 663-6000
Howard.Shapiro@wilmerhale.com
Jonathan.Paikin@wilmerhale.com
Jennifer.Milici@wilmerhale.com
Daniel.Volchok@wilmerhale.com
Derek.Woodman@wilmerhale.com

DAVID Z. GRINGER
WILMER CUTLER PICKERING
HALE AND DORR LLP
7 World Trade Center
250 Greenwich Street
New York, NY 10007
(212) 230-8800
David.Gringer@wilmerhale.com

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GLOSSARY OF ABBREVIATIONS

Abbreviation	Meaning
ALJ	Administrative Law Judge
CC	Complaint Counsel
CCB	Complaint Counsel’s Post-Trial Brief
CCPC	Complaint Counsel’s Proposed Conclusions of Law
CCPF	Complaint Counsel’s Proposed Findings of Fact
CRM	customer relationship management
ID	Initial Decision
IDF	Initial Decision Finding of Fact
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

Intuit offers online tax-filing products for free to qualifying consumers. Each year, *tens of millions* of consumers use these products to file their taxes for free. Promoting free tax filing benefits consumers, and there is nothing deceptive about advertising free products as free. Yet the ALJ here deemed Intuit’s free-product ads deceptive because not everyone can use the free products, and he proposed a sweeping remedial order. Both the deception finding and the order are based on an unrealistic—and unrecognizable—legal regime. The Commission should reject both.

As to the finding: None of the challenged ads was deceptive. Most stated that a particular product was free—a statement that was indisputably true; no consumer *ever* paid a penny to use any of the products in question. Each ad also communicated that only consumers who qualified could use the advertised free product, often by stating that the particular offer was for “simple tax returns only,” a commonly used and understood term in the industry. And the ads invited consumers to see if they qualified on the TurboTax website (or linked to the website), reinforcing that not everyone qualified, and telling consumers how to find out whether they did. Considered together, as the law requires, these elements of the challenged ads effectively and accurately communicated the qualifications for free TurboTax offers.

Extrinsic evidence further forecloses any finding that the challenged ads were likely to mislead a substantial minority of reasonable consumers. Survey evidence, for example, revealed that consumers found the phrase “simple tax returns” easy to understand, and consumers testified that they correctly understood it. Moreover, copy testing and market research showed that roughly the same percentage of consumers who *believed* they could file for free actually *could*. And three Intuit executives—with decades of combined experience—along with four experts testified that reasonable consumers would not have been misled by the challenged ads.

The ALJ nevertheless found that Intuit’s ads were deceptive, but only by disregarding or improperly construing evidence. The finding also rests on a heightened standard for advertising free products that is unsupported, unworkable, and in fact counterproductive. It flows from an impermissibly piecemeal analysis of the ads’ disclosures, rather than the holistic analysis the law requires. And it anachronistically applies a legal doctrine (“deceptive door opener”) that makes no sense—and has never been applied—in the e-commerce context.

Even if there were any sustainable deception finding here, no cease-and-desist order would be warranted. A consent order with all 51 state attorneys general that already requires changes to Intuit’s advertising precludes the need for such an order. The proposed order, moreover, unconstitutionally compels speech and impermissibly encompasses Intuit products never claimed to have been marketed unlawfully. It also would all but prohibit Intuit from advertising free products in places where consumers increasingly consume content and lower the number of taxpayers who file for free.

STATEMENT

I. FACTUAL BACKGROUND

A. Intuit And Its TurboTax Products

Intuit was founded with the mission of helping customers manage their finances through innovative technology. RPF ¶29. “TurboTax” is the brand name for Intuit’s online tax-preparation products. IDF ¶6. The TurboTax brand encompasses three tiers of products offering different levels of assistance. IDF ¶11. Each tier includes four different products, or “SKUs.” IDF ¶15. The various SKUs cover tax situations of differing complexity. IDF ¶10.

The most basic SKU in each tier—including the do-it-yourself product Free Edition—is free for consumers with “simple tax returns.” RPF ¶67. (Other consumers cannot pay to use Free Edition or any other free TurboTax product; those products are simply unavailable to such

consumers.) Simple tax returns are those filed on Form 1040 with no attached schedules. RPF ¶¶121, 124. The phrase “simple tax return” is ubiquitous and well-understood. RPF ¶¶119, 122, 141-142. Most taxpayers who file online have simple returns and thus qualify to file for free using a TurboTax product. RPF ¶¶127-128.

Intuit hopes consumers with simple returns will use TurboTax to file for free, have a good experience doing so, and thereby develop life-long relationships with Intuit, meaning they stay with Intuit as their tax situations grow more complex. RPF ¶83. Intuit recognizes that creating a mistaken expectation amongst consumers who do not qualify to file for free that they do would cause consumers to both leave TurboTax and share their dissatisfaction with others. RPF ¶134. That would erode trust in the TurboTax brand and lower customer retention, hurting Intuit’s business. RPF ¶96.

B. Intuit’s Free-Product Advertising

The challenged ads for free TurboTax products were just that—ads for free products. They expressly stated that the free offers were available only to consumers with “simple tax returns” (or similar language). RPF ¶322. Nearly all the ads also identified the specific SKU or offer that was free. RPF ¶¶215, 250-251, 266, 281, 294. And they invited consumers to visit (or linked directly to) the TurboTax website, TurboTax.com, to “see if they qualify.” RPF ¶¶215, 253, 269, 284, 294. No ad said that everyone could use the free TurboTax product, or made unqualified claims that TurboTax is free.

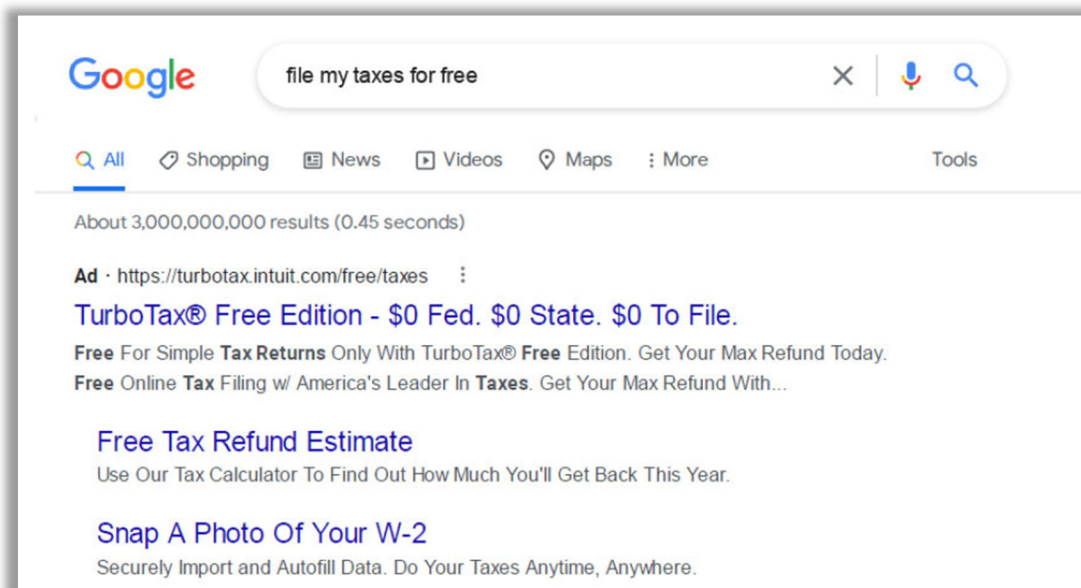
The challenged ads ran on many advertising channels, including television, online display, paid-search, email, and radio. IDF ¶¶48, 203. Example ads are shown below. Each communicated, as explained, both that the free product being offered was available only to qualified consumers—those with “simple tax returns”—and that additional information was available (“see *if* you qualify”) at TurboTax.com.



RPF ¶216 (television).



RPF ¶249 (non-video display).



RPF ¶268 (paid search).



IMPORTANT INFORMATION

TurboTax Free Edition: \$0 federal (forms 1040EZ/1040A) offer only available with TurboTax Free Edition; State filing charges apply. TurboTax online and mobile pricing is based on your tax situation and varies by product. Actual prices are determined at the time of print or e-file and are subject to change without notice.

#1 Best-Selling Brand: Based on aggregated sales data for all tax year 2016 TurboTax products.

Fastest tax refund with e-file and direct deposit; tax refund times will vary.

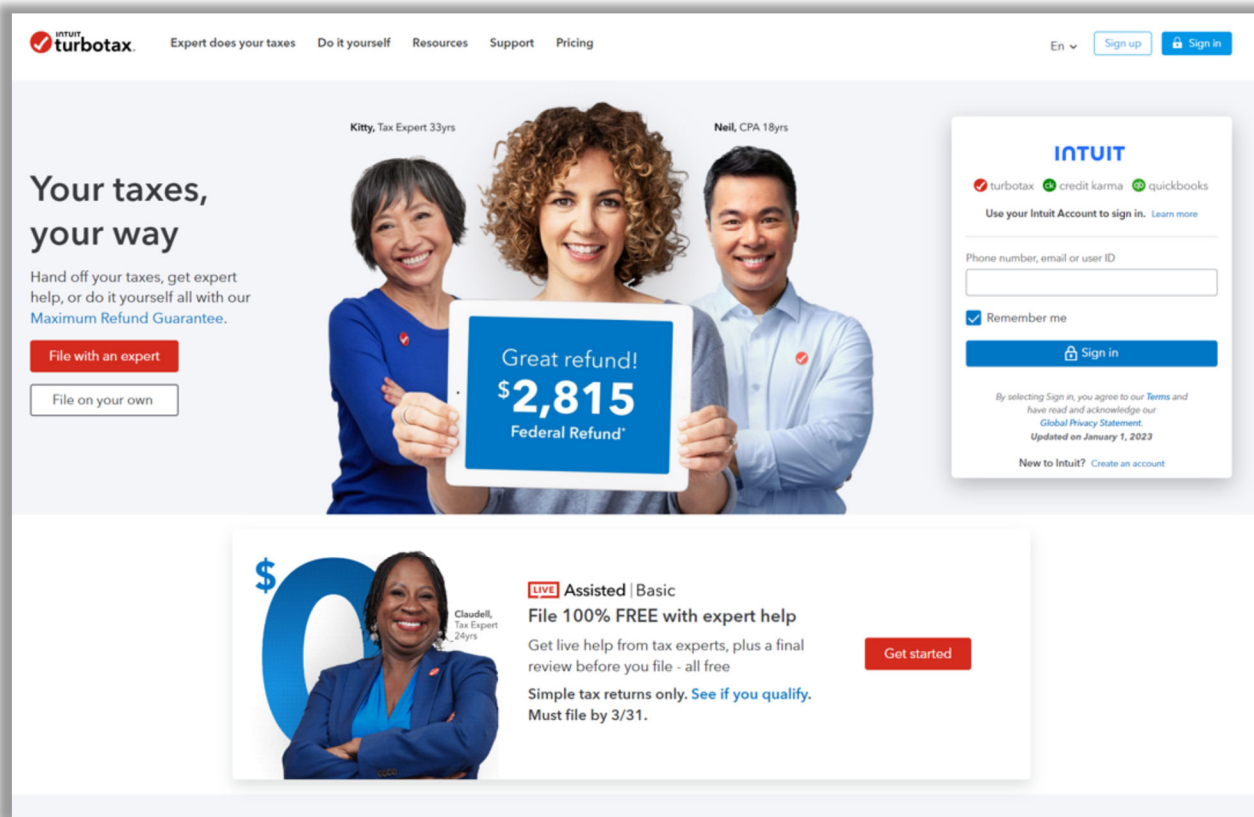
Visit <https://turbotax.intuit.com/lp/voy/guarantees.jsp> for TurboTax product guarantees and other important information. Intuit, TurboTax and TurboTax Online, among others, are registered trademarks and/or service marks of Intuit Inc. in the United States and other countries.

RPF ¶282 (email).

Each year, Intuit has taken steps to make its ads clearer, both because it believes that that is the right thing to do and because doing so is in its business interest. RPF ¶¶33, 39, 363. In the ad-development process—which can take up to nine months for one ad—several stakeholders review every TurboTax ad to ensure that none is misleading. RPF ¶¶163, 165. If anyone believes a draft ad is misleading, it is either revised to eliminate the problem or is not publicly

released. RPF ¶168. At no point did Intuit’s leaders believe that consumers were misled by any free-SKU ad; if they had, they would have immediately pulled the ads from circulation. RPF ¶¶167-177.

The TurboTax website prominently featured in Intuit’s free-SKU advertising includes detailed disclosures regarding eligibility for free offers, including color-contrasted hyperlinks explaining that the free offer is for simple returns only and telling consumers to click to “see if you qualify.” RPF ¶¶364-452. A screenshot from the TY 2022 TurboTax homepage is below.



RPF ¶375. When consumers clicked any hyperlinked disclosure on any page of the website, a pop-up screen provided “detailed information about the tax situations covered by” the free SKUs. RPF ¶379. A screenshot of the website’s disclosures is below.



RPF ¶380.

C. Consent Order

Last year, the attorneys general of all 50 states and Washington, D.C. agreed to a consent order relating to Intuit’s free-product advertising. RPF ¶¶805-806. The agreement resolved claims relating to TurboTax free marketing. RPF ¶¶805, 807.

The consent order, lifted almost verbatim from the FTC’s pre-litigation proposal to Intuit, prohibits Intuit from running the so-called “Free, Free, Free” video advertisements or any substantially similar ones. RPF ¶¶810. It also requires that all TurboTax free-product advertising clearly and conspicuously disclose the character and nature of any requirements to use the free product, and communicate that the free offer is qualified. RPF ¶¶812-814. These binding provisions ensure that Intuit’s free-SKU advertising makes all appropriate disclosures clearly and conspicuously. RPF ¶¶811-814, 818-819. Intuit has complied with the order and will continue doing so. RPF ¶¶821-827.

D. Procedural History

The FTC’s investigation of Intuit’s advertising began in 2019. IDF ¶533. An administrative complaint issued in 2022. ID 1. The FTC concurrently sought a temporary restraining order and preliminary injunction in federal court—unsuccessfully. RPF ¶¶12, 16, 18. At a hearing, the court expressed skepticism about CC’s theory of liability. It observed that Free Edition ads “don’t say it is free to everybody and nobody thinks it is.” RPF ¶15. It also challenged CC’s assertion that Intuit’s ads “omitted” disclosures, pointing out that the disclosure “is right there.” *Id.*

CC then moved for summary decision. ID 2. Although the Commission denied CC’s motion, it criticized Intuit’s evidence, signaling the result it wanted (the one the ALJ reached).

The ALJ held an evidentiary hearing. CC introduced the challenged ads and presented testimony from one affirmative expert (who also appeared on rebuttal) as well as an additional rebuttal expert. Intuit provided testimony from three executives about topics including the company’s business strategy, values, ad-making process, and understanding of whether the ads were deceptive. RPF ¶¶848-877. Intuit also presented testimony from four experts, on topics ranging from reasonable consumers in the tax-preparation industry to why Intuit’s economic

incentives militate against deception to the results of a test-and-control study measuring the efficacy of the disclosures CC sought. RPF ¶¶878-911.

The ALJ concluded after the hearing that the challenged ads were deceptive and that a sweeping cease-and-desist order was warranted. *See generally* ID.

II. SUMMARY OF ARGUMENT

1. The ALJ erroneously found Intuit’s ads deceptive. To establish deception, CC had to prove both that the ads conveyed to consumers who could *not* file their taxes for free that they *could*, and that a significant minority of reasonable consumers was likely to be misled by the claim conveyed. CC proved neither.

First, each challenged ad conveyed to reasonable consumers that the advertised free offer was qualified, i.e., *not* available to everyone. The ads never stated or implied that the offer was available to everyone or that all TurboTax was free. Moreover, the ads contained disclosures that met or exceeded industry benchmarks under FTC guidelines, both in terms of legibility and understandability. These disclosures told consumers that each offer applied to a specific SKU, that only taxpayers with “simple returns”—a phrase understood by reasonable consumers—were eligible, and that consumers could find additional information about the qualifications at TurboTax.com. Just the fact that consumers were informed that eligibility was not universal defeats CC’s deception theory, as did telling consumers they *might* qualify and how to find out if they did. But the evidence also establishes that reasonable consumers understood the ads’ messaging and the scope of the free claim.

Second, the evidence does not prove that a significant minority of reasonable consumers was likely to be deceived. It proves the contrary. To begin, CC did not attempt to prove what reasonable consumers took away from *any* challenged ad. Intuit, meanwhile, offered un rebutted testimony that reasonable consumers understood that the free offers had qualifications and knew

where to find those qualifications, and that Intuit's ads were consistent with reasonable consumers' expectations. Intuit also showed that additional information was accessible in *seconds*. And Intuit offered (1) a test-and-control survey debunking CC's critique of the challenged ads' disclosures, (2) metrics inconsistent with CC's theory of widespread deception, and (3) expert testimony that the experience of Intuit's customer base belies CC's theory. CC—who had the burden of proof—offered only a grossly inadequate survey and a handful of unrepresentative consumer complaints, the latter of which proved the *absence* of deception.

2. The proposed cease-and-desist order is unwarranted. Intuit's *current* ads are not deceptive, and its past ads cannot justify prospective relief. Moreover, Intuit presented un rebutted testimony from its executives regarding its commitment to—and business interest in—clarity in its advertising. Perhaps most importantly, the state consent order, because it already enjoins any potentially deceptive conduct, both moots this case and assures that Intuit's advertisements going forward are without reproach. The record therefore does not reflect the cognizable danger of future unlawful activity required for injunctive relief.

Even if any cease-and-desist order were appropriate, the ALJ's is not. That order is impermissibly vague and punitive. It would also be ineffective, and likely *harm* consumers by preventing them from filing for free. And it is overbroad, impermissibly encompassing products other than TurboTax, even though the record says nothing about other products. Finally, the order's mandate that Intuit include certain language in its ads unconstitutionally compels speech.

3. This proceeding is rife with threshold infirmities. It is unconstitutional, violating due process (both because of the FTC's combination of functions and because of the Commission's biased conduct here), articles II and III of the Constitution, and the non-delegation doctrine. The proceeding is untimely as well, both because section 5 claims are subject to a

three-year statute of limitations and because the Commission inequitably waited years before bringing this proceeding.

QUESTIONS PRESENTED

- I. Whether the challenged ads were deceptive.
- II. Assuming deception, whether the ALJ’s cease-and-desist order—or *any* cease-and-desist order—is warranted.
- III. Whether these proceedings are constitutional and timely.

ARGUMENT

I. THE INITIAL DECISION’S RULING THAT THE CHALLENGED ADS WERE DECEPTIVE IS DEEPLY FLAWED

A. Under A Proper Analysis, None Of The Challenged Ads Was Deceptive

Free Edition is free—for every single person who uses it. No case has ever held that it is deceptive to tell consumers the true price of a product. In fact, the typical deception claim is *hiding* a product’s true price.

To support their highly unusual theory, CC had to show that (1) the challenged ads conveyed that consumers could file for free with TurboTax when they actually could not, and (2) a substantial minority of reasonable consumers was likely to be misled by the ads. *See FTC Policy Statement on Deception*, 103 F.T.C. 174, 175-176 (Oct. 14, 1983), *appended to Cliffdale Associates*, 103 F.T.C. 110 (1984). CC did not show either.

1. The challenged ads conveyed that specific TurboTax products were free to consumers who qualified

CC failed to prove that any challenged ad conveyed that *all* TurboTax products were free, that any TurboTax product was free without qualification, or any other claim CC asserted.

First, CC failed to prove an “express claim,” which requires an ad to “directly state” a false message. RB 37-39; RRB 5-8. CC insist that they can proceed on an express claim theory,

RPF ¶206, but they already conceded that no ad directly stated the false messages asserted, RPF ¶¶302-308. The ALJ reached a contrary conclusion by misapplying the law and mischaracterizing the ads. *See* ID 169-170, 175-176, 185. The ALJ asserted, for example, that one ad expressly claimed, “you can file on TurboTax for absolutely nothing.” ID 169. But the ALJ ignored that when the quoted words were spoken, the ad displayed not only the name of the product and offer being advertised—“Federal Free Edition” and “Absolute Zero”—but also “TurboTax Federal Free Edition is for simple U.S. returns only” and “See offer details at TurboTax.com.” RPF ¶226. The ALJ also quoted several ads that directly stated, “TurboTax Free Edition is Free.” ID 169-170, 175, 185. But because Free Edition is free, stating that fact is not a false express claim.

Nor did any challenged ad *imply* any false message. “An advertisement will only be found to contain implied claims” if, “after examining the interaction of all of the [ad’s] constituent elements,” the court can “conclude with confidence” that those elements together “convey a particular implied claim to consumers acting reasonably under the circumstances.” *Telebrands Corp.*, 140 F.T.C. 278, 429 (2005). Here, “examining the interaction of all of the constituent elements,” *id.*, makes clear that nothing false was implied. RPF ¶¶215-218, 248-252, 266-268, 281-282, 294.

In concluding otherwise, the ALJ made two critical errors. He failed to recognize that Free Edition *is* free and thus that the ads made a truthful claim. He also wrongly discounted the ads’ qualifying language on the ground it was not “legible and understandable,” ID 170, or was “inconspicuous” and “unclear,” ID 160.¹

¹ The ALJ criticized CC for presenting incomplete advertisements, ID 173 n.19, but never considered the import of that obfuscation: *He*, the adjudicator, was not presented with the full advertisements, i.e., in the form actually seen or heard by reasonable consumers.

a. The challenged ads’ qualifying language was sufficiently “legible” (and audible). *Policy Statement on Deception*, 103 F.T.C. at 184. The ALJ averred that the language was “small,” “faint,” or too “fast[.]” ID 171. But those adjectives require evidence. And CC offered *no* evidence that the qualifying language could not be seen (or heard) by reasonable consumers. RPF ¶¶230-231, 255-256, 271, 286, 295.

The ALJ, moreover, ignored the only evidence that objectively measured the qualifying language. Professor Peter Golder compared Intuit’s video and social-media ads to those of eighteen benchmark companies across four industries, using seven metrics drawn from the FTC’s guidelines on “How to Make Effective Disclosures in Digital Advertising”: placement, height, color, duration, repetition, proximity in time to the claim being qualified, and whether distracting factors were present. RPF ¶¶234-236, 258. On every metric, the challenged TurboTax ads were statistically comparable or superior to the benchmark companies’. RPF ¶¶237, 259. CC did not even attempt to rebut Professor Golder’s conclusions, responding instead that compliance with the FTC’s guidelines did not *necessarily* mean an ad was not deceptive. RPF ¶927. That assertion is facially dubious, inverts the burden of proof, and if true would raise due-process concerns, *see FCC v. Fox Television Stations*, 567 U.S. 239, 254 (2012).

The qualifying language in the challenged ads also met or exceeded the standards courts have established. Disclosures have been held adequate even when they were “smaller than most of the text in the advertisement,” *FTC v. DirecTV*, 2018 WL 3911196, at *8 (N.D. Cal. Aug. 16, 2018), or appeared only “in the closing seconds of the commercial,” *Estrella-Rosales v. Taco Bell Corp.*, 2020 WL 1685617, at *2 (D.N.J. Apr. 7, 2020). The ALJ’s observation that the ads’ qualifying language was “smaller” than other text, ID 176, or “appeared near the end of the advertisement and lasted only a few seconds,” ID 171—which could also be said of the ads’

references to TurboTax, RPF ¶¶223—is thus not answering a question that matters. The evidence showed that qualifying language is frequently smaller, because often there is more of it. *E.g.*, RPF ¶¶215-218, 232-237. Reasonable consumers know this and know where to find it. RPF ¶¶229, 232, 238, 257, 259, 514-524.

b. The ads’ qualifying language was “understandable” to reasonable consumers. *Policy Statement on Deception*, 103 F.T.C. at 184. As elaborated below, the ads included multiple qualifications, stating that (1) the ad was for a specific TurboTax SKU, (2) consumers’ ability to use that SKU was qualified, and (3) additional information about the SKU and its qualifications was on TurboTax.com. RPF ¶¶244, 262, 275, 290, 299. Taken together (as they must be), these “constituent elements,” *Telebrands*, 140 F.T.C. at 429, ensured that reasonable consumers understood that TurboTax was advertising a free product available only to qualified consumers.

First, most of the challenged ads (and all the challenged video ads, contrary to the initial decision’s and summary decision’s assertions, *see* ID 171; Summary-Decision Order 11 (Jan. 31, 2023)) conveyed that they were for a particular free product—not for every TurboTax product or for TurboTax as a whole. RPF ¶¶215, 250, 266, 281-282, 294. The ALJ’s contrary conclusion, that telling consumers the product name somehow reinforced that the free claim was unqualified, ID 171, makes no sense. If Intuit has a “free *edition*,” reasonable consumers understand that there are also editions that are not free. RPF ¶319. Unsurprisingly, there is unrebutted evidence that the inclusion of the product name in the challenged ads was itself sufficient to convey to consumers that there were multiple TurboTax SKUs and that only one was being advertised as free. *Id.*

Second, the challenged ads included language conveying that not all consumers would qualify for a free TurboTax product. Most ads, for example, specified that a free offer was for “simple tax returns only” (and/or for “Forms 1040EZ/1040A” only, until a 2017 amendment of the tax laws engendered changes in IRS forms). RPF ¶¶215-217, 248-249, 252, 267-268, 281-282, 294. The ALJ dismissed this critical language as “ambiguous.” ID 172. That is wrong: The evidence, including a consumer survey and consumer testimony, shows that reasonable consumers understood the meaning of “simple tax returns.” RPF ¶¶130-145; *infra* Section I.A.2.b. It is also irrelevant, because even if reasonable consumers were unsure *precisely* what constituted a “simple tax return,” the disclosure that the advertised product was for “simple tax returns only” unmistakably conveyed the material limitation, i.e., that a consumer viewing the ad might not qualify for the offer based on the complexity of their return. Thus, a reasonable consumer would not conclude that “TurboTax was free.” The ALJ responded that “simple tax returns only” could convey “*either* an unqualified free offer available to the viewer *or* a qualified offer that may not apply to the viewer.” ID 172. That is facially incorrect; there is *no way* in which “simple tax returns only” could convey “an unqualified free offer,” *id.* As Professor Golder put it, both “simple” and “only” each mean (at the very least) not “all.” RPF ¶135. Even CC’s own expert testified that he understood, after seeing that Free Edition was for simple returns only, that his taxes would not qualify “given that [his] tax situation [was] complicated.” RX1396 at 188.

“Simple returns only,” moreover, puts consumers on notice of the *nature* of the qualifications to use the free product. *See* RPF ¶¶135-136, 314-315, 322. Courts routinely uphold similar disclosures (in fact, disclosures far more ambiguous). One court, for example, held that the disclosures “[a]t participating locations for a limited time” and “[p]rices may vary”

were consistent with television advertising practices and sufficient to put reasonable consumers on notice of the promotion’s restrictions, even without further details. *Estrella-Rosales*, 2020 WL 1685617, at *2; *see also Little Caesars Enterprises v. Smith*, 895 F.Supp.884, 888, 899 (E.D. Mich. 1995) (similar). Just so here: The phrase “simple tax returns only” conveyed that not all tax returns were covered and that tax complexity would determine eligibility.

Finally, many of the challenged ads (including all the challenged video ads) conveyed that consumers could find more information about the qualifications for free TurboTax offers at TurboTax.com, inviting consumers to “see if you qualify” or “see details” at that website. RPF ¶¶215, 218, 294. (Most of the ads that did not expressly refer to the website were themselves hyperlinks that took consumers directly there. RPF ¶¶253, 269, 284.) The ALJ discounted these disclosures on the ground that they were “pro forma statements.” ID 172 (quoting *Policy Statement on Deception*, 103 F.T.C. at 183). But contrary to the initial decision’s citation, the phrases “see details” and “see if you qualify” are *not* identified in the FTC’s policy statement as “pro forma statements.” ID 172. Those phrases, in fact, appear nowhere in the policy statement—likely because they are not “pro forma.” Rather, they both (1) clearly informed consumers that the free product was not for everyone, RPF ¶324, and (2) directed consumers to thorough information about the product’s limitations, RPF ¶¶254, 285, 370.

2. Reasonable consumers were not likely to be misled

a. Reasonable consumers expect free tax-preparation offers to be qualified

CC had to show that the challenged ads were likely to mislead “not just any consumers,” but a significant minority of “consumers acting reasonably in the circumstances.” *Southwest Sunsites, Inc. v. FTC*, 785 F.2d 1431, 1436 (9th Cir. 1986). That analysis “starts with the background knowledge of the reasonable consumer.” *Dinan v. Sandisk LLC*, 2019 WL 2327923,

at *6 (N.D. Cal. May 31, 2019). CC’s case (and the ALJ’s decision) fails because it is rooted in an outdated view of consumer perception. The 1950s ended over 60 years ago; it is time for the FTC to modernize its case law and recognize that reasonable consumers have access to more information and are far savvier than when television was new. It is the *reasonable* consumer standard, which requires analyzing consumers as they are, not as they used to be.

Missing from CC’s presentation of evidence was information about reasonable consumers in this industry. The record shows that those consumers understand both that free offers have qualifications (RPF ¶¶471-480) and, more specifically, that free online tax-preparation offers are typically available only to consumers with simple tax returns (RPF ¶¶481-484). Consumers understand that such offers are so limited because all major players in the online tax-preparation industry have both a basic free product for consumers with simple tax returns and paid products for more complex tax situations. RPF ¶¶481-482. By 2011, in fact, that model was “an entrenched part of the ... market.” *United States v. H&R Block*, 833 F.Supp.2d 36, 46-48 (D.D.C. 2011). The model’s ubiquity led reasonable consumers to expect free online tax-preparation offers to have qualifications tied to tax complexity—even if (unlike here) those qualifications were not expressly stated. RPF ¶¶483-484. And that expectation manifested in consumer skepticism of free online tax-preparation offers, which resulted in consumers *underestimating* whether they could file for free. RPF ¶¶488-493; *see also* RPF ¶¶485-487.

The FTC’s “free” guidelines likewise recognize that the “public understands” that free offers are usually coupled with the requirement to purchase paid products at full price. RPF ¶476. The ALJ ignored that guidance, even when citing other portions of the guidelines to justify his order, ID 227. The ALJ cannot selectively choose what parts of the FTC’s guidance

should apply—either the free guides should be credited, or not. This provision—properly considered—establishes as a matter of law that reasonable consumers were unlikely to be deceived because their baseline assumption was that they would have to pay.

The record also shows that consumers were familiar with the term “simple tax returns,” which originated with the IRS and is used throughout the tax-preparation industry. RPF ¶¶119-123, 141-143, 453-454, 458-459. Intuit chose to use the term precisely “ [REDACTED] [REDACTED] because [REDACTED] and because it [REDACTED] [REDACTED] RPF ¶123. Indeed, because the phrase is “commonplace in the [relevant] market,” “reasonable consumer[s]” should be deemed *as a matter of law* to “understand[]” it. *Ebner v. Fresh, Inc.*, 838 F.3d 958, 965 (9th Cir. 2016); *see also Marksberry v. FCA US LLC*, 606 F.Supp.3d 1075, 1081 (D. Kan. 2022) (reasonable consumers are familiar with qualifications “often ... associated with” a product).

Even consumers who were not familiar with free tax-preparation offers were unlikely to be deceived, because reasonable consumers generally do not expect ads to provide every detail about an offer and understand that additional information is available elsewhere, often online, especially for an online product. RPF ¶¶510-513, 520-527. The challenged ads reinforced that understanding, expressly directing and/or linking consumers to TurboTax.com, which fully explained each offer’s qualifications, including with the very form-by-form analysis CC and the ALJ would require. RPF ¶¶253-254, 269-270, 284-285.

Finally, the record shows that consumers typically choose a tax-preparation product only after engaging in a “considered” and “high involvement” process. *DirectTV*, 2018 WL 3911196, at *3; *see* RB 59-61. That process normally involves not just relying on ads but also considering alternatives and consulting with friends, family, and/or third-party reviews. RPF ¶¶502-509,

782, 786, 891. This further underscores the unlikelihood that a substantial minority of reasonable consumers would be deceived by ads saying (in sum and substance) “For simple tax returns only. Find out if you qualify at TurboTax.com.” This is not the same as *requiring* consumers to do research. Instead, the evidence reveals that consumers *already* research tax-preparation products—in part explaining why there was no showing of actual deception even after the challenged ads ran billions of times.

Despite acknowledging that extrinsic evidence must be considered, ID 158, the ALJ ignored or improperly discounted the evidence just discussed. For instance, he wholly failed to address the evidence that reasonable consumers conduct substantial research before selecting a tax-preparation method or provider. RPF ¶¶502-509, 513, 782, 891. He also wrongly asserted that consumers’ familiarity with the phrase “simple returns” “says little or nothing about consumers’ understanding [regarding] whether, or how, the phrase applies to them.” ID 193. That contradicts both fact and expert testimony, RPF ¶¶122-123, 134-136, 139-145, which the ALJ did not even acknowledge. As Professor Golder explained, for example, the widespread and consistent use of the term is “critically important” to consumer understanding. RPF ¶144. Further, the ALJ’s reasoning defies common sense: Familiarity implies understanding. RPF ¶145.

Likewise indefensible is the ALJ’s critique that Intuit’s “contention that ‘simple tax returns’ is an IRS term familiar to consumers was not supported by any IRS evidence, such as public communications or other IRS documents,” ID 193 n.25. Several IRS documents in evidence, as well as a report by the Government Accountability Office, show that the IRS has long used the phrase. RPF ¶¶119-120. To the extent the ALJ faulted Intuit for not presenting *additional* evidence, Intuit could not do so only because the ALJ denied its motion seeking that

evidence. *See* Order (Jan. 3, 2023). As Intuit previously explained, and the ALJ has now recognized, documents reflecting how the IRS uses the term “simple tax returns” are relevant and should have been discoverable. Intuit’s Motion to Compel Production of Documents 6-8 (Dec. 19, 2022). Given that the ALJ’s faulty ruling denying such discovery manifestly played a role in his deception finding, that ruling itself merits remand.

Finally, the ALJ wrongly disregarded evidence concerning consumers’ experience with other free offers simply because those offers involved tiered products or bundles of products rather than a single product. ID 195. What matters is that reasonable consumers expect free offers to be qualified, such that they are unlikely to assume that a product is necessarily free for them. RPF ¶¶472-483, 485-491. That does not change if the free offer relates to a single product rather than a bundle of products. *Id.* Indeed, the FTC’s own free guide deals only with tiered or bundled products, 16 C.F.R. §251.1, yet the ALJ used the guide as the predicate for his decision and order, ID 227.

b. *Extrinsic evidence confirms that reasonable consumers were not likely to be deceived*

i. Intuit copy testing and market research. Intuit’s testing of the challenged ads (CC and their experts did no such testing) established that the ads were not deceptive. Copy testing from TYs 2020 and 2022 shows that around one-third of consumers believed they could file for free using TurboTax, both when presented with just the TurboTax brand name in TY 2020 (RPF ¶¶609-610), and when shown recent TurboTax ads in TY 2022 (RPF ¶¶702-711). That one-third share is far *less* than the 50% of consumers in the market for online tax-preparation who have simple tax returns and therefore qualify. RPF ¶¶695, 709-711, 804. The 33% figure is also lower than expected given that participants in the copy testing were likely to qualify to file for free. RPF ¶¶689-690, 695, 702, 705, 709-711. Those results indicate that the challenged ads did

not mislead consumers into believing that TurboTax was free for them when it was not. RB 31-32, 68-69.

A TY 2020 Net Promoter Score study similarly indicated a lack of deception or customer confusion. RPF ¶721. The study demonstrated that the percentage of respondents who were aware of a free TurboTax product before they decided to use TurboTax (48%) was about the same as the percentage who in fact filed for free with Free Edition (44%). RPF ¶717. Thus, of those who even knew about a free TurboTax product, nearly all used that product and filed for free. RPF ¶¶718-721.

These tests establish as a matter of law that there was no deception, as the confusion rates are far below the lowest number ever accepted as proof of deception in any FTC enforcement action. *See Telebrands*, 140 F.T.C. at 446-448 (citing cases). Indeed, in *Telebrands*, the Commission found that a 10% confusion rate, based on a test-and-control study, met the “significant minority” standard, but that a 3.9% rate did not. *Id.* at 422, 447-448; *see also ECM Biofilms*, 160 F.T.C. 652, 667-668 (2015) (“[W]e have found percentages ranging from 10% to 22% to be sufficient to constitute a significant minority.”).

The ALJ either ignored or misconstrued this evidence, finding that market research “shows that at least a significant minority of consumers believe that they can file their taxes for free with TurboTax.” ID 187-188. As discussed, it showed the opposite. The ALJ’s apparent belief that no consumers should believe they can file for free with TurboTax—when roughly 50% of consumers in the online tax-preparation market actually can—is the source of this serious error. Further demonstrating that infirm belief, the ALJ relied on market research from a single year revealing that 22% or 49% of respondents were confident that Free Edition is free. But Free Edition is in fact free, so those results say nothing about whether consumers were *deceived*. RRF

¶¶597-598. The ALJ’s characterization of consumer confidence that a free product is free as “not ... insignificant” is thus meaningless, and his reliance on those figures erroneous. ID 196.

The ALJ’s reliance on Intuit’s copy testing is similarly misplaced. ID 188. The TY 2018 and 2020 copy tests are not evidence that reasonable consumers were misled into believing they could file for free using TurboTax, because neither presented consumers with the final versions of ads. RRB 29-32; RRF ¶¶601, 610; RPF 699. Accordingly, neither test says anything about the challenged ads, including the claims conveyed by those ads or whether the ads were likely to mislead consumers. As noted, moreover, participants in both tests were more likely to qualify for Free Edition than the general public (and therefore it is more likely that any belief they had that they could file for free was correct). RRF ¶¶600-610; RPF 690, 699. The ALJ simply assumed without justification (or explanation) that a minority of participants would have qualified to use Free Edition. ID 188.²

The ALJ also erroneously relied on results from the TY 2018 copy test indicating that the advertisements “communicat[ed] the parent brand TurboTax well” but that “only about ~5% take away the sub brand (TurboTax Free, TurboTax Live).” ID 194. That merely reflected responses to the question: “Which brand do you think this ad was for?” RRF ¶¶609-610. Understandably, most consumers would consider the relevant “brand” to be TurboTax (which it is).

Finally, the ALJ’s characterization of the percentages in the TY 2022 copy test as “not insignificant,” ID 221 n.42, is neither coherent nor supported by evidence. The TY 2022 results, which showed that [REDACTED] and [REDACTED] of participants believed that [REDACTED], are consistent with the percentage of consumers in the general population who actually do

² For the same reasons, the ALJ was wrong that the TY 2018 and 2020 copy tests put Intuit on notice that a significant percentage of consumers mistakenly believed that TurboTax was free for them. ID 221.

qualify to file for free using Free Edition. RPF ¶¶690. The fact that consumers accurately understood whether they qualified for free filing is evidence of *non*-deception. Moreover, the evidence shows that [REDACTED]

[REDACTED] RPF ¶¶705-706. Again, the ALJ failed to grapple with the sample, offering only the conclusory claim that it was “not probative.” ID 221 n.42.

ii. Consumer complaints and feedback. The miniscule number of consumer complaints CC adduced further proves that a significant minority of reasonable consumers was unlikely to be deceived. If the challenged ads had deceived consumers in significant numbers, Intuit would have been “overwhelmed with complaints, in every channel.” RPF ¶¶647; *see also* RPF ¶¶624-625. Instead, CC identified (at most) 228 consumer complaints. Even if all those complaints were both relevant and reliable (they weren’t, *see* RPF ¶¶626-630, 633-635), they represent just 0.0003% of the 86.4 million TurboTax customers who completed at least one return between TYs 2015 and 2021, RPF ¶¶631-632, 637. That amounts to 0.0025 complaints per 1,000 consumers—much lower than the range of 0.35 to 143.8 complaints per 1,000 consumers found to support deception in other FTC cases (as detailed by an FTC economist in a paper relied on here by CC’s expert). RPF ¶¶641-642; *see also* RPF ¶¶643-644, 646. Professor Golder’s complaint-benchmarking analysis confirms that the number of complaints lodged against Intuit is inconsistent with deception. RB 86-87; RPF ¶¶623-625, 638-640, 646-647.³

Intuit’s customer-review data similarly show exceedingly low rates of negative feedback:

[REDACTED] and [REDACTED] of TurboTax’s TY 2020 and TY 2021 customers bases, respectively.

³ Bizarrely (or perhaps revealingly), just as Professor Golder was testifying about the numerous unreliable consumer complaints, the ALJ pressured him to move on. Tr. 1206-1207.

RRF ¶¶635, 642. That is a far cry from the “ten percent” figure that “FTC cases suggest ... the Commission would be justified in considering” indicative of deception. *Telebrands*, 140 F.T.C. at 447-448.

The ALJ discounted this consumer-feedback evidence because “evidence that some consumers were not injured or were satisfied with TurboTax’s products” is not a defense to liability. ID 205. That is not what Intuit argued. Intuit argued that CC could not possibly show that a substantial minority of reasonable consumers was likely to be deceived when some of the best evidence of deception (consumer complaints and other feedback) is starkly inconsistent with such widespread deception. RPF ¶¶623-626. To the extent the ALJ was suggesting that it is a novel concept that consumer feedback can provide evidence of deception, that is wrong; CC’s own expert authored an article explaining that consumers “retaliat[e]” against brands if a product “does not meet expectations.” RPF ¶624. And it is well-established in academic marketing literature that complaints are a “major source of information on the quality of products and companies.” *Id.*

The ALJ likewise wrongly dismissed Professor Golder’s complaint-benchmarking analysis, again on the ground that “the existence of some satisfied customers” is not a defense to liability. ID 205. But the analysis did not show—or even try to show—merely that some consumers were satisfied; it showed that Intuit’s complaint rate was entirely inconsistent with CC’s theory of deception. RPF ¶640; RRF ¶¶722, 735. As to *that* key point, the ALJ (and CC) had nothing to say.

Nor does the record support the ALJ’s unscientific assertion that there were “ample reports” from consumers indicating that they were deceived. ID 205. The supposedly “ample” reports are 6 customer reviews from TY 2020 and 45 reviews or complaints from TY 2021. ID

205. The 6 reviews from TY 2020 account for [REDACTED] of the [REDACTED] consumers who filed using TurboTax in that year, and the 45 reviews or complaints from TY 2021 account for [REDACTED] of the [REDACTED] who used TurboTax in that year. *See* RRF ¶¶635-662. These few examples do not provide a meaningful picture of consumer sentiment. RPF¶654. Even these seemingly negative reviews, moreover, lack the context necessary to assess whether they support CC’s theory of deception—and often, in fact, the little context that exists shows they do not. RRF ¶¶635-662.

Lastly, the ALJ’s reliance on one source of customer reviews—Intuit’s Customer Relations Management (CRM) data, IDF ¶¶488-507—was improper because Intuit was prevented from offering expert evidence providing essential context for the data. CC’s summary of CRM entries was excluded by a bench ruling in which the ALJ denied both parties’ requests to introduce supplemental expert reports. Order Memorializing Bench Rulings (Mar. 28, 2023). But CC then circumvented that order by repurposing an appendix to their excluded supplemental expert report as summary exhibit GXD006, which the ALJ admitted over objection. *Compare* Intuit’s Motion for Leave to Amend Its Exhibit List, Attachment GX870 at App’x B, *with* GXD006. Because Intuit was denied the opportunity to offer a supplemental expert report to respond to the evidence, the evidence must be disregarded. *See* 16 C.F.R. §3.43(d)(1); *see also* Attachment A (proffered supplemental expert report).

iii. Consumer-experience data. Various other metrics reflecting consumers’ experiences with TurboTax provide still more evidence that consumers’ expectations were met, i.e., that consumers were not deceived. RPF ¶656. For instance, the fact that consumers abandoned TurboTax’s paid products at the same rate they abandoned its free products (22%) demonstrates that consumers who abandon TurboTax do so not because they were misled about

whether they could file for free but for a reason (or reasons) common to all products. RPF ¶¶656-658. TurboTax’s high customer-retention rate for its paid products—which *exceeds* the rate for Free Edition, contrary to what one would expect if the alleged deception existed—likewise reflects that consumers who paid for TurboTax did not feel misled. RPF ¶¶91-92, 649-650.

iv. Consumer deposition testimony. Numerous consumers offered deposition testimony indicating that they were not deceived by the challenged ads. *E.g.*, RPF ¶635. For example, consumers testified that they:

- understood that there were qualifications for free TurboTax offers, that free TurboTax offers were not available to everyone, and that not all TurboTax products were free, RRF ¶¶669-670;
- understood that Free Edition’s qualifications were based on tax complexity and that it was available to taxpayers with simple returns, RRF ¶¶666, 669-670;
- understood the phrase “simple tax returns,” RRF ¶670;
- understood that they could visit TurboTax.com to find details about what qualified as a simple tax return and determine whether they qualified, RRF ¶¶669-670; and
- understood that they could click on hyperlinks at TurboTax.com to learn more about the qualifications for free offers, RRF ¶675.

The ALJ gave no reason for ignoring this testimony while focusing intently on select deposition excerpts CC offered. IDF ¶¶511-517.

The deposition testimony on which the ALJ relied does not support finding that a significant minority of reasonable consumers was likely to be deceived either. To begin with,

the testimony often contained “obvious inconsistencies” that rendered it “unreliable,” *Southern States Distributing Co.*, 1973 WL 165073, at *19 (F.T.C. 1973). See RRF ¶¶664-675. For example, one consumer testified both that he did not know who qualified for Free Edition and that he understood that Free Edition was only for consumers with simple tax returns. See GX137 at 56, 67-68. Further, the sixteen consumers whose testimony the ALJ cited represent an infinitesimally small fraction of all TurboTax customers and are not even close to representative of Intuit’s customer base. Instead, CC identified these consumers as likely to support CC’s case because they had filed complaints related to TurboTax or signed a declaration *at CC’s request*. E.g., RRF ¶664. Meanwhile, while one would expect those consumers to uniformly testify in support of CC, only a few did. In fact, two of the ALJ’s findings are supported by just one consumer’s testimony; a single consumer’s experience—particularly an outlier who filed a complaint related to TurboTax—does not establish how reasonable consumers would have perceived the challenged ads. IDF ¶¶516-517.

v. TY 2021 customer-base analysis. The detailed analysis of TY 2021 customer-level data conducted by Bruce Deal, an economist and Intuit’s expert, further suggests that the challenged ads were not deceptive to a substantial minority of reasonable consumers. As explained in Intuit’s post-trial brief (at 89-92), those data reflect that only 510 customers out of 55.5 million, or 0.0009%, exhibited behavior consistent with deception. RPF ¶¶679-682. The ALJ failed to even address the import of Mr. Deal’s analysis, much less explain why it does not undermine (if not outright eviscerate) his conclusions.⁴

⁴ Mr. Deal’s opinions were not in the record when CC moved for summary decision. When Commissioner Slaughter asked at oral argument whether Intuit would present evidence concerning the value of customer retention to Intuit’s business model, Intuit answered affirmatively. Mr. Deal offers that evidence. His trial testimony is at Tr. 1291-1497, and his report is RX1027.

vi. Other expert analyses and survey evidence. John Hauser’s “Disclosure Efficacy Survey” provides additional evidence that the challenged ads were not deceptive. RB 93-94; RPF ¶¶722-745. Dr. Hauser showed consumers versions of the challenged ads that were modified to reduce the emphasis on “free” and to provide additional information about Free Edition’s qualifications. If the challenged ads were deceptive, one would expect these revisions to have discouraged consumers from considering the advertised product. The survey showed otherwise. RPF ¶742. Perhaps for that reason, the ALJ never mentioned the survey when analyzing deception.

c. *The ALJ erroneously relied on Professor Novemsky’s survey*

As Intuit first explained in its (wrongly denied) motion in limine, the survey and related opinions offered by FTC expert Nathan Novemsky are irrelevant (because he failed to show his participants any of the challenged ads) and unreliable (due to numerous methodological flaws). The record subsequently developed confirms that Professor Novemsky’s opinions are entitled to no weight. RB 71-82; RRB 13-14, 53-55; RRF ¶¶467-894.

i. “Simple returns” results. The ALJ erroneously concluded that Professor Novemsky’s survey constitutes “persuasive evidence that consumers do not accurately understand the meaning of ‘simple returns.’” ID 191. As Intuit explained (RRB 53-54), the survey does no such thing.

To start, Professor Novemsky admitted that many of his survey participants understood that eligibility for TurboTax’s free SKUs was based on the “complexity or simplicity” of their tax returns. RPF ¶136. Moreover, the survey says nothing about how consumers understood the challenged ads’ use of “simple returns” because, again, Professor Novemsky did not show respondents the actual ads or otherwise provide respondents with all the information that the actual ads did. RRF ¶¶491-492, 496-497. In the actual ads, for example, Intuit’s use of the

phrase was nearly always accompanied by language (such as “see if you qualify”) inviting consumers to see additional information about the advertised product’s qualifications on the TurboTax website, as well as language specifying the product being advertised. RPF ¶¶244, 262, 275, 290, 299.

The ALJ concluded that providing survey participants with that additional information—i.e., the *actual ads* that are the subject of this proceeding—was unlikely to “materially alter their perception of their qualification for ‘simple returns’” because Intuit’s “fail[ure] to include any additional details about th[e] qualification ... invites consumers to determine the meaning of the phrase for themselves.” ID 191. But the language that Professor Novemsky omitted (“see details” or “see if you qualify at TurboTax.com”) would *prevent* consumers from determining the meaning of “simple returns” themselves. RRF ¶¶491-492. The ALJ hypothesized that consumers likely have “their own pre-existing definition of ‘simple,’” based on “wishful thinking,” and that they are unlikely to “seek[] out additional information.” ID 191-192; IDF ¶443. The only cited support for that hypothesis, however, is Professor Novemsky’s survey, *id.*; *see* RPF ¶927; RRF ¶499, which provides no support since Professor Novemsky *barred* participants from seeking out additional information, RRB 54.

The survey’s results concerning consumers’ understanding of “simple returns” were further infected by the flaws and biases discussed in the balance of this subsection.

ii. Improper survey design. The ALJ correctly concluded that Professor Novemsky’s opinion about the “source of survey participants’ beliefs ... lacks a firm grounding and is not entitled to much weight” because Professor Novemsky “did not show [his participants] any TurboTax advertisements” and “did not use a control group.” ID 190. But the decision fails to appreciate the impact of this improper survey design, finding despite these acknowledged

flaws that Professor Novemsky used “an appropriate design to measure consumer existing consumer perceptions” (IDF ¶395) and that his survey represented “reasonably reliable ... proof that a significant percentage of consumers who are ineligible to file for free have the misimpression that they can file their taxes for free with TurboTax” (ID 190). In reality, because Professor Novemsky did not use a control, he had no way to estimate the effect of the survey itself on respondents’ perceptions. RPF ¶539. Given this shortcoming (and the survey’s various other flaws), the ALJ’s conclusion that Professor Novemsky adhered to survey guidelines (IDF ¶¶400, 435) is incorrect, RRF ¶532; *see also* RPF ¶¶566-589; RRF ¶481.⁵

iii. Leading survey questions. The Novemsky survey results concerning whether consumers thought they could file for free are also unreliable because they are based on a single multiple-choice question (TAT240) that invited guessing (RB 74) and “primed respondents” to answer the way Professor Novemsky wanted (RPF ¶¶572-573). *See Fish v. Kobach*, 309 F.Supp.3d 1048, 1060 (D. Kan. 2018) (disapproving survey that similarly “primed respondents” to answer in a particular way), *aff’d*, 957 F.3d 1105 (10th Cir. 2020). Several survey participants confirmed that their responses were prompted by the survey itself, providing explanatory answers like, “[i]t’s been said a few times now during survey that you can file for free using TurboTax.” RPF ¶¶575-577. The ALJ dismissed those responses because they involved “[f]ewer than 1%” of respondents (IDF ¶421), but “respondents actively not[ing] the impact of the survey on their answers without prompting is strongly indicative of a more widespread” problem, RRF ¶589. Nor did the ALJ address Dr. Hauser’s blind-coding analysis, which showed

⁵ Given the ALJ’s finding that the Novemsky survey says nothing about the source of participants’ beliefs, the contradictory finding—that the results from one survey group (Group B) “provide[d] some indication of the power of ‘free messaging,’ and its potential to overcome even the past experiences of those who have previously paid to use TurboTax,” ID 128—lacks any logical basis and should be disregarded.

that nearly half of Professor Novemsky's respondents provided open-ended answers that were inconsistent with their answer to TAT240, further suggesting that those participants' perceptions were influenced by the survey. RPF ¶¶579-589.

iv. Unrepresentative and biased survey population. The ALJ overlooked the numerous ways in which Professor Novemsky's survey population was unrepresentative and biased. The 607 people who completed the survey represented under five percent of the 12,239 who began it (RPF ¶542)—a “woefully low response rate” comparable to rates courts have deemed insufficient to produce reliable results, *In re Autozone, Inc.*, 2016 WL 4208200, at *17 (N.D. Cal. Aug. 10, 2016), *aff'd*, 789 F.App'x 9 (9th Cir. 2019); *see* RB 77. Furthermore, by screening out respondents who qualified for Free Edition and had already filed their taxes, Professor Novemsky crafted a survey population that was especially unlikely to be familiar with TurboTax and the challenged ads, RPF ¶¶543-549, and for whom the ads were definitionally not material since they supposedly believed they could file for free on TurboTax and yet chose not to do so. His analysis also focused on respondents who had not used TurboTax for at least three years, meaning they were more likely to be familiar with competitors' products and advertising, which likely influenced their responses. RPF ¶¶550-552.

Finally, Professor Novemsky failed to safeguard against bias. He permitted respondents who completed his survey to opt out after informing them of the survey's purpose. RPF ¶¶555-559. Roughly 21% of participants did so, and their answers were deleted. RPF ¶557. As the FTC has recognized, such “transparen[cy] about the nature or purpose of a survey” is improper because it may “create bias in ... consumers' decision to participate,” which “would affect the accuracy and validity of the information collected and effectively nullify the survey.” RPF

¶¶558-559. The ALJ’s dismissal of this flagrant bias because the opt-out occurred at the end of the survey (ID 127) makes no sense. *Id.*

B. The Initial Decision Is Premised On Fundamental Legal Errors

The foregoing sections address the flaws in the ALJ’s analysis of particular evidence, but there are several additional, overarching problems with the ALJ’s ruling that further underscore that reversal is required.

1. The ALJ imposed a heightened disclosure requirement that is both unsupported and infeasible

The ALJ erred by giving the word “free” all-but-dispositive significance in advertising (and deception analysis). Attaching supreme significance to the word “free”—the actual price of the product at issue here—lacks any basis in law. The ALJ’s only support (*see* ID 170) were decades-old cases, each about a product that was advertised as “free” but was *not* free for *anyone*. For example, in *Book-of-the-Month Club*, 48 F.T.C. 1297 (1952), “[t]he use by the respondent of the word ‘free’ [was] false,” because “the books designated as ‘free’ [were] not ... without cost to the recipient,” *id.* at 1306. And in *FTC v. Mary Carter Paint Co.*, 382 U.S. 46 (1965), the advertised “can of paint was not ... ‘free,’” as the respondent was “allocating what [was] in fact the price of two cans to one can, yet calling one ‘free,’” *id.* at 48. Unlike in those cases, the products advertised here as free for qualifying consumers *are* free to those consumers; consumers do not have to pay Intuit anything to use any of the free products, and as explained it is *impossible* to pay to use any of them. The principle drawn from the ALJ’s cited case law—that “[d]isclaiming a free claim can be particularly difficult,” ID 203 (emphasis added)—is therefore irrelevant. Intuit did not need to disclaim its free claims; they were true.

The ALJ nonetheless used that principle to shift the burden of proof regarding deception to Intuit. For instance, the ALJ held that Intuit’s evidence “fails to prove” the *lack* of deception,

ID 203; that Intuit’s evidence “is not proof that Intuit’s current advertisements are unlikely to mislead,” ID 221 n.42; and that Intuit failed to “rebut” CC’s positions, ID 195, 197. Use of the word “free” does not license this inversion; the regulation instructing that “[c]ounsel representing the Commission ... shall have the burden of proof,” 16 C.F.R. §3.43(a), does not provide any exception for cases involving “free” claims.

Relying further on the notion that “[d]isclaiming a free claim can be particularly difficult,” ID 203, the ALJ set an impracticably (and unlawfully) high bar for Intuit’s disclosures. Specifically, the ALJ concluded that it is not sufficient for Intuit’s digital ads “to disclose ‘the existence and category’ of the applicable limitations” on eligibility for its free offers while hyperlinking to full eligibility details. ID 220. That is a remarkable departure from existing FTC guidance, which provides that an ad need only disclose the “nature and relevance” of limitations, and that if details (including regarding “price”) “are too complex to describe adjacent to the [relevant] claim, those details may be provided by using a hyperlink.” GX316 at 10, A-8 (FTC, *.com Disclosures* (Mar. 2013)). That is the situation here: As the ALJ acknowledged, CC’s expert conceded “that the eligibility requirements to file for free ‘cannot be easily communicated in an ad to a reasonable consumer.’” ID 224 (emphasis omitted). But rather than applying the FTC guidance that approves the use of hyperlinks in precisely these circumstances, *see* GX316 at A-7, A-8, the ALJ declared that “the solution” is for Intuit to “avoid” describing its free products as free, ID 224. That is shocking. It is not, and certainly should not, be that the law forbids advertising a free product as free merely because the offer has qualifications. That would outlaw any hotel’s “kids stay and eat free” offer, as well as countless other free offers with which reasonable consumers are familiar. RPF ¶¶473-477. It would even outlaw any IRS marketing

for the IRS Free File program, which describes the program as “free” without disclosing that it is available only to taxpayers below a certain income level. RPF ¶¶59, 278-279.

In short, the ALJ erred in ruling that Intuit’s accurate use of the word “free” both necessitated impracticable disclosures and triggered a “particularly strong” legal standard, under which the burden of proof shifted to Intuit. ID 170; *see also* ID 201, 203; IDF ¶¶427-428.

2. The ALJ improperly analyzed the ads’ components piecemeal and from a subjective viewpoint

a. By analyzing the various components of the challenged ads piecemeal, the ALJ violated “the principle that the Commission looks to the impression made by the advertisements *as a whole*,” *American Home Products*, 695 F.2d at 688 (emphasis added), as well as the Commission’s instruction to consider “the juxtaposition of various phrases” in an ad, *Policy Statement on Deception*, 103 F.T.C. at 176. Indeed, courts have “emphasized that in reviewing FTC actions prohibiting unfair advertising practices,” a court “must consider the advertisement *in its entirety* and not ... engage in disputatious dissection.” *S.C. Johnson & Son, Inc. v. Clorox Co.*, 241 F.3d 232, 238 (2d Cir. 2001) (quotation marks omitted; ellipsis in original; emphasis added).

The initial decision flouts this judicial mandate. As noted, the challenged ads included at least three different types of disclosures: (1) the specific product being advertised, (2) language conveying that eligibility for the advertised product was limited based on the complexity of one’s tax return, and (3) language directing consumers to full eligibility information. In analyzing these disclosures, the ALJ expressly considered “each tile separately,” rather than the “entire mosaic,” as the law requires. *S.C. Johnson & Son*, 241 F.3d at 238.

For example, as to the challenged ads’ disclosure of the specific product being advertised, the ALJ concluded that “*without any further disclosures*, the mere name of the product is

unlikely to dispel a viewer’s [mis]impression” that TurboTax would necessarily be free for them. ID 171 (emphasis added). That conclusion is irrelevant, as there *were* further disclosures. As to the disclosure that eligibility was limited based on the complexity of one’s tax return, the ALJ similarly concluded that “the interjection of ‘simple tax returns’” was insufficient to qualify the challenged ads’ “*generalized* ‘free’ claim.” ID 172 (emphasis added). That conclusion is flawed because, as noted, the free claims were *not* “generalized,” but rather were expressly associated with specific products. Finally, the ALJ concluded that disclosures like “see details” or “see if you qualify” were—again, *by themselves*—“unlikely to alter the overall net impression of an advertisement.” *Id.*

b. The ALJ independently erred by considering the ads and their components from his subjective perspective. That was improper because “[t]he deception standard is objective in nature.” *Richards v. Direct Energy Services, LLC*, 915 F.3d 88, 100 (2d Cir. 2019).

First, the ALJ ignored critical objective evidence regarding the adequacy of the challenged ads’ disclosures: Professor Golder’s analysis. RPF ¶¶234-236, 258. As noted, Intuit’s disclosures were comparable or superior to the comparators on each of these metrics. RPF ¶¶237, 259. These metrics—not CC’s or the ALJ’s subjective opinions—are legally relevant, not least because, as CC’s expert conceded, they were drawn from FTC guidelines. RPF ¶927.

Second, the ALJ disregarded the only perspective that matters: that of reasonable consumers. As a matter of law, “reasonable consumer[s]” are deemed to “understand[.]” concepts that “are commonplace in the [relevant] market.” *Ebner*, 838 F.3d at 965. And as explained in section I.A.2.a, the ALJ failed to account for reasonable consumers’ familiarity with free offers in the online-tax-preparation market. Likewise, as explained in section I.A.2.b, he

inappropriately ignored or disregarded evidence concerning market research, consumer complaints, consumer-experience data, consumer testimony, Mr. Deal’s TY 2021 customer-base analysis, and other expert analyses showing that reasonable consumers in fact were not deceived by the challenged ads.

3. The ALJ relied on a doctrine that has no place here and involves disregarding detailed information readily available to consumers

The ALJ erroneously relied on an antiquated and inapplicable doctrine to disregard the detailed disclosures provided prominently and repeatedly on the TurboTax website. That ruling threatens to render e-commerce advertisements absurdly complex and unworkable, for no sound reason.

The ALJ acknowledged (ID 201) “that consumers must visit the TurboTax website ... to use TurboTax Free Edition, and that the website included additional information about the ... qualifications for using TurboTax Free Edition.” Indeed, Free Edition’s qualifications were at the top of both the TurboTax homepage and the Free Edition landing page throughout the relevant period. RPF ¶¶374-384, 388-398. Nevertheless, the ALJ invoked the “deceptive door opener” doctrine to dismiss those upfront and detailed disclosures as irrelevant. ID 200. As the ALJ observed at trial, the upshot of applying the door-opener theory in this case is that “it doesn’t matter what a consumer sees at the website”; all that matters is that the ads “induced [consumers] to the website.” RPF ¶467. (And yet, the ALJ never found that any of the ads here induced consumers to the website.)

Intuit explained at length in its post-trial briefing why applying the door-opener doctrine to an online product like TurboTax is anachronistic and contrary to law, especially where the ads expressly incorporated the website disclosures through the “see if you qualify” disclosure. RB 51-56; RRB 62-65. The initial decision offers no persuasive response.

First, the decision ignores case law requiring that “deceptive advertising claims ... take into account all the information available to consumers,” *Bell v. Publix Super Markets, Inc.*, 982 F.3d 468, 477 (7th Cir. 2020), or at least any “information *readily available* to the consumer,” *Moore v. Trader Joe’s Co.*, 4 F.4th 874, 882 (9th Cir. 2021). The TurboTax website was expressly mentioned in every challenged video and radio ad, RPF ¶¶215, 218, 222, 244, 294, 299, and linked to directly by every other challenged ad, RPF ¶¶253-254, 269-270, 284-285. Moreover, CC’s expert recognized both that it takes only “a few seconds” to get to the website by typing “TurboTax” into a web browser, and that once on the website it takes only “five to ten seconds” to encounter the qualifications for free TurboTax offers. RPF ¶790. The information on the website was undoubtedly “readily available to the consumer,” *Moore*, 4 F.4th at 882. It thus cannot be that “it doesn’t matter what a consumer sees at the website,” RPF ¶467.⁶

Second, the ALJ ignored that the doctrine, which originated in the brick-and-mortar context, is inapplicable to online products like TurboTax. As Intuit explained (RB 53-54; RRB 64-65), the door-opener concept was developed in cases about ads that either lured consumers to a physical facility under false pretenses, *Resort Car Rental Systems, Inc. v. FTC*, 518 F.2d 962, 964 (9th Cir. 1975) (per curiam), or induced consumers to literally open their front doors so that salesmen could “gain entrance into [their] homes,” *Encyclopaedia Britannica, Inc.*, 87 F.T.C. 421, 496 (1976); *see also Grolier, Inc.*, 99 F.T.C. 379, 383 (1982). The ALJ’s only justification for applying these half-century-old cases to twenty-first-century e-commerce is that “no FTC case has held that the deceptive door opener rule does *not* apply to transactions that take place online rather than in a brick-and-mortar store.” ID 201 (emphasis added). But neither has any

⁶ The cases cited above cannot be dismissed because they were not decided under the FTC Act. They were decided under state statutes that are, if anything, broader than the Act, and their legal principles reflect countless more cases than have been brought under the FTC Act.

case held that the rule *does* apply online. To the contrary, courts have rejected deception claims (under state laws modeled on the FTC Act) in the online context where price disclosures occurred at the point of sale, much later than consumers see detailed information on the TurboTax website. *See Washington v. Hyatt Hotels Corp.*, 2020 WL 3058118, at *5 (N.D. Ill. June 9, 2020); *Harris v. Las Vegas Sands L.L.C.*, 2013 WL 5291142, at *2, *5-6 (C.D. Cal. Aug. 16, 2013). The ALJ declared without explanation that these cases involved “different factual contexts,” ID 201, but their contexts are far more relevant than the pre-Internet cases the ALJ cited.

Finally, the ALJ failed to explain why the reasons the door-opener theory was rejected in *FTC v. DirecTV* do not apply equally here. Those reasons were that (1) “nothing in [the challenged advertisement] contradict[ed] the true terms of [the advertiser’s] provision of services” and (2) the advertisement was “for a complex product” and in a constrained format, such that “a reasonable consumer would understand the limitations of how information is presented.” *DirecTV*, 2018 WL 3911196, at *15. So too here: Nothing in the challenged ads contradicted the true terms of the advertised offers. *See supra* section I.A.1. And as CC’s expert testified, “the level of information ... in the eligibility requirements” for Intuit’s free TurboTax offers “could not be effectively communicated in a” constrained format. RPF ¶841.

Accordingly, more detailed disclosures would have been “out of step with what consumers” expect. RPF ¶845. The ALJ declared (ID 203) that “*DirecTV* is readily distinguishable,” but that assertion is unsupported. The ALJ simply provided a conclusory recitation of his own

falsity holding, which was flawed, and his observation that *DirectTV* involved “disclos[ures] on the face of the advertisements themselves,” which of course describes this case as well.⁷

II. THERE IS NO BASIS FOR THE PROPOSED CEASE-AND-DESIST ORDER

A. No Cease-And-Desist Order Is Warranted

Even if any of the challenged ads—none of which is still running, RPF ¶¶336, 803—were deceptive, no cease-and-desist order would be warranted. Such orders are permitted only “to prevent illegal practices in the future,” *FTC v. Ruberoid Co.*, 343 U.S. 470, 473 (1952), not “to fasten liability on respondents for past conduct,” *FTC v. Cement Institute*, 333 U.S. 683, 706 (1948). Accordingly, CC had the burden to prove that there is “some cognizable danger of recurrent violation, something more than [a] mere possibility.” *United States v. W. T. Grant Co.*, 345 U.S. 629, 633 (1953). CC did not do so. The ALJ’s decision to issue an order anyway failed to account for the improvement over time in the clarity of Intuit’s ads, Intuit’s intent to be clear with consumers and to follow the law, and the assurance provided by Intuit’s binding consent order with all 51 state attorneys general.

1. The overwhelming and largely uncontested evidence of improvement in the clarity of Intuit’s ads belies any “cognizable danger of recurrent violation,” *W. T. Grant*, 345 U.S. at 633. Over the past several years, Intuit has lessened the prominence of its “free” claims, RPF ¶354, increased the size and contrast of its text disclosures, RPF ¶¶355-357, and added and strengthened verbal disclosures, RPF ¶¶355, 359, 361-362. Copy testing confirms that these

⁷ The ALJ also asserted in a footnote (ID 204 n.31) that the TurboTax website was deceptive on its own, “independently of the deceptive door opener theory.” But the decision makes clear that CC did not meet their burden of proof on that subject. *Id.* The Commission should not credit a footnoted conclusion unsupported by *any* argument. In any event, even a cursory review of the website makes clear that it is not deceptive. *See* ID §II.B.7; RPF ¶¶372-452.

efforts worked: [REDACTED]

[REDACTED], RPF ¶¶702-713—the same as the share of *all* U.S. taxpayers who qualify to file for free (even though [REDACTED]) [REDACTED]

[REDACTED], RPF ¶¶705-706). The ALJ acknowledged that this recent testing showed “smaller percentages” of filers believing they could file for free “than shown by copy testing of” prior ads, but he discounted the recent testing on the ground that the percentages of filers it showed believed they could file for free ([REDACTED]) was “not insignificant.” ID 221 n.42. The question, however, is not whether the percentage was large or small in an absolute sense. What matters is how the copy-testing percentage compared to the *actual* percentage of the population who qualify. And as just explained, the copy testing shows that the tested and actual percentages for Intuit’s current ads are extremely close. That strongly undercuts any conclusion that there is any realistic danger here of future section 5 violations. In fact, CC effectively conceded that Intuit is currently complying with the laws by not challenging any of Intuit’s current ads as deceptive. *See* RPF ¶¶336, 803.

If more were needed, “Intuit has ... ceased the ... ‘free, free, free’ video advertising campaign” that was the centerpiece of CC’s case. ID 216; *see also* ID 163. The ALJ discounted this voluntary cessation because it occurred “four days before the issuance of the FTC’s Complaint.” ID 216. But it is the FTC that decided to issue a complaint *after* the termination of the ad campaign. Moreover, the ALJ ignores that this cessation was undertaken—with great effort by Intuit, RPF ¶¶7-8—as soon as the Commission first articulated specific concerns with the ad campaign, RRB 70-71.

2. Undisputed evidence of Intuit’s past and continuing intent to be fully honest and transparent with consumers further militates against any cease-and-desist order. CC conceded before trial that they lack any evidence of intent to deceive. RPF ¶¶175. And at trial, Intuit’s former and current executives consistently (and credibly) testified that the company’s values, goals, and business interests are inconsistent with deception. RPF ¶¶30, 33-38, 73, 167-176, 353, 647, 769, 850-852, 860, 870. That testimony was corroborated by the instructions Intuit gave its ad agencies, RPF ¶¶172-173; expert testimony regarding economic incentives in the tax-preparation industry, RPF ¶¶39, 89; and case law recognizing “the importance of reputation and brand in driving consumer behavior in purchasing” online tax-preparation products, *H&R Block*, 833 F.Supp.2d at 75. Indeed, the ALJ *credited* “the sincerity of Intuit’s witnesses testifying to Intuit’s commitment not to deceive its customers—including because of Intuit’s own business incentives.” ID 221.

3. Intuit’s legally enforceable consent order with the attorneys general of all 50 states and Washington, D.C. leaves “nothing for this court to enjoin” and thus moots this case, *Wold v. Robart*, 2018 WL 1135396, at *5 (E.D. Wis. Feb. 28, 2018). At an absolute minimum, it provides powerful “assurance[] of future compliance” with the FTC Act, eradicating any “cognizable danger” of future violation and thereby foreclosing a cease-and-desist order, *TRW, Inc. v. FTC*, 647 F.2d 942, 954 (9th Cir. 1981). The consent order bars the “free, free, free” video ads and any substantially similar ads. RPF ¶213. It also requires “Clear and Conspicuous” disclosures in all free ads, including written disclosures that not all taxpayers qualify, as well as corollary verbal disclosures in all video ads eight seconds or longer, RPF ¶¶809-819. There is no dispute that Intuit has complied with the consent order, that Intuit has charged an internal team

with ensuring compliance in the future, and that all relevant Intuit employees now receive comprehensive training on the consent order's provisions. RPF ¶¶821-828.

Intuit's post-trial reply brief explained at length why each of CC's quibbles with the consent order (repeated by the ALJ, *see* ID 220-221) is unavailing. RRB 72-75. To summarize, each is inconsistent with either the FTC's own guidance on the propriety of hyperlinks, RRB 73, its guidance on the context-dependent necessity of audio disclosures, *id.*, or other recent orders, RBB 74, and each would make modern-day space-constrained advertising largely impossible.

* * *

Because the allegedly deceptive ads are no longer running, because the ads that *are* running are demonstrably improved, because Intuit's honest intent is undisputed, and because a consent order with all 51 state attorneys general provides powerful assurances against future deception, no cease-and-desist order is warranted.

B. The ALJ's Order Is Inappropriate

The ALJ's order is especially unwarranted because it is vague, harmful, overbroad, and unconstitutional.

1. A lynchpin of the ALJ's order—provision I.B—is not “stated with clarity and precision” and thus is “unenforceable.” *LabMD, Inc. v. FTC*, 894 F.3d 1221, 1235-1236 (11th Cir. 2018).

Provision I.B. requires that “[a]ll the terms, conditions, and obligations upon which receipt and retention of [a] ‘Free’ good or service are contingent [be] set forth Clearly and Conspicuously at the outset of the [free] offer so as to leave no reasonable probability that the terms of the offer might be misunderstood.” ID 232. Like the consent order, this provision requires the clear and conspicuous presentation of relevant qualifications. But *unlike* the consent order, it “says precious little about how this is to be accomplished,” *LabMD*, 894 F.3d at 1237.

The ALJ’s response—that “[t]he terms of Section I.B appear to be as specific as the circumstances will permit,” ID 227 (quotation marks omitted)—is plainly wrong given the consent order’s far more specific terms, *see* RPF ¶¶810-819, and is hardly a compelling justification. And the ALJ’s fallback assertion—that “uncertainty may be resolved” through the prior-restraint provision of the Commission’s Rules of Practice, ID 226-227—is cold comfort, as the applicable rule allows the Commission to “at any time reconsider any advice given under this section and, where the public interest requires, rescind or revoke its prior advice,” 16 C.F.R. §2.41(e). In any event, the rule of practice does not supersede precedent requiring that any cease-and-desist order’s provisions be “stated with clarity and precision,” *LabMD*, 894 F.3d at 1235.

2. The ALJ’s order would not help and in fact would harm consumers. Provision I.B, for example, would result in “information overload” and thus be counterproductive to consumer understanding. RPF ¶¶138, 383, 834-835. CC never rebutted the testimony of Intuit’s witnesses on this subject. RPF ¶¶833, 842, 844; *see* RRB 83-84 (recounting testimony). As the ALJ acknowledged, moreover, *both* sides’ experts recognized a “potential to overload consumers with complicated information in an advertisement,” with CC’s expert confirming that “the eligibility requirements to file for free ‘cannot be easily communicated in an ad to a reasonable consumer.’” ID 224 (emphases omitted). That is especially true for space-constrained video ads (on TikTok, for example), in which it would be difficult to comply with the order. The ALJ appears to have discounted this expert consensus on the ground that “neither witness conducted any formal analysis using the disclosures required by the Proposed Order.” *Id.* That is unsurprising, since the proposed order’s requirements are so completely incoherent that no expert could be sure what to test. It is also impermissible burden-shifting; it was CC’s burden to

prove their proposed order was warranted, *see W. T. Grant*, 345 U.S. at 633. CC failed to do so, offering *no* evidence that provision I.B would help consumers better understand free TurboTax advertising. RPF ¶832.

Provision I.C, which requires Intuit to state in its ads that its free products are “not Free for a majority of U.S. taxpayers,” likewise would harm consumers. As Professor Golder explained, that provision would cause many consumers to assume—often incorrectly—that they do not qualify for the free TurboTax product being advertised. RPF ¶843. That is especially pernicious because, of consumers in the market for online tax-preparation software, most *do* qualify to file for free. RPF ¶¶129, 464; *see also* RPF ¶¶485-501.

3. The ALJ’s order inappropriately encompasses products other than TurboTax. Any cease-and-desist order must be reasonably tethered to the challenged practice. *American Home Products Corp. v. FTC*, 695 F.2d 681, 710-711 (3d Cir. 1982). Indeed, the “concept of ‘reasonableness’ has” often “required the narrowing of deceptive advertising orders so that they more closely relate to the offending conduct.” *Fedders Corp. v. FTC*, 529 F.2d 1398, 1402 (2d Cir. 1976). That is the situation here, as CC neither made allegations nor provided evidence concerning any product other than TurboTax.

To be sure, courts have recognized that equitable relief can involve “some fencing in.” *FTC v. Grant Connect, LLC*, 763 F.3d 1094, 1105 (9th Cir. 2014). But the factors the ALJ considered—the deliberateness and history of Intuit’s conduct, *see* ID 229—cut *against* any such “fencing.” As discussed, *see* section II.A.2, the evidence shows that Intuit’s ads have improved and that Intuit was and remains committed to communicating clearly and honestly with consumers. The ALJ’s reliance on the fact that Intuit “was a defendant in numerous court cases claiming that Intuit’s free tax filing advertising was deceptive,” ID 229, is improper because

mere “allegations are not evidence of the truth of what is alleged,” *Wright v. Farouk Systems, Inc.*, 701 F.3d 907, 911 n.8 (11th Cir. 2012). The ALJ’s reliance on those cases is also inappropriate because many are irrelevant, and none were successful. RRF ¶¶917-934. There was thus no sound basis for the order to reach products beyond TurboTax.

4. Provision I.C—again, requiring Intuit to disclose that a product is “not Free for a majority of U.S. taxpayers”—is unconstitutional. The government may not compel commercial speech unless the speech is “noncontroversial” and the compulsion neither “unjustified [n]or unduly burdensome.” *National Institute of Family & Life Advocates v. Becerra*, 138 S.Ct. 2361, 2372 (2018). Provision I.C fails both elements. First, the compelled speech is far from “noncontroversial,” *id.* As the ALJ recognized at trial, the entire taxpayer population is “pretty much meaningless” for measuring eligibility to use Free Edition. RPF ¶463. The more relevant population is taxpayers in the market for online tax preparation, and most of them *do* qualify to use TurboTax for free. RPF ¶¶129, 464. Second, imposing provision I.C on Intuit but not its competitors who market similar free offers, RPF ¶¶453-460, would be “unjustified or unduly burdensome” because it would disadvantage Intuit relative to its competitors. “[A] government-compelled disclosure that imposes [such] an undue burden fails for that reason alone.” *American Beverage Ass’n v. City & County of San Francisco*, 916 F.3d 749, 757 (9th Cir. 2019). The ALJ’s dismissal of this self-evident point on the ground that it was “unsupported by record evidence” again amounts to an impermissible shifting of CC’s burden to prove that their proposal was warranted, *see W. T. Grant*, 345 U.S. at 633.

In sum, no order is warranted here, and certainly not the vague, consumer-hurting, overbroad, and unconstitutional one the ALJ adopted.

III. THE PROCEEDING IS UNCONSTITUTIONAL AND UNTIMELY

A. Constitutionality

1. The Supreme Court has held that “an unconstitutional potential for bias” under the Due Process Clause inevitably exists “when the same person serves as both accuser and adjudicator in a case.” *Williams v. Pennsylvania*, 579 U.S. 1, 4, 8 (2016); *see* RB 117-118. Such bias is present here, where the Commissioners who authorized the filing of the complaint against Intuit are now deciding its merit. That bias is underscored by the Commission’s summary-decision order, which (1) criticized Intuit’s evidence even before Intuit had an opportunity to develop a record, (2) incorrectly asserted that most ads failed to mention Free Edition, and (3) effectively mandated the initial decision’s result. *See* Summary-Decision Order (Jan. 31, 2023).

In upholding the FTC’s combination of functions, the ALJ cited (ID 211) three cases that all pre-date *Williams*. He also cited (*id.*) *Withrow v. Larkin*, 421 U.S. 35 (1975), which expressly recognized that a combination of functions violates due process when “the probability of actual bias on the part of the judge or decision-maker is too high to be constitutionally tolerable,” *id.* at 47. The Commission’s unblemished record before itself is that kind of “strong sign of an unhealthy and biased institutional process.” RPF ¶934.

The FTC’s current makeup exacerbates the risks posed by its unconstitutional structure and provides yet another reason why the Commission cannot lawfully act. The FTC was created as a five-member body with no more than three Commissioners from the same political party. 15 U.S.C. §41. *Humphrey’s Executor* confirmed the need for the FTC to be “nonpartisan.” 295 U.S. 602, 624 (1935); *see also* S. Rep. 63-597 at 22 (1914) (“[I]t was essential that the commission should not be open to the suspicion of partisan direction.”). The FTC’s current composition—three commissioners all from the same party—contravenes that statutory mandate, rendering any Commission action invalid.

The Due Process Clause is also violated when “a disinterested observer may conclude that the agency has in some measure” prejudged the case. *Fast Food Workers Committee v. NLRB*, 31 F.4th 807, 815 (D.C. Cir. 2022). Intuit renews its argument, also made in its pending motion to disqualify, that Chair Khan’s participation in this case supports such a conclusion, and her continued presence taints the remaining commissioners.

Relatedly, the ALJ erred when he denied Intuit’s motion for discovery related to the Commission’s prejudgment. Order Denying Respondent’s Motion for Discovery Pursuant to Rule 3.36 (Nov. 7, 2022). That order largely rested (*id.* at 6) on the incorrect notion that Chair Khan’s conduct was not a basis for disqualification, RB122-125.

2. “[C]ases involving ‘private rights’” must be decided in article III courts. *Executive Benefits Insurance Agency v. Arkison*, 573 U.S. 25, 32 (2014). This case involves Intuit’s private right of “advertising,” which is a “core private right[],” *Axon Enterprise v. FTC*, 598 U.S. 175, 198 (2023) (Thomas, J., concurring), one “integral” to Intuit’s “liberty,” 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 522 (1996) (Thomas, J., concurring in part). Channeling claims involving private rights to administrative agencies not only violates article III, but also “may violate due process.” *Axon*, 598 U.S. at 202 (Thomas, J., concurring). The ALJ ignored this constitutional infirmity. *See* RB 118-119.

3. The FTC’s structure contravenes article II because the Commissioners and the FTC’s ALJs are impermissibly insulated from presidential removal. RB 119-121. In disagreeing, the ALJ relied (ID 211) on *Humphrey’s Executor v. United States*, 295 U.S. 602 (1935). But *Seila Law v. CFPB*, 140 S.Ct. 2183 (2020), “repudiated almost every aspect of *Humphrey’s Executor*,” *id.* at 2212 (Thomas, J., concurring in part and dissenting in part). To the extent *Humphrey’s* survives, Intuit preserves the argument that the case should be overruled.

And even if it is still good law, that case blessed Commissioner tenure protection only after noting that the FTC “is to be nonpartisan,” 295 U.S. at 624, which is not the case today.

As to ALJs, the ALJ acknowledged (ID 211) that “the Fifth Circuit held that the statutory removal restrictions for [SEC ALJs] are unconstitutional” in *Jarkesy v. SEC*, 34 F.4th 446, 464 (5th Cir. 2022), *cert. granted*, 143 S.Ct. 2688 (2023). Yet he refused without explanation to extend *Jarkesy* to himself. No material distinction exists between the two agencies’ ALJs, *see* RB 119-120. The FTC ALJ’s double-layered removal protections are thus unconstitutional.

4. The Commission’s unfettered discretion to proceed before either an administrative or an article III tribunal, *see* 15 U.S.C. §§45(b), 53(b), is unconstitutional, *see Gundy v. United States*, 139 S.Ct. 2116, 2123 (2019) (plurality), especially where, as here, the FTC already tried and failed in a neutral forum. The Fifth Circuit recently held that the SEC’s materially identical forum-selection delegation was unconstitutional. *Jarkesy*, 34 F.4th at 461. Again, no basis exists to distinguish *Jarkesy*. RB 121-122.

The ALJ rejected Intuit’s non-delegation argument on the ground that the Commission is merely “exercis[ing] enforcement discretion—a traditional executive power.” ID 213. But in deciding whether to proceed administratively or judicially, Congress “effectively gave the [agency] the power to decide which defendants should receive *certain legal processes* (those accompanying article III proceedings) and which should not.” *Jarkesy*, 34 F.4th at 462. That power is one “Congress uniquely possesses.” *Id.*

B. Timeliness

This case was untimely in two respects.

First, laches—which bars equitable relief when the plaintiff engages in “unreasonable, prejudicial delay in commencing suit,” *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 667 (2014)—precludes the FTC from punishing Intuit for outdated ads of which the FTC has

long been aware. The FTC began investigating Intuit in 2019, RPF ¶1, yet allowed nearly three whole tax seasons to pass before initiating an action in 2022, RPF ¶6, challenging ads that ran as early as 2015. The ALJ wrongly concluded (ID 209) that laches is categorically inapplicable. *See, e.g., FTC v. DirecTV*, 2015 WL 9268119, at *3 (N.D. Cal. Dec. 21, 2015); RB 116.

Separately, ads from TYs 2014-2017 cannot support relief because they ran outside the three-year statute of limitations applicable to section 5 claims. When statutes (like section 5) lack an express limitations period, courts “‘borrow’ the most suitable statute or other rule of timeliness from some other source.” *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151, 158 (1983); RB 113-115. Here, analogous state and federal laws both point to a three-year limitations period. *See, e.g., Cal. Civ. Code §1783; 15 U.S.C. §57b(d)*. The ALJ rejected *DelCostello* because it did not involve claims brought by the government. ID 210. But if anything, government claims have a *greater* need for a limitations period, because time limits are “an almost indispensable element of fairness,” *Rothensies v. Electric Storage Battery Co.*, 329 U.S. 296, 301 (1946), and it would be “utterly repugnant to the genius of our laws” if government enforcement actions could “be brought at any distance of time,” *Adams v. Woods*, 6 U.S. 336, 342 (1805). *See* RB 114-115.

CONCLUSION

The Commission should dismiss the complaint.

September 26, 2023

Respectfully submitted,

By: /s/ David Z. Gringer

David Z. Gringer
WILMER CUTLER PICKERING
HALE AND DORR LLP
7 World Trade Center
250 Greenwich Street
New York, NY 10007
(212) 230-8800
David.Gringer@wilmerhale.com

Howard M. Shapiro
Jonathan E. Paikin
Jennifer Milici
Daniel S. Volchok
Derek A. Woodman
WILMER CUTLER PICKERING
HALE AND DORR LLP
2100 Pennsylvania Avenue NW
Washington, DC 20037
(202) 663-6000
Howard.Shapiro@wilmerhale.com
Jonathan.Paikin@wilmerhale.com
Jennifer.Milici@wilmerhale.com
Daniel.Volchok@wilmerhale.com
Derek.Woodman@wilmerhale.com

Attachment A

PUBLIC



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

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

In the Matter of:

Intuit Inc., a corporation.

Docket No. 9408

**SUPPLEMENTAL EXPERT REPORT OF BRUCE F. DEAL
MARCH 9, 2023**

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I. QUALIFICATION AND ASSIGNMENT

1. My name is Bruce Deal, and I submitted an expert report in this matter on January 13, 2023 (“Deal January 2023 Report”).¹ The Deal January 2023 Report includes a summary of my professional experience, my qualifications, and my assignment in this matter.
2. In this supplemental report, I have been asked by counsel to analyze whether additional data produced by Intuit change any of my opinions presented in the Deal January 2023 Report. I have also been asked to analyze whether these data provide support for Complaint Counsel’s allegations of widespread deception in general.² I understand these data were produced in response to a Motion to Compel submitted by Complaint Counsel.³ These data contain selected information “pertaining to customers and potential customers who interacted with a free TurboTax offer or product or service” as recorded in Intuit’s customer relationship management (“CRM”) databases between November 2, 2020, and January 10, 2023.⁴ I refer to these data as “CRM Data.”⁵
3. A list of materials I have relied upon in forming my opinions expressed in this report are listed in **Appendix A**. In preparing my report, I have utilized the following commercially available computer programs: Microsoft Office, SAS, Python, and Adobe Acrobat.

¹ Expert Report of Bruce F. Deal, *In the Matter of Intuit Inc.*, Docket No. 9408, January 13, 2023 (“Deal January 2023 Report”).

² Complaint, *United States of America before the Federal Trade Commission in the Matter of: Intuit Inc., A Corporation*, Docket No. 9408, March 28, 2022 (“Complaint”).

³ Order Granting Complaint Counsel’s Motion to Compel Production of Documents, *In the Matter of Intuit Inc.*, Docket No. 9408, December 30, 2022.

⁴ Complaint Counsel’s First Requests for Production of Documents to Intuit Inc., *In the Matter of Intuit Inc.*, Docket No. 9408, September 12, 2022, pp. 2–6 (“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.”; “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.”); CRM Data 1, INTUIT-FTC-PART3-000618568–78.

⁵ Approximately 1 million customer interactions with Intuit’s customer service representatives were produced. I describe the data in detail in Section I of Appendix B, “Methodology Appendix.”

II. SUMMARY OF OPINIONS

4. The CRM Data do not alter my opinions as stated in the Deal January 2023 Report, and these additional data do not provide support for Complaint Counsel's allegations of deception.
5. In Section VII of the Deal January 2023 Report, I concluded that there were 510 customers (representing less than 1 in 100,000 of the 55.5 million tax year 2021 ("TY21") TurboTax customer base) for whom Intuit's customer data may be consistent with Complaint Counsel's allegations of deception and theories of harm. After employing the same methodology to analyze the customer service interactions in the CRM Data, I conclude that there are still 510 such customers. I discuss this analysis in **Section III**.
6. Additional analyses of the CRM Data indicate that these data are almost entirely unrelated to Complaint Counsel's allegations of deception. I discuss this in **Section IV.A**.
 - Only 34,706 (3.3 percent) of the 1,055,079 interactions in the CRM Data even mention the word "free." 3,513 of these interactions contain implicit language that may be suggestive of an expectation that filing would be free and/or mention "free" in conjunction with references to Intuit's marketing or advertising. Only 502 of these explicitly mention Intuit's marketing or advertising, indicating a possibility that the customer was seeking to file for free *because* of Intuit's marketing or advertising. Putting this result in context, only 0.05 percent of the approximately 1 million records in the CRM Data (or 1 in 2,100) are potentially related to Complaint Counsel's allegations of deception.
 - There are hundreds of thousands of interactions in the CRM Data that appear to reflect ordinary course of business communication between customers or potential customers and Intuit's customer service representatives providing tax and product support. These interactions cannot reasonably be characterized as "complaints." Many refer to issues that commonly arise while using an online product or service, such as technical issues, or issues with logging into or navigating within a product. Other interactions are particular to tax preparation but are unrelated to the alleged deception, such as issues involving amending a tax return, printing or downloading a completed tax return, tracking refund status, claiming a stimulus payment, or

questions regarding specific tax forms or tax situations. None of these types of interactions are related to Complaint Counsel's allegations of deception.

7. After stratifying the interactions in the CRM Data by customer filing status, I find that the majority are with customers who filed their returns for free. Interactions with customers who filed their taxes for free, by definition, cannot support Complaint Counsel's allegations of deception, regardless of the content or nature of these interactions. The 3,513 interactions I identified that include language suggestive of an expectation that filing would be free and/or mention Intuit's advertising and marketing were associated with 3,481 unique customers or potential customers. Excluding those who filed for free reduces this number to 1,943 customers. Among those, only 327 customers are associated with interactions that mention "free" in conjunction with references to Intuit's marketing or advertising, a tiny fraction relative to the [REDACTED] million tax returns filed by customers who paid to use TurboTax products in TY20–21, the [REDACTED] million customers who explored TurboTax and pursued other options in TY20–21, and the estimated [REDACTED] million visits to the TurboTax website in TY20–21 by potential customers who did not proceed to log in. This is not consistent with Complaint Counsel's allegations of deception. I discuss this in **Section IV.B**.

III. MY CONCLUSIONS EXPRESSED IN THE DEAL JANUARY 2023 REPORT REMAIN UNCHANGED AFTER CONSIDERING THE CRM DATA

8. In Section VI of the Deal January 2023 Report, I identified TY21 TurboTax customers whose experiences with TurboTax, as recorded in Intuit's customer data, are inconsistent with Complaint Counsel's allegations of deception. In Section VII of the Deal January 2023 Report, I analyzed the remainder of the TY21 TurboTax customer base, consisting of approximately 1.3 million customers. The data indicated these customers had limited past experiences with or awareness of TurboTax paid products, that they started in Free Edition, encountered a required upgrade screen during the tax preparation process, and paid to use a TurboTax product, without purchasing other add-on services or live support.⁶

⁶ These customers, representing 2.4 percent of the TY21 TurboTax customer base, are those who paid to file their tax returns in TY21 using TurboTax, had complex tax situation that would not qualify them for Free Edition, did not reveal preferences for paid features or other capabilities available in paid products, including live assistance, did not pay to file using TurboTax in TY19 and/or TY20, did not start their return in or encounter an

9. Using the CRM Data, I extend the analysis from the Deal January 2023 Report and cross-reference the approximately 1.3 million customers from the TY21 TurboTax customer base with the customer service interactions in the CRM Data. I identify 8,625 interactions from the CRM Data associated with 7,395 customers in this group.⁷ Even a cursory review of these interactions reveals that many of them are unrelated to Complaint Counsel’s allegations, and instead reflect ordinary course of business interactions between Intuit’s customers and its customer service representatives driven by product or tax support issues, such as a customer who “needed to know how to access her w2,”⁸ or a customer who “had questions about amending her return.”⁹
10. Following a systematic methodology outlined in Section II of the **Methodology Appendix**, I find that only 518 of these 7,395 customers even mention the word “free” in any of their interactions. Note that not all of these interactions are suggestive of deception.¹⁰ For example, for 119 of the 518 customers, the word “free” appears *only* in the context of product names (e.g., “Free Edition”) across all of their interactions.¹¹ Other customers, even if they mention “free” outside the context of product names, have interactions that still do not relate

upgrade screen for a paid product in TY19 and/or TY20, and did not receive a recommendation to file using a paid product in TY21. See Deal January 2023 Report, Section VI.C for how I arrived at the set of the approximately 1.3 million customers.

⁷ There can be multiple interactions per customer in the CRM Data. The Methodology Appendix describes my methodology for cross-referencing TurboTax customers in the TY20–21 Customer-Level Data with their interactions recorded in the CRM Data. TY21 Customer-Level Data, INTUIT-FTC-PART3-000608572; TY14–20 Customer-Level Data, INTUIT-FTC-PART3-000608571; CRM Data 1, INTUIT-FTC-PART3-000618568–78. See Methodology Appendix for additional information relevant to the CRM Data and Appendix D of the Deal January 2023 Report for information relevant to other data.

⁸ CRM Data 1, INTUIT-FTC-PART3-000618568–78, *casenumber* = “1483381163,” *comment_body* = “[...] cx needed to know how to access her w2. ;Verbatim: I had a I have to get my W. Two but I don’t know where my paper copy is. | let me just make sure it has what I need before I let you get off here with me [...].”

⁹ CRM Data 1, INTUIT-FTC-PART3-000618568–78, *casenumber* = “1490613877,” *comment_body* = “[...] cx had questions about amending her return. ;Verbatim: It just happened when I amended so I don’t know, maybe I did something, I don’t know but yeah. | Okay. Alright I appreciate it. I’m about to go back into it [...].”

¹⁰ See, e.g., Videotaped Deposition of Megan Baburek, *In the Matter of Intuit Inc.*, Docket No. 9408, February 23, 2023 (“Baburek Deposition”), 109:13–110:7 (“Q. Let’s look at an example of the ‘file for free’ search term. [...] And looking specifically in Column V, the comment body field, this record captures [...] following customer interaction, quote, ‘CX wanted to file for free so I showed her – so I showed where to go and what to click on.’ Did I read that correctly? A. Yes. [...] Q. Based on what you can see in the comment body field, would you agree that this customer is not complaining about TurboTax’s free TurboTax advertising? A. Yes.”).

¹¹ This statistic considers interactions where the word “free” appears exclusively as a part of the following product names: “Free Edition,” “TTO Free,” or “IRS Free File.” See Section II.B.1 of Methodology Appendix.

to Complaint Counsel’s allegations.¹² For example, an interaction with a customer who encountered “issues with processing her state return” includes the following comment: “Walked cx thru a few troubleshooting steps. [...] She was unable to complete because she had to get off the phone. She will call back tomorrow when she is *free* [emphasis added].”¹³ Suggesting that this interaction is somehow evidence of deception—as would be true by focusing simply on the number of times the word “free” is mentioned within these interactions—is simply incorrect.

11. I also identify customers associated with interactions that contain implicit language that may be suggestive of an expectation that filing would be free and/or mention “free” in conjunction with references to Intuit’s marketing or advertising.¹⁴ I identify 61 of the 518 customers with such interactions. However, again, not all of these are necessarily related to Complaint Counsel’s allegations. As an example, one of these interactions, with a customer who worked for Uber but was not sure if they qualified for Free Edition, includes the following: “[customer] *thinks* they are eligible for *free* edition.”¹⁵ Even though this customer may have expressed an aspiration to file for free, it does not appear to be an expectation explicitly linked to Intuit’s marketing or advertising.

¹² Baburek Deposition, 102:5–103:3 (“Q. So looking at the bottom of this free text field, do you see that the last two sentences in this record read, quote, ‘Please feel free to contact us again with any questions. Thank you for using TurboTax.’ Did I read that correctly? A. Yes. Q. So the instance of the term ‘free’ in this record is in connection with the phrase ‘please feel free to contact us again’; is that right? A. Yes. Q. And on its face, that would have nothing to do with Intuit’s free TurboTax advertising; right? A. That specific text portion, yes.”).

¹³ CRM Data 1, INTUIT-FTC-PART3-000618568–78, *casenumber* = “1486929252,” *comment_body* = “Cx having issues processing state return Cx having issues processing state return. The continue button is missing from the state page. Walked cx thru a few troubleshooting steps. Made sure all credit and deductions pages were completed. She was unable to complete because she had to get off the phone. She will call back tomorrow when she is free [...]”

¹⁴ This approach allows for: (i) the word “free” to appear in close vicinity—within five words—of keywords such as “expect,” “guarantee,” “should,” “suppose,” or “think,” or their variations; or (ii) the interaction to include the word “free” along with keywords related to Intuit’s marketing or advertising, such as “ads,” “promotion,” “TV,” or similar. See Methodology Appendix, Section II.B, for details of my methodology.

¹⁵ CRM Data 1, INTUIT-FTC-PART3-000618568–78, *casenumber* = “1496623702,” *comment_body* = “[...] Situation: cx had questions about uber and if he could use the program. Verbatim: Yes sir. Okay. Computer. Okay. All right. Should enter. Alright. Are you ready for the code? | Okay perfect. so I did some delivering for uber but they did not give me any sort of 1099. or anything like that. They just gave me a docent and I’m curious how I would implement input that into into the into the system. [...] Cx thinks they are eligible for free edition. Walked Cx through charges.”

12. Consequently, to arrive at a set of customers associated with interactions more likely to relate to the alleged deception,¹⁶ I identify the subset of the 61 customers whose interactions specifically mention “free” in conjunction with references to Intuit’s marketing or advertising, indicating a possibility that the customer was expecting to file for free *because* of Intuit’s marketing or advertising. Only 17 of the 61 customers meet these criteria. Among these 17 customers, one had an interaction identical to a complaint by the same customer previously identified by Complaint Counsel, which I already considered in the Deal January 2023 Report.¹⁷ Setting this duplicate interaction aside to avoid double counting, I arrive at 16 customers whose interactions with Intuit recorded in the CRM Data could be potentially relevant to Complaint Counsel’s allegations, and for which the CRM Data provide new information about these customers relative to the information I considered when filing my previous report.
13. In my review of these interactions, however, even this set appears to contain interactions unrelated to Complaint Counsel’s allegations. For example, a customer who called “for info on amending return after filing and receiving form 1099-G” was advised “to go back to the original return *ad* [sic] locate the amend option,” reporting that “it was just an easy form *free* on the intuit TurboTax [emphasis added].”¹⁸ Even though the words “ad” and “free” both appear in the CRM interaction, the customer was seeking information on how to amend their tax return and the word “ad” appears to be a typo for “and.” Suggesting that this interaction is somehow evidence of deception—as would be true by focusing simply on the number of times Intuit’s marketing or advertising is mentioned within these interactions—is also incorrect.

¹⁶ Complaint, ¶ 57 (“Thus, Intuit’s deceptive door-opener ads described above bring consumers to the TurboTax website representing that consumers can file their taxes for free using TurboTax, but once there, many consumers encounter screens that inform them that they cannot complete and file their taxes for free.”) and ¶ 119 (“In numerous instances in connection with the advertising, marketing, promotion, offering for sale, or sale of online tax preparation products or services, Respondent represents, directly or indirectly, expressly or by implication, that consumers can file their taxes for free using TurboTax.”).

¹⁷ Deal January 2023 Report, ¶ 160.

¹⁸ CRM Data 1, INTUIT-FTC-PART3-000618568–78, *casenumber* = “1495287518,” *comment_body* = “Cx call for info on amending return Cx call for info on amending return after filing and receiving form 1099-G. Cx was advise to go back to the original return ad locate the amend option and res. System Generated Summary via ASTAR version: 1.0.2 Situation: cx filed her daughter’s taxes and realized she had unemployment income. ;Verbatim: Okay I I filed my daughter’s taxes, it was just an easy form free on the intuit TurboTax And now realize she I had unemployment income that I got to amend a return [...]”

14. In the Deal January 2023 Report, I identified 510 TY21 customers, representing less than 1 in 100,000 of the 55.5 million TY21 TurboTax customer base, for whom Intuit’s customer data may be consistent with Complaint Counsel’s allegations of deception and theories of harm and who provided a low PRS or customer rating, or filed a complaint identified by Complaint Counsel.¹⁹ I consider the 16 customers identified above in the same way. That is, I consider a potentially relevant interaction in the CRM Data to be equivalent to a low PRS or customer rating, or a complaint identified by Complaint Counsel; I also considered this information in the context of the entirety of the customer data available to me and that I analyzed in the Deal January 2023 Report. All 16 of these customers have characteristics that indicate their experiences as reflected in the data—such as time-to-upgrade screen, marketing channel, or past experience with TurboTax—were inconsistent with Complaint Counsel’s allegations of deception and theories of harm. Therefore, these are *not* incremental to the 510 customers I identified in my previous report. Therefore, the CRM Data do not at all change my opinions expressed in the Deal January 2023 Report. Indeed, none of the calculations even change.²⁰

IV. THE CRM DATA ARE LARGELY IRRELEVANT TO COMPLAINT COUNSEL’S ALLEGATIONS OF WIDESPREAD DECEPTION

15. The CRM Data, as I understand, pertain to customers and potential customers who interacted with a free TurboTax offer, product, or service.²¹ Based on my analysis, and as described below, the CRM Data capture various types of interactions including many unrelated to customer complaints, such as sales or technical support.²² These data also contain customer

¹⁹ See Deal January 2023 Report, ¶ 161.

²⁰ Even if I treated all of these 16 interactions as additive to the 510 customers identified previously, an approach that I do not endorse, the number of potentially deceived TY21 customers would remain insignificant and my opinions would remain unchanged.

²¹ Complaint Counsel’s First Requests for Production of Documents to Intuit Inc., *In the Matter of Intuit Inc.*, Docket No. 9408, September 12, 2022, ¶ 22 (“All data pertaining to customers and potential customers who interacted with a free TurboTax offer or product 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.”).

²² Complaint Counsel’s data analyst agreed that CRM database can capture various types of interactions. Baburek Deposition 50:20–51:5 (“Q. And you mentioned customer complaints earlier as one type of data in the CRM. You recognize that there are other types of data in the CRM; right? A. Yes. Q. A CRM might log, for example, technical support calls from a customer; right? A. Yes. Q. It might log sales data or -- it might log sales to a customer; right? A. Yes.”).

complaints across many topics. It is not the case that the full set of interactions in the CRM data, or even the full set of complaints in the CRM Data, are related to Complaint Counsel’s allegations.²³ However, assuming Complaint Counsel’s allegations were valid, and deception regarding consumers’ ability to file for free were widespread, I would expect customer interactions recorded in the CRM Data to include a large number of customers and potential customers describing that they had been deceived by Intuit’s marketing or advertising.^{24,25} Below, I analyze the available CRM Data to look for evidence of the alleged widespread deception.²⁶

²³ Baburek Deposition, 56:13–57:11 (“Q. You understand that the CRM data is not limited to records of consumers who are complaining about Intuit’s free TurboTax advertising; right? A. Yes. Q. What is the basis for that understanding? A. That the records provided could complain -- could contain complaints not related to -- specific to this case. Q. And, in fact, the records provided could include records of customer interactions that are not complaints at all; right? A. Okay.”).

²⁴ I include “potential customers” in my analyses due to the fact that Complaint Counsel and their experts claim that even consumers who did not file using TurboTax—including consumers who did not create an account or even visit the TurboTax website—could have been deceived by Intuit’s advertising. Expert Rebuttal Report of Erez Yoeli, Ph.D., *In the Matter of Intuit Inc.*, Docket No. 9408, January 27, 2023 (“Yoeli Rebuttal Report”), ¶ 94 (“First, it omits the [REDACTED] million consumers who visited turbotax.com but did not log in to an existing account or create a new account.”); Confidential Videotaped Deposition of Erez Yoeli, Ph.D., *In the Matter of Intuit Inc.*, Docket No. 9408, February 16, 2023 (“Yoeli Deposition”), 240:25–241:18 (“Q. So you’re not saying that if someone saw a TurboTax ad in a particular year and didn’t go to the TurboTax website in that year that they were deceived? A. I’m saying it’s possible. Q. How is that they were deceived? [Objection...] A. The -- the question of deception has to do with whether the consumer’s interpretation of the ad is that TurboTax would be free for them and they actually don’t qualify to file for TurboTax for free, and they could have had those -- that experience without having gone to the TurboTax website.”); Expert Rebuttal Report of Nathan Novemsky, Ph.D., *In the Matter of Intuit Inc.*, Docket No. 9408, January 27, 2023 (“Novemsky Rebuttal Report”), ¶ 282 (“Mr. Deal eliminates as not likely to be deceived any consumers who came to the TurboTax website but did not log into or create an account, arriving at a pool of only 55.5 million TurboTax customers. This measure sets aside, without any reason or support, that millions of consumers who come to the TurboTax website because of Intuit’s “free” advertising may very well have been deceived by that marketing.”); Complaint, ¶ 35 (“Given this advertising, reasonable consumers may believe that the TurboTax products and services Intuit advertises as free are free for them – that they can file their taxes for free using TurboTax.”).

²⁵ While these “potential consumers” would not be able to submit a customer review or provide a PRS if they did not use the product, they could still have reached out to Intuit’s customer support to voice their concerns, and these interactions would be included in the CRM Data, and would be supplemental to the data I analyzed in my previous report. Deposition of Bruce Deal, *In the Matter of Intuit Inc.*, Docket No. 9408, February 15, 2023 (“Deal Deposition”), 178:8–15 (“Q. [...] Is there anywhere in your [Deal January 2023] report that you take into account complaints made to Intuit’s customer service representatives? A. No. That data wasn’t available. And as I think I’ve described many times today, if that data were to become available, it could be done. But, no, I don’t -- I didn’t -- I didn’t have that data.”).

²⁶ Deal Deposition, 173:7–174:25 (“Q. [W]ould CRM data, in your experience, potentially be another place that you could find evidence of consumer negative feedback? [Objection] THE WITNESS: I think we’ve had this discussion already. You know, the typical CRM database is sort of basically tracking -- think about every customer service agent you’ve ever talked to. They are typing in some notes. So it’s the customer service agent typing in notes into some kind of a CRM, saying, oh, I just talked to Bruce, and, you know, he loved his cable TV show, or whatever. So I certainly agree it’s very messy data. And, you know, I think before, we were talking about, is it possible that in that data, there could be someone typing in, Customer XYZ is upset about – you

A. The Vast Majority of Interactions in the CRM Data Are Unrelated to Complaint Counsel's Allegations

16. Many of the customer service interactions captured in the CRM Data appear to reflect ordinary course of business communication between customers or potential customers and Intuit's customer service representatives, entirely unrelated to Complaint Counsel's allegations of deception. These interactions refer to issues that commonly arise while using a product or service, such as technical issues, or issues with logging into or navigating within the product, such as customers "having issues downloading software" or "having issues with password."²⁷ Other interactions are particular to tax preparation but unrelated to the alleged deception, such as issues involving amending a tax return, tracking refund status, claiming stimulus payment, or questions regarding specific tax forms or tax situations, such as a customer who "had questions [a]bout his rejected return."²⁸ My analysis of the full CRM Data²⁹ identify the following:

- More than 346,000 interactions potentially related to inquiries after tax filing, including when a tax return may be audited or may need to be amended, or when checking on the status of a tax return;

know, thought it was free, and it's not -- in any kind of context; cable TV, whatever. You know, that's a very common sort of generic complaint you see across a lot of things; I didn't think I was paying for this, and why do I have this; I was told it was free. Things like that. So it's certainly -- you know, within this data, there can be that information. For the analysis I was doing, I had a set of complaints the FTC had identified, and I had these actual customer reviews, which are kind of systematic and numeric and, you know, represent the actual experience that they had at the time, so I didn't -- excuse me -- I didn't have any need for the CRM data. It's messy. If CRM becomes available in some form that can be used and produced in this matter, one can certainly, you know, use it. But my experience is, it would be -- it would be a big challenge to try and separate out any -- again, there's just so much in there and it's so all over the place and it's sort of moderated through whatever the customer service person typed in, things like that. So there's a lot of challenges and problems with using the data.").

²⁷ CRM Data 1, INTUIT-FTC-PART3-000618568-78, *casenumber* = "472061249," *comment_body* = "cx having issues downloading software. Working with cx and AA for over a hour to get the problem fixed. Cx stopped replying. 1st and 2nd snippet sent." CRM Data 1, INTUIT-FTC-PART3-000618568-78, *casenumber* = "465849342," *comment_body* = "customer called in having issues with password when she gets to a computer she will call back to ts."

²⁸ CRM Data 1, INTUIT-FTC-PART3-000618568-78, *casenumber* = "471868586," *comment_body* = "Filing Questions Cx had questions bout his rejected return."

²⁹ Interactions can belong to more than one of these categories. My methodology for identifying these interactions is fully described in the Methodology Appendix.

- More than 283,000 interactions potentially related to technical issues, such as difficulties logging in, installing or downloading software, or receiving error messages;
- More than 263,000 interactions potentially related to specific issues that arise during the tax preparation process, mentioning COVID, crypto, stimulus payments, or similar subjects;
- Approximately 170,000 interactions potentially related to the tax filing process, inquiring about extensions, refund amounts, or refund advances;
- Approximately 54,000 potentially incomplete interactions, such as dropped calls or unresponsive chats; and
- Approximately 13,000 interactions potentially related to products that I understand are not at issue in this case, including TurboTax Desktop products, Mint, or QuickBooks.

17. Consistent with this result, the vast majority of interactions in the CRM Data do not mention the word “free.” Only 34,706 interactions, or 1 in 30, even mention the word “free.”³⁰ This finding is also consistent with Complaint Counsel’s own summary exhibits of the CRM Data.³¹ By itself, these numbers illustrate the absence of evidence of widespread consumer deception in these data. Further, unlike Complaint Counsel’s summary exhibits, I recognize that simply mentioning the word “free” is not sufficient for an interaction to be relevant to the alleged deception.³² Similar to the analysis described above in **Section III**, I identified 3,513 interactions in the CRM Data that, in addition to the word “free,” contain implicit language that may be suggestive of an expectation that filing would be free and/or mention

³⁰ My methodology is described in detail in the Methodology Appendix.

³¹ The two spreadsheets prepared by Ms. Baburek, “CRM_combined_wordsearch.xlsx” and “CRM_single_wordsearch.xlsx,” identify 34,679 and 375 observations out of the total of 1,055,079 observations as containing the word “free.” 1,020,025 observations (96.7 percent) are not flagged as such. RX 1374, CRM_combined_wordsearch.xlsx; RX 1376, CRM_single_wordsearch.xlsx.

³² Note that Ms. Baburek in her analysis produced by Complaint Counsel did not attempt to identify evidence of the alleged consumer deception. See, e.g., Baburek Deposition, 80:20–23 (“Q. Do you have a belief that this type of data analysis would yield results relevant to complaint counsel’s allegations in this case? A. I don’t know.”) and 96:18–25 (“Q. Did you attempt to validate whether the records returned in your keyword analysis on the search term ‘free’ were relevant to this litigation? A. No. Q. Why not? A. Because I was not told to review the records returned. I was told to search for ‘free’ and return all records with that.”).

“free” in conjunction with references to Intuit’s marketing and advertising.³³ Considering only the subset of interactions that reference Intuit’s marketing or advertising, I find 502 interactions, representing 1 in 2,100 entries in the CRM Data, that could potentially be relevant to Complaint Counsel’s allegations of deception.

18. To validate my systematic analysis, I conduct a manual review of random samples of interactions from the CRM Data. I sample interactions that mention “free,” and separately, sample interactions that do not mention “free.”³⁴ The result of the manual review of the random samples is consistent with my systematic analysis. That is, (i) none of the interactions that do not include “free” have evidence indicating that the customer or potential customer had an expectation of being able to file for free because of Intuit’s marketing or advertising; (ii) the rate at which interactions from the random samples indicate a possibility that the customer was seeking to file for free *because* of Intuit’s marketing or advertising does not fundamentally differ from the rate identified through my systematic analysis.³⁵

B. The Majority of Interactions in the CRM Data Are with Customers Who Filed for Free and the Number of Interactions that Mention “Free” in Conjunction with References to Intuit’s Marketing or Advertising Is Inconsistent with Complaint Counsel’s Allegations

19. I also analyze the frequency of potentially relevant interactions in the CRM Data relative to customer filing status. I rely on the TY20–21 Customer-Level Data to identify which customers in the CRM Data filed for free, paid to file, or abandoned their returns. A subset of customers in the CRM Data have insufficient identifying information such that I cannot identify them in the TY20–21 Customer-Level Data. I analyze this subset separately.

Figure 1 below summarizes the results of this analysis. Additional discussion follows.

³³ See Methodology Appendix.

³⁴ I generate four stratified random samples from the CRM Data to ensure that I include interactions from CRM Data 1 and CRM Data 2, and interactions that mention “free” and interactions that do not. I instruct two reviewers to examine the content of these randomly selected interactions. See Section III, Methodology Appendix.

³⁵ See Methodology Appendix.

Figure 1
Customers with Interactions in the CRM Data by Filing Status³⁶

Filing Status	Number of Customers and Potential Customers in CRM Data	Mention “Free”	Mention “Free” + Expectation of Free or Marketing/Advertising	Mention “Free” + Marketing/Advertising	TY20–21 Customers and Potential Customers
Filed for Free	443,717	Not Relevant	Not Relevant	Not Relevant	████████
Paid to File	194,547	7,229	970	165	████████
Explored TurboTax and Pursued Other Options	128,406	5,781	646	98	████████
Insufficient Identifying Information	136,865	4,152	327	52	████████
Total	903,535	17,162	1,943	315	████████

Notes:

[A] A customer may be associated with more than one interaction.

[B] There are 10,842 interactions with *createddate* on or after November 1, 2022.

[C] The number of customers or potential customers with insufficient identifying information is represented by the number of website visits without a login in TY20–21. ██████████ is estimated by doubling the number of consumers who arrived at the TurboTax website but did not log in or create an account in TY21, as shown in row [2] of Table 1 in the Yoeli Report (i.e., ██████████).

[D] As discussed in ¶ 20, Complaint Counsel admitted, and their experts affirmed, that Free Edition is a truly free product and customers who filed for free were unlikely to have been deceived. Therefore, interactions recorded in the CRM Data that are associated with customers who did not pay to file their federal and state returns are unlikely to have been deceived, regardless of the content or volume of those interactions. They are hence noted as “Not Relevant.”

[E] I use *auth_id__c* and *createddate* to map interactions in the CRM Data onto TY20–21 Customer-Level Data. For interactions associated with customers with sufficient identifying information, the figure in each cell represents the number of unique *auth_id__c*'s with the given filing status and at least one interaction of the given category. For example, the number of unique customers with interactions that mention “free” represents the number of those who had at least one interaction including “free.”

[F] Interactions that do not have an associated *auth_id__c* are treated as associated with unique customers for simplicity. Note that even among these interactions, a many-to-one relationship may exist between interactions and customers. For example, among the 327 interactions without sufficient identifying information that are identified to contain implicit language that may be suggestive of an expectation that filing would be free and/or mention “free” in conjunction with references to Intuit’s marketing or advertising, three customers, based on their personally identifiable information, have two interactions each recorded in the CRM Data.

³⁶ CRM Data 1, INTUIT-FTC-PART3-000618568–78; CRM Data 2, INTUIT-FTC-PART3-000618579 - Deal; TY14–20 Customer-Level Data, INTUIT-FTC-PART3-000608571; TY21 Customer-Level Data, INTUIT-

[G] I manually review interactions that have implicit language suggestive of an expectation of filing for free and/or explicit reference to Intuit’s marketing or advertising that are associated with customers or potential customers with insufficient identifying information, and as a result, cannot be identified in the TY20–21 Customer-Level Data. Upon review, interactions indicating that their inquiry was related to TurboTax Desktop products or filing of Canadian tax returns are excluded.

1. Customers Who Filed Their Tax Returns for Free

20. I identify 557,452 interactions (or 52.8 percent of the total interactions in the CRM Data) associated with 443,717 customers who filed a tax return for free using TurboTax in the same tax year as their interaction in the CRM Data.³⁷ Complaint Counsel admitted, and their experts affirmed, that TurboTax Free Edition is a “truly free”³⁸ product and that customers who filed for free were unlikely to have been deceived, since they received exactly what the at-issue marketing campaign advertised.³⁹ These interactions are thus not relevant as they cannot provide evidence of the alleged consumer deception, regardless of the content or nature of the interaction.⁴⁰

FTC-PART3-000608572; TY19–20 Upgrade Screen Data, INTUIT-FTC-PART3-000608573; TY21 Upgrade Screen Data, INTUIT-FTC-PART3-000608574; TY21 Upgrade Screen Categorization, INTUIT-FTC-PART3-000608570; TY21 Customer Reviews, INTUIT-FTC-PART3-000490341; TY21 Customer Review ID Crosswalk, INTUIT-FTC-PART3-000608569; Complainant Tax History Data, INTUIT-FTC-PART3-000608568.

³⁷ Consistent with my approach in the Deal January 2023 Report, these customers could have filed their federal and/or state tax return for free using either Free Edition or another product.

³⁸ The Bureau of Competition conceded under oath that TurboTax Free Edition is also “truly free” for those who qualify. See Videotaped Deposition of William T. Maxson, *In the Matter of Intuit Inc.*, Docket No. 9408, December 8, 2022 (“Maxson Deposition”), CC-00005358 at 279:6-18 (“Q. Right. And TurboTax Free Edition is truly free for the people who qualify to use TurboTax Free Edition, correct? A. Yes. I believe TurboTax Free Edition product TurboTax or free edition SKU is free for consumers that qualify under the TurboTax terms and conditions. Q. Not just free, but by the definition used in the complaints it’s – TurboTax Free Edition is truly free for those who quali[f]y, correct? A. For those who qualify, yes, I think it would be fair to say truly free.”).

³⁹ See, e.g., Novemsky Rebuttal Report, ¶ 197 (“[C]onsumers [...] were not deceived because they were eligible to file their taxes for free with TurboTax”); Yoeli Rebuttal Report, ¶ 27 (“[T]here is [...] one category of consumers for whom deception was unlikely in the tax year 2021: those who filed their federal and state taxes with TurboTax for free in tax year 2021.”)

⁴⁰ Ms. Baburek did not filter out in her keyword analysis record instances of interactions with customers who filed for free. See, e.g., Baburek Deposition, 100:4–10 (“Q. [...] You did not attempt to filter out from your keyword analysis records where the customer, in fact, did file for free using TurboTax Free Edition; right? A. I did not filter out any of the data.”); Baburek Deposition, 116:21–25 (“Q. You also didn’t attempt to identify which consumers in the CRM data filed for free, using TurboTax; correct? A. Correct. I just used the word searches to identify rows.”).

2. *Customers Who Paid to File*

21. I identify 209,975 interactions (or 19.9 percent of the total interactions in the CRM Data) associated with 194,547 customers who paid to file a tax return using TurboTax.⁴¹ 7,229 of these customers are associated with interactions that mention “free” and of these, 970 customers are associated with interactions that contain implicit language that may be suggestive of an expectation that filing would be free and/or mention “free” in conjunction with references to Intuit’s marketing or advertising. Only 165 of these are associated with interactions that mention Intuit’s marketing or advertising. Of the [REDACTED] million customers who paid to file using TurboTax in TY20–21, this represents approximately [REDACTED] customers associated with such interactions. This evidence is inconsistent with Complaint Counsel’s allegations that customers were deceived into filing their tax return using a paid product.⁴²

3. *Customers Who Explored TurboTax and Pursued Other Options*

22. I identify 141,591 interactions (or 13.4 percent of the total interactions in the CRM Data) associated with 128,406 customers who explored TurboTax and pursued other options in the same tax year as their interaction in the CRM Data. 5,781 of these customers are associated with interactions that mention “free,” and of these, 646 customers are associated with interactions that contain implicit language that may be suggestive of an expectation that filing would be free and/or mention “free” in conjunction with references to Intuit’s marketing or advertising. Only 98 of these customers are associated with interactions that mention Intuit’s marketing or advertising. This represents approximately [REDACTED] customers among the [REDACTED] million customers who logged in to their TurboTax account but pursued other options, as indicated by abandoning or not even starting a TurboTax return in TY20–21. This evidence is also inconsistent with Complaint Counsel’s allegations of

⁴¹ These interactions contain the 8,625 interactions I included in my analysis in Section III. Note that while 8,625 interactions indicated in Section III are among the 1.3 million TY21 customers at risk of potential deception at the time they filed their TY21 taxes, these 209,975 interactions are associated with *all* customers who paid to file in TY20–21 ([REDACTED] million).

⁴² As I note in the Deal January 2023 Report, there is also evidence in Intuit’s customer data, for this and other categories of customers, inconsistent with Complaint Counsel’s allegations of deception for the vast majority of TurboTax customers and there are no data supporting claims that Intuit’s alleged deception resulted in customers using TurboTax paid products in TY21 as alleged by Complaint Counsel. See Deal January 2023 Report, Sections VI and VII.

deception and directly contradicts the opinions offered by Dr. Yoeli in his report and deposition regarding these customers.⁴³

4. *Potential Customers and Customers with Insufficient Identifying Information*

23. Continuing with the same logic, I identify 146,061 interactions (or 13.8 percent of the total interactions in the CRM Data) associated with 136,865 customers or potential customers who have insufficient identifying information to categorize them by the filing status. For some of these interactions, the customer information provided does not match any tax return in the relevant year, while others simply do not contain sufficient information to identify the customer in the TY20–21 Customer-Level Data. I discuss each of these two sub-groups below.

a. *Customers Who Did Not File a TurboTax Online Return in the Same Tax Year as Their Interaction in the CRM Data*

24. I identify 70,092 interactions (or 6.6 percent of the total interactions in the CRM Data) for which the customer information provided does not match any completed or abandoned tax return in the TY20–21 Customer-Level Data. There are many reasons why this could occur. For instance, the interactions could have occurred with customers who forgot their password and failed to log into their account; with customers reaching out regarding products not at issue, such as TurboTax Desktop, QuickBooks, or Mint, or other products not captured in the TY20–21 Customer-Level Data; with customers with multiple accounts; or with customers who interacted with TurboTax only after June 10, 2022 and thus are not captured in the

⁴³ Dr. Yoeli argues that the behavior of customers who logged into their TurboTax accounts but pursued other options is consistent with alleged deception. See Yoeli Rebuttal Report, ¶ 101 (“[T]he behavior of these customers is in line with what one would expect from deceived customers: they log on to TurboTax, and upon potentially discovering they were deceived, some leave before paying to file their taxes”). See also Yoeli Rebuttal Report, ¶ 108 (“The bottom line is, for the [REDACTED] million consumers that Mr. Deal says could not have been deceived because they explored TurboTax but pursued other options: they could have faced high switching costs, they could have been deceived, and in fact, they behaved in line with consumers who were deceived.”); Yoeli Deposition, 319:3–15 (“Q. [...] how many [...] of the [REDACTED] million customers who started in what Mr. Deal calls a free TurboTax product and subsequently did not file their tracking with TurboTax, did not qualify to file their taxes for free using TurboTax? A. I did not look at that. Q. You write it is possible that these customers came to the TurboTax’s website expecting to file their taxes for free and on discovering that was the case left TurboTax; right? A. I do write that.”). For the reasons stated in the Deal January 2023 Report, I disagree.

TY20–21 Customer-Level Data.⁴⁴ These 70,092 interactions are associated with 60,896 customers or potential customers.⁴⁵

25. Within this subset, 2,055 of these customers or potential customers are associated with interactions that mention “free.” 185 of these customers or potential customers are associated with interactions that contain implicit language that may be suggestive of an expectation that filing would be free and/or mention “free” in conjunction with references to Intuit’s marketing or advertising. Only 30 of these customers or potential customers are associated with interactions that mention Intuit’s marketing or advertising.⁴⁶

b. Potential Customers and Customers with Insufficient Identifying Information

26. I also identify 75,969 interactions (or 7.2 percent of the total interactions in the CRM Data) that do not contain sufficient identifying information to link the customers involved to the TY20–21 Customer-Level Data. Again, there are several reasons why this could—and did—occur. For instance, these could be interactions that occurred with customers before they created their TurboTax accounts, with customers who provided incomplete information, with customers who dropped the call, with potential customers who did not proceed to log in to TurboTax, with customers using other products such as TurboTax Desktop; or these could be the result of data limitations in the CRM database.⁴⁷ For example:

- A non-Intuit customer called after receiving texts with a TurboTax security code because they were “worried there might be a potential security issue.”⁴⁸

⁴⁴ As discussed in my January 2023 Report, the TY21 Customer-Level Data only contain TurboTax Online returns initiated through June 10, 2022. Customer interactions in CRM Data are logged through January 10, 2023.

⁴⁵ See Methodology Appendix, Section I.

⁴⁶ These counts exclude customers or potential customers with insufficient identifying information that would allow me to locate them in the TY20–21 Customer-Level Data whose interactions indicated that their inquiry was related to TurboTax Desktop products or filing of Canadian tax returns.

⁴⁷ Note that the fact that a customer cannot be mapped to TY20–21 Customer-Level Data does not imply that this customer did not use TurboTax or did not proceed to logging into their account.

⁴⁸ CRM Data 1, INTUIT-FTC-PART3-000618568–78, *casenumber* = “150954054,” *comment_body* = “[...] Yes, I’m calling you because I’m worried there might be a potential security issue in the last 20 minutes or so I’ve received three texts that I did not request Two of them are supposedly TurboTax codes that are six digit nbers. | And then I got one that says your intuit code is a six digit nber. And I am as far as I know, I’m not a TurboTax customer or an intuit customer. I’m wondering if some buddy is trying to, you know, use my information to steal it from you [...].”

- A mother called on behalf of her son “to see if her son’s taxes were accepted.”⁴⁹
- A first-time tax filer asked if their “best option [is] to use the free live help.”⁵⁰
- A desktop product user reached out to seek help to “download CD to Windows computer.”⁵¹

27. Within this subset, 2,097 of these customers or potential customers are associated with interactions that mention “free.” 142 of these customers or potential customers are associated with interactions that contain implicit language that may be suggestive of an expectation that filing would be free and/or mention “free” in conjunction with references to Intuit’s marketing or advertising. Only 22 of these customers or potential customers had interactions that mention Intuit’s marketing or advertising.⁵²

c. There Are Very Few Interactions in the CRM Data from Potential Customers and Customers with Insufficient Identifying Information

28. One of the critiques raised by Complaint Counsel and its experts is that perhaps a large number of consumers are deceived into believing they would be able to file for free, but realized before even logging in or creating an account that they do not qualify for TurboTax Free Edition.⁵³ Even though the situations of these potential customers are not consistent

⁴⁹ CRM Data 1, INTUIT-FTC-PART3-000618568–78, *casenumber* = “1489029692,” *comment_body* = “[...] Situation: cx called in to see if her son’s taxes were accepted. ;Verbatim: And you need to anybody. I wanted to speak on behalf of the taxes that I I owe. Tell him, can I speak to you? | We spoke on the [PII] because he did his taxes, he didn’t get a chance to show me. So I can I told him don’t put them in before, let me check them to see because I’m training him on how to do this. He has to learn so I don’t know what happened it went through. [...]”

⁵⁰ CRM Data 1, INTUIT-FTC-PART3-000618568–78, *casenumber* = “469679189,” *subject* = “[...] I am filing taxes for the first time by myself and I have to file for two states, is my best option to use the free live help?”

⁵¹ CRM Data 1, INTUIT-FTC-PART3-000618568–78, *casenumber* = “476821839,” *comment_body* = “[...] Cx is unable to download CD to Windows computer. Says when he enters CD, nothing happens. Walked him thru settings to disable but cx states that he is unable to make any changes (nothing allows him to click on it). Tried enabling firewall to allow app access but unable to make those changes.. [...] Sent free download version to email confirmed on acct.”

⁵² These counts exclude customers or potential customers with insufficient identifying information that would allow me to locate them in the TY20–21 Customer-Level Data whose interactions indicated that their inquiry was related to TurboTax Desktop products or filing of Canadian tax returns.

⁵³ See, e.g., Yoeli Rebuttal Report, Section VI.A. See also Novemsky Rebuttal Report, ¶ 283 (“As an initial matter, Mr. Deal eliminates as not likely to be deceived any consumers who came to the TurboTax website but did not log into or create and [sic] account [...]. This measure sets aside, without any reason or support, that millions of consumers who come to the TurboTax website because of Intuit’s ‘free’ advertising may very well have been deceived by that marketing.”). Deal Deposition, 93:5–23 (“Q. A consumer who saw an Intuit ad but didn’t log into their account is excluded from your analysis; right? A. I mean, I don’t know if I would say

with deception (i.e., causing them any injury due to spending money or even spending meaningful time on the website because they did not even get to the point of logging in),⁵⁴ Complaint Counsel has posited that they may still be deceived.⁵⁵ I disagree with this conception of deception because, as explained in the Deal January 2023 Report, the TurboTax website directs consumers to the “Products & Pricing” page, where potential customers encounter the product lineup and other information and interactive tools that allow them to learn about the TurboTax products.⁵⁶ The challenged ads expressly invited consumers to “see if you qualify” at the TurboTax website and, as Dr. Yoeli conceded in his deposition, qualifying information about TurboTax Free Edition is accessible in a matter of seconds.⁵⁷

excluded in the sense that I am aware of them; I talk about them; they’re in the funnel; there’s, you know, whatever it is, ■ million people -- or ■ million interactions. We don’t have an AUTH ID for them, so... So I’m aware of them, but I – they’re not customers. They haven’t even gone through the step of actually even creating an account. So if you have an expectation of getting it for free and then you don’t even bother to create an account, that seems inconsistent with an expectation. It might be an interest; oh, gosh, that’s interesting; I wonder if I qualify for that. So exploration, lots of reasons why people look at websites there, but it doesn’t -- it is not consistent with having an expectation of filing for free.”)

⁵⁴ Yoeli Deposition, 50:7–51:4 (“Q. And in your definition of deception does that concept of materiality play a role? A. I have not focused on that in describing my definition of deception to you obviously you don’t look at deception if you don’t think it matters, so I guess there is a two step process one looks at deception when you think it matters and then one applies that definition. Q. If someone shows up at the TurboTax website expecting TurboTax to be free from them and before they begin preparing their taxes, finds out that it is not free for them, how is that consumer harmed? A. The main issue for a consumer like that that you’ve just described -- this is somebody who does not actually file with TurboTax. -- is that they now have a less clear picture of what’s going on in the market. It makes it harder for them to rely on advertising claims in general and make a decision as to which product that they’re going to use.”)

⁵⁵ Yoeli Rebuttal Report, ¶ 94 (“First, it omits the ■ million consumers who visited turbotax.com but did not log in to an existing account or create a new account.”); Yoeli Deposition, pp. 240–241 (“Q. So you’re not saying that if someone saw a TurboTax ad in a particular year and didn’t go to the TurboTax website in that year that they were deceived? A. I’m saying it’s possible.”); Novemsky Rebuttal Report, ¶ 282 (“Mr. Deal eliminates as not likely to be deceived any consumers who came to the TurboTax website but did not log into or create an account, arriving at a pool of only 55.5 million TurboTax customers. This measure sets aside, without any reason or support, that millions of consumers who come to the TurboTax website because of Intuit’s “free” advertising may very well have been deceived by that marketing.”); Complaint, ¶ 35 (“Given this advertising, reasonable consumers may believe that the TurboTax products and services Intuit advertises as free are free for them – that they can file their taxes for free using TurboTax.”).

⁵⁶ Deal January 2023 Report, ¶ 68.

⁵⁷ Yoeli Deposition, 34:1–35:5 (“Q. Fair enough. Did it take you a long time from typing in ‘TurboTax’ to get to that web page? A. No. Q. In fact, it was a matter of seconds from typing ‘TurboTax’ into my phone to arriving at the web page where you’re currently -- where you currently are; correct? A. Yes, it took a few seconds. Q. And at the top of the page, do you see something -- at the top of page where you are on my cell phone, do you see something that says, ‘See if you qualify’? A. I mean, I do now. Q. Okay. And click on, if you don’t mind, ‘See if you qualify.’ A. Okay. Q. Did what do you see now? A. There’s a pop-up, and it says what qualifies is a simple tax return. Q. How long did it take from getting to the top of the web page to seeing the pop-up? A. Minus all the questions? Q. Minus the questions. A. Probably a -- I don’t know -- ten – five to ten seconds,

29. Such a framework suggests that Intuit might have deceived consumers but only to then educate them about the potential costs without collecting any payment. Deceiving masses of potential customers without monetizing those interactions hardly seems like a rational business strategy. Similarly, if it did occur, one would expect to observe such aggrieved consumers calling Intuit’s customer representatives to complain about the deception. These consumers, who according to Dr. Yoeli “could have been deceived,”⁵⁸ would not have identifying customer information in the CRM Data. As discussed above, there are a total of 146,061 interactions associated with 136,865 customers or potential customers with insufficient identifying information to be categorized by the filing status of the customers involved.⁵⁹ A total of 4,152 of these customers or potential customers are associated with interactions that mention “free,” and 327 among them are associated with interactions that contain implicit language that may be suggestive of an expectation that filing would be free and/or mention “free” in conjunction with references to Intuit’s marketing or advertising.⁶⁰ Only 52 of these customers are associated with interactions that mention Intuit’s marketing or advertising, which could potentially be related to the alleged deception.⁶¹
30. A simple calculation demonstrates that this number of customers is miniscule relative to the number of visits to the TurboTax website. Employing Dr. Yoeli’s approach to calculating the number of bounced visits to the TurboTax website in TY21 (i.e., visits that did not result in a customer logging in or in an account being created as the difference between the [REDACTED] million who visited the website and 55.5 million who logged in) results in [REDACTED] million visits.^{62,63} These data are not available for TY20, so I double this number to create a rough

assuming somebody actually does click on ‘See if you qualify’ and notices it, because until you asked me, I didn’t see it.”).

⁵⁸ Yoeli Rebuttal Report, ¶ 94 (“This omits a large number of consumers who could have been deceived by Intuit’s ads. First, it omits the [REDACTED] million consumers who visited turbotax.com but did not log in to an existing account or create a new account.”).

⁵⁹ 146,061 is calculated as the sum of 70,092 (reported in Section IV.B.4.a) and 75,969 (reported in Section IV.B.4.b).

⁶⁰ I also removed from this group customers or potential customers whose interactions indicated that their inquiry related to TurboTax Desktop products or filing of Canadian tax returns.

⁶¹ These statistics are calculated as the sum of the corresponding figures reported in Sections IV.B.4.a and IV.B.4.b.

⁶² Yoeli Rebuttal Report, Table 1.

⁶³ I note that the calculations in the Yoeli Rebuttal Report referring variously to [REDACTED] million or [REDACTED] million are incorrect, as [REDACTED] 55.5 [REDACTED]. See, e.g., Yoeli Rebuttal Report, ¶ 94 (“First, it omits the [REDACTED] million consumers who visited turbotax.com but did not log in to an existing account or create a new

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estimate of the number of bounced visits to the TurboTax website in TY20 and TY21. If one were to attribute all 52 customers associated with such interactions to the estimated [REDACTED] million bounced website visits for TY20 and TY21, the result would be that approximately [REDACTED] in [REDACTED] million website visits. The miniscule number of these complaints is inconsistent with the allegations of deception.



Bruce Deal

March 9, 2023

account.”). See also Yoeli Rebuttal Report, ¶ 98 (“Specifically, he omits the more than [REDACTED] million customers in row [2] and begins his analysis with row [3]”).

APPENDIX A Materials Relied Upon

Legal Documents

Complaint Counsel's First Requests for Production of Documents to Intuit Inc., *In the Matter of Intuit Inc.*, Docket No. 9408, September 12, 2022.

Complaint Counsel's Supplemental Responses to Intuit's First and Second Set of Interrogatories, *In the Matter of Intuit Inc.*, Docket No. 9408, December 22, 2022 and attachments.

Complaint, *United States of America before the Federal Trade Commission in the Matter of: Intuit Inc., A Corporation*, Docket No. 9408, March 28, 2022.

Confidential Videotaped Deposition of Erez Yoeli, Ph.D., *In the Matter of Intuit Inc.*, Docket No. 9408, February 16, 2023

Deposition of Bruce Deal, *In the Matter of Intuit Inc.*, Docket No. 9408, February 15, 2023.

Expert Rebuttal Report of Erez Yoeli, Ph.D., *In the Matter of Intuit Inc.*, Docket No. 9408, January 27, 2023.

Expert Rebuttal Report of Nathan Novemsky, Ph.D., *In the Matter of Intuit Inc.*, Docket No. 9408, January 27, 2023.

Expert Report of Bruce F. Deal, *In the Matter of Intuit Inc.*, Docket No. 9408, January 13, 2023.

Order Granting Complaint Counsel's Motion to Compel Production of Documents, *In the Matter of Intuit Inc.*, Docket No. 9408, December 30, 2022.

Videotaped Deposition of Megan Baburek, *In the Matter of Intuit Inc.*, Docket No. 9408, February 23, 2023.

Videotaped Deposition of William T. Maxson, *In the Matter of Intuit Inc.*, Docket No. 9408, December 8, 2022, CC-00005358.

Data

Complainant Tax History Data, INTUIT-FTC-PART3-000608568.

CRM Data 1, INTUIT-FTC-PART3-000618568-78.

CRM Data 2, INTUIT-FTC-PART3-000618579 - Deal.

INTUIT-FTC-PART3-000618579.

RX 1374, CRM_combined_wordsearch.xlsx.

RX 1376, CRM_single_wordsearch.xlsx.

TY14-20 Customer-Level Data, INTUIT-FTC-PART3-000608571.

TY19-20 Upgrade Screen Data, INTUIT-FTC-PART3-000608573.

TY21 Customer Review ID Crosswalk, INTUIT-FTC-PART3-000608569.

TY21 Customer Reviews, INTUIT-FTC-PART3-000490341.

TY21 Customer-Level Data, INTUIT-FTC-PART3-000608572.

TY21 Upgrade Screen Categorization, INTUIT-FTC-PART3-000608570.

TY21 Upgrade Screen Data, INTUIT-FTC-PART3-000608574.

Public Documents

- @SenWarren, “Intuit Has Raked in Billions by Tricking Americans into Paying for Tax Filing Services That Should Be Free,” May 4, 2022, <https://twitter.com/SenWarren/status/1522026666603819008>, accessed March 9, 2023.
- Frankel, Alison, “Intuit Defends \$40 Million Class Settlement, Attacks Mass Arbitration Firm,” *Reuters*, December 9, 2020, <https://www.reuters.com/article/legal-us-otc-intuit/intuit-defends-40-million-class-settlement-attacks-mass-arbitration-firm-idUSKBN28J34A>, accessed March 9, 2023.
- Frankel, Alison, “Judge Breyer Rejects \$40 Million Intuit Class Settlement Amid Arbitration Onslaught,” *Reuters*, December 22, 2020, <https://www.reuters.com/article/idUSKBN28W2M5>, accessed March 9, 2023.
- Root, Tik, “Why Are Millions Paying Online Tax Preparation Fees When They Don’t Need To?,” *ProPublica*, June 18, 2018, <https://www.propublica.org/article/free-file-online-tax-preparation-fees-intuit-turbotax-h-r-block>, accessed March 9, 2023.
- State of California Office of the Attorney General, Press Release, “Attorney General Bonta Announces Nationwide Settlement Against Intuit for Deceptive Advertising of “Free” TurboTax Products,” May 4, 2022. <https://oag.ca.gov/news/press-releases/attorney-general-bonta-announces-nationwide-settlement-against-intuit-deceptive>, accessed March 9, 2023.

Internal Intuit Documents

- Intuit, “FY’22 KPI Book,” March 2, 2022, INTUIT-FTC-PART3-000485269.

APPENDIX B
Methodology Appendix

This Methodology Appendix provides details for the analyses presented in the expert report. **Section I** describes the underlying datasets used in analyses. **Section II** documents the methodology used to identify potentially relevant or potentially irrelevant interactions in the data. **Section III** describes manual review of random samples to validate my systematic analysis.

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I. DATA SUMMARY

[1] I understand that Intuit produced data contained in its customer relationship management (“CRM”) database in response to a Motion to Compel submitted by Complaint Counsel.¹ These data include information on interactions between Intuit’s customer service representatives and customers or potential customers who interacted with a free TurboTax offer, product, or service, from November 2, 2020 to January 10, 2023, based on information in *createddate*.² I describe below each data file I used for my analyses.

A. CRM Data 1

1. Data files: INTUIT-FTC-PART3-000618568–78

2. Data Description

[1] I refer to data contained in INTUIT-FTC-PART3-000618568–78 as the “CRM Data 1.” These data include categorizations, descriptions, and summaries of the interactions.

[2] Each row in the CRM Data 1 represents a customer interaction, uniquely identified by the *casenumber* variable. In total, the dataset contains 1,054,585 observations. Multiple interactions can be associated with the same customer (as determined *auth_id__c* or other personally identifiable information such as *name*, *email*, and *phone*) in the same or in different tax years.³

[3] Each column in the dataset represents a variable that describes information associated with a particular interaction. The dataset contains information on the following:

- Personally identifiable information: *contact_mailing_address__c*, *encoded_contact_first_name__c*, *contact_email__c*, *allemails__c*, *name*, *email*, *phone*, *mobilephone*, *homephone*, *mobilephonenumber*
- Other identifiers: *casenumber*, *accountid*, *auth_id__c*, *case_number_text__c*
- Descriptions and summaries of the interaction: *subject*, *description*, *short_description__c*, *investigation_subject__c*, *comment_body*
- Categorical variables: *case_channel__c*, *producttags__c*, *product__c*, *category__c*, *segment__c*, *sub_category__c*, *product_pick__c*
- Date variables: *createddate*, *date_time_opened_2__c*, *closeddate*

¹ Order Granting Complaint Counsel’s Motion to Compel Production of Documents, *In the Matter of Intuit Inc.*, Docket No. 9408, December 30, 2022.

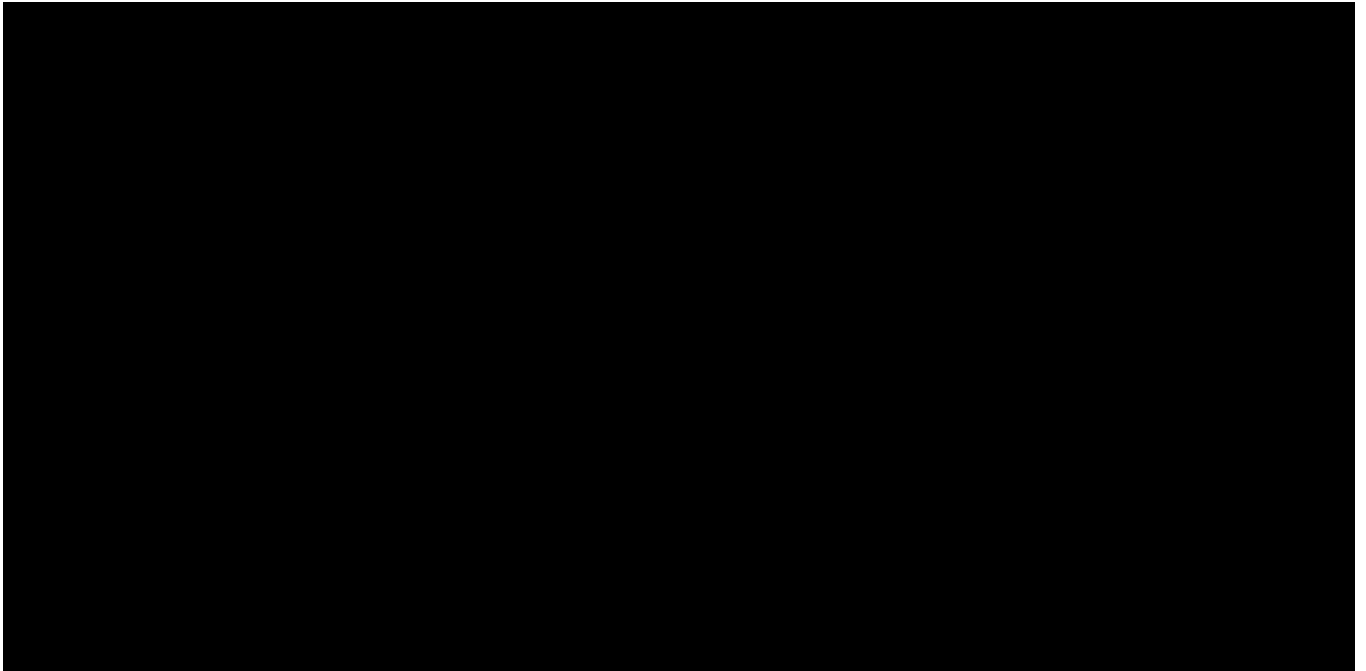
² Complaint Counsel’s First Requests for Production of Documents to Intuit Inc., *In the Matter of Intuit Inc.*, Docket No. 9408, September 12, 2022, pp. 2–6 (“Unless otherwise specified, the time period covered by each request below shall be from November 1, 2020, through the date of your complete compliance with these requests.”; “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.”).

³ I use the *createddate* to infer which tax year the interaction was initiated in. For example, if an interaction was initiated between November 1, 2021, and October 31, 2022, I consider the interaction to be related to TY21. The same logic is applied to TY20 and TY22.

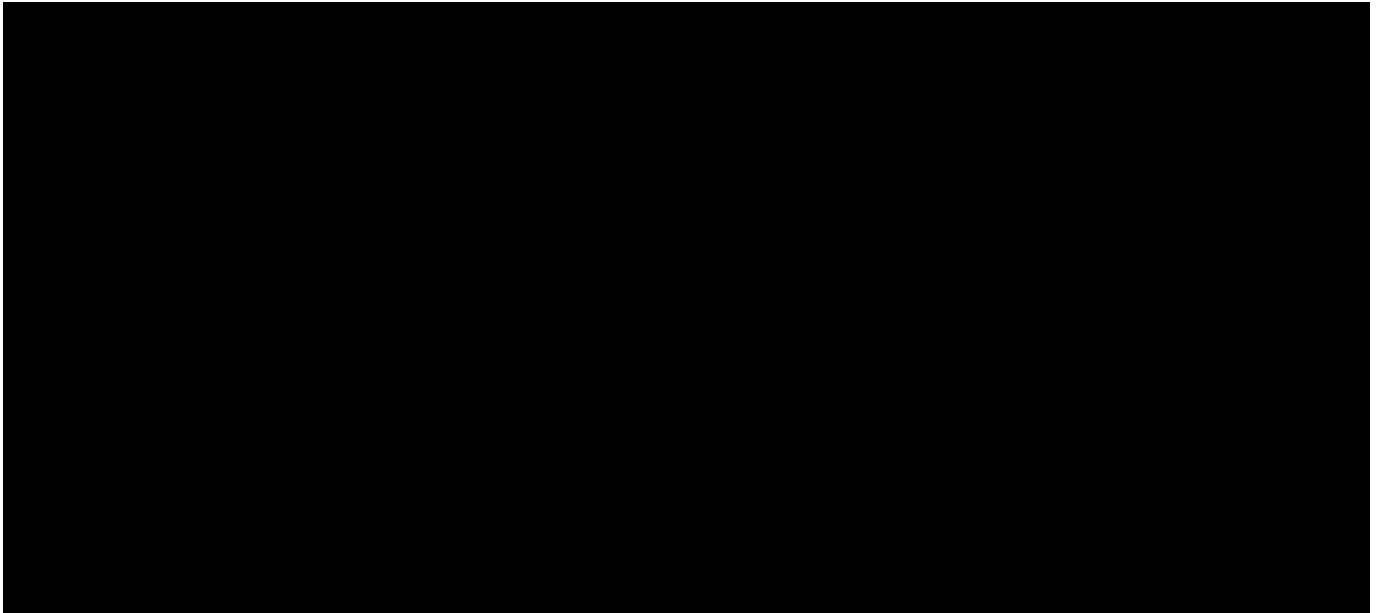
[4] *auth_id__c* and *createddate*, where available, were used to match observations in the CRM Data 1 to corresponding observations in the Customer-Level Data for TY20–21.⁴ Of the 813,292 unique *auth_id__c* values associated with 1,043,743 interactions that occurred between November 1, 2020 and October 31, 2022, 762,528 (94 percent) appear in the Customer-Level Data for TY20–21 in the corresponding year. The remaining 75,925 interactions do not have accompanying *auth_id__c* information and therefore cannot be linked to the Customer-Level Data.

3. Examples of Data (20 Entries)

[1] The tables below show data for 20 entries from CRM Data 1 excluding personally identifiable information (name, email address, mailing address, and phone number).



⁴ As discussed in the Deal January 2023 Report, the Customer-Level Data made available to me include returns initiated through June 10, 2022. See Expert Report of Bruce F. Deal, *In the Matter of Intuit Inc.*, Docket No. 9408, January 13, 2023 (“Deal January 2023 Report”), Appendix D, p. D-27.



B. CRM Data 2

1. Data files: INTUIT-FTC-PART3-000618579 – Deal

2. Data Description

[1] Data contained in INTUIT-FTC-PART3-000618579 include information on interactions between Intuit’s customer service representatives and customers or potential customers who interacted with a free TurboTax offer, product, or service.⁵ The data file I used, INTUIT-FTC-PART3-000618579 – Deal, which I refer to as CRM Data 2, contain all information available in INTUIT-FTC-PART3-000618579, supplemented with additional *auth_id__c* values where missing, as well as a binary variable, *complaint_duplicate*, that flags customer interactions that are identical or nearly identical to complaints previously identified by Complaint Counsel that I already analyzed in the Deal January 2023 Report.⁶

[2] Each row in the CRM Data 2 represents a customer interaction, uniquely identified by the combination of *name1*, *contact_driver_1__c*, *type_of_contact__c*, and *bu_customer_verbatim__c*. In total, the dataset contains 494 observations.

[3] Each column in the CRM Data 2 represents a variable that describes information associated with a particular interaction. The dataset contains information on the following:

- Personally identifiable information: *name1*, *email*, *phone*
- Other identifiers: *auth_id__c*,⁷ *related_primary_account__c*, *id*

⁵ INTUIT-FTC-PART3-000618579.

⁶ Deal January 2023 Report, ¶ 160.

⁷ For interactions with missing *auth_id__c*, I instructed my team to use information in *email*, *phone*, and *name1* to populate the missing data using information manually looked up in Intuit’s CRM. Information on *auth_id__c* was filled for 124 of the 168 interactions with missing *auth_id__c*.

- Descriptions and summary of the interaction: *what_caused_the_escalation_to_*, *what_did_the_customer_need_hel*, *bu_customer_verbatim__c*
- Categorical variables: *contact_driver_1__c*, *contact_driver_2__c*, *product__c*, *type_of_contact__c*
- Indicator for interactions duplicate with complaints: *complaint_duplicate*⁸
- Variables that are not populated: *date_oop_received__c*, *government_agency_root_cause__*, *government_agency_root_cause_o*, *escalation_driver_13_tsk_proc_it*, *bu_specific_incident_detail__c*

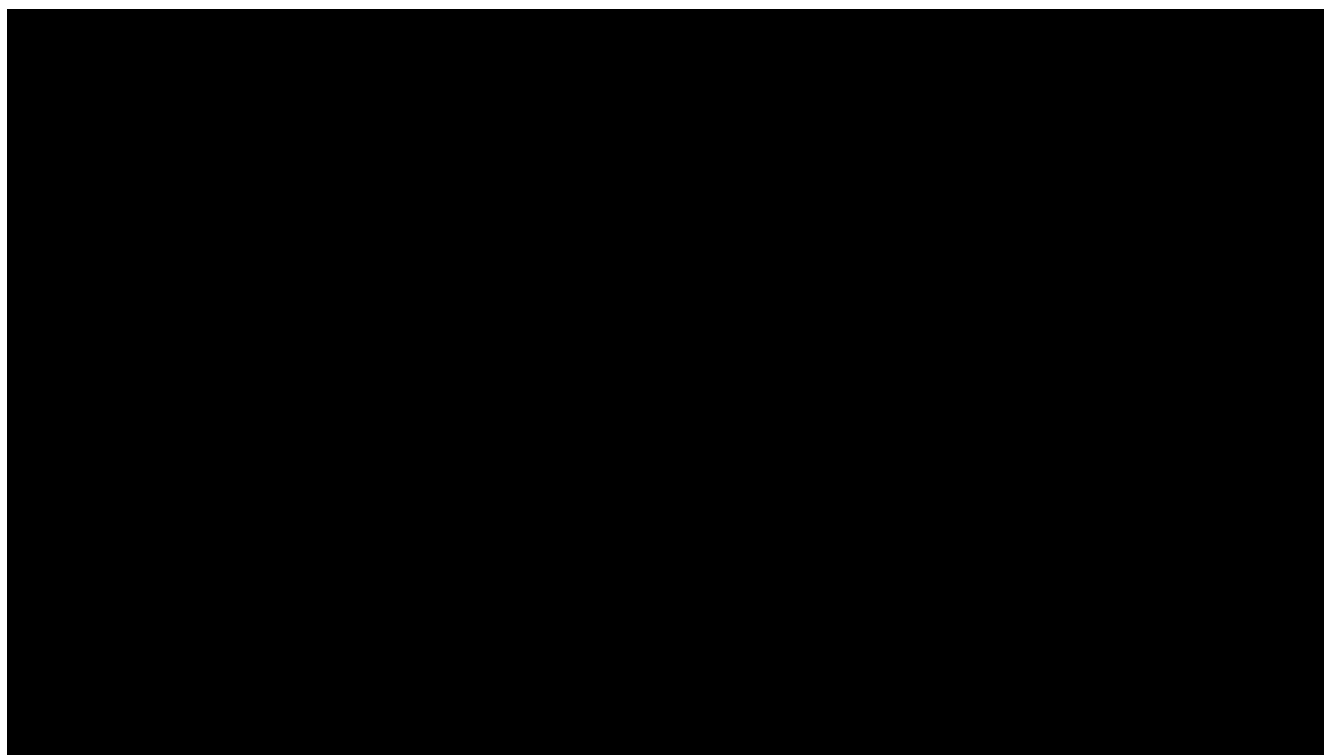
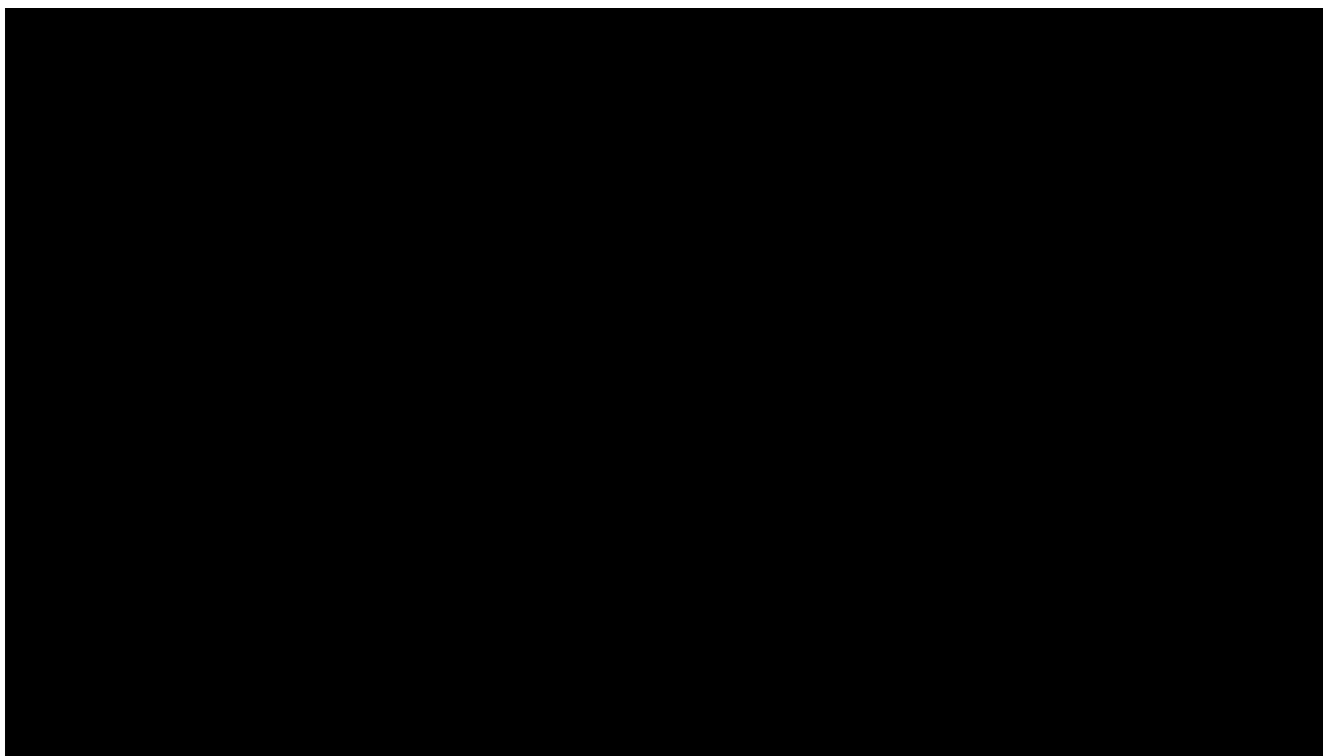
[4] The identifying variable, *auth_id__c*, where available, was used to match observations in CRM Data 2 to observations in the TY20–21 Customer-Level Data.⁹ Since there is no information on when an interaction took place, I matched observations in the CRM Data 2 to the TY20–21 Customer-Level Data by prioritizing matching to the TY21 Customer-Level Data. In the case of multiple *auth_id__c* values being associated with a single interaction, I prioritized the *auth_id__c* with a completed return. Of the 428 unique *auth_id__c* values associated with 450 interactions in the CRM Data 2, 394 (92 percent) appear in the Customer-Level Data for either TY20 or TY21. The remaining 44 interactions do not have accompanying *auth_id__c* information, even after the additional effort to retrieve the missing information, and therefore cannot be linked to the Customer-Level Data.

3. Examples of Data (20 Entries)

[1] The tables below show data for 20 entries from CRM Data 2 excluding personally identifiable information (name, email address, and phone number).

⁸ This is a binary flag that equals one for customer interactions that are identical or nearly identical to complaints previously identified by Complaint Counsel that I already analyzed in the Deal January 2023 Report, ¶ 160. To establish whether a customer interaction is duplicative of one of those complaints, I instructed three independent reviewers to assess whether the text detailing the content of the interaction and the customer's name are identical or substantially identical to the text of the complaint and the corresponding complainant's name. Specifically, the reviewers based their comparison on *bu_customer_verbatim__c* and *name1* of the CRM Data 2 and *Complaint Comments*, and *First Name* and *Last Name* of the data on complaint and the corresponding complainants. See Complaint Counsel's Supplemental Responses to Intuit's First and Second Set of Interrogatories, *In the Matter of Intuit Inc.*, Docket No. 9408, December 22, 2022 and attachments, Attachment A.

⁹ As discussed in the Deal January 2023 Report, the Customer-Level Data made available to me include returns initiated through June 10, 2022. See Deal January 2023 Report, Appendix D, p. D-27.



C. Identifying the Unique Number of Customers in the CRM Data

[1] The CRM Data include 1,055,079 interactions overall.¹⁰ A customer or potential customer may appear in one or both of the datasets (CRM Data 1 and CRM Data 2) and may be associated

¹⁰ The CRM Data 1 contain 1,054,585 interactions while the CRM Data 2 contain 494.

with more than one interaction. In total, there are 822,399 unique customers, as identified by unique values of *auth_id_c*, associated with 909,018 interactions. The remaining 146,061 interactions are associated with customers without sufficient identifying information and cannot be linked to the Customer-Level Data. At least 107,580 customers, as identified by unique values of *auth_id_c*, were associated with more than one interaction, and at least 59 customers appear in both CRM Data 1 and CRM Data 2. For example:

- A customer reached out to Intuit’s customer service to discuss a letter she received from the IRS regarding earned income tax credit calculation. Her interactions with Intuit’s customer service representatives regarding this issue were recorded in both CRM Data 1 and CRM Data 2.¹¹
- Another customer had at least 19 different interactions with customer support as captured in the CRM Data 1 between February 3, 2021 and October 12, 2021. She requested assistance with starting over her TY20 tax return, updating how she would receive her tax refund, checking the status of her stimulus payment, and learning about the TY21 filing window.¹²
- A non-TurboTax user called twice to request a refund for \$65 erroneously charged to her credit card. The customer “stated that she has her taxes done at another company and does not have TurboTax,” which the representative confirmed as the “[the system] do[es] not show her having TT.”¹³

II. METHODOLOGY TO IDENTIFY POTENTIALLY RELEVANT AND POTENTIALLY IRRELEVANT INTERACTIONS

[1] Interactions contained in the CRM Data cover a range of issues that may or may not be relevant to Complaint Counsel’s alleged consumer deception.¹⁴ To assess the potential relevance of individual interactions contained in the data, I analyzed the following text fields: *description*,¹⁵ *comment_body*, and *subject* for interactions recorded in the CRM Data 1;

¹¹ CRM Data 1, INTUIT-FTC-PART3-000618568–78, *auth_id_c* = “100017703.”; CRM Data 2, INTUIT-FTC-PART3-000618579 - Deal, *auth_id_c* = “100017703.”

¹² CRM Data 1, INTUIT-FTC-PART3-000618568–78, *auth_id_c* = “13563577969169579.”

¹³ CRM Data 1, INTUIT-FTC-PART3-000618568–78, *casenumber* = “479080625,” *comment_body* = “does not have TT and got it on cc Ms. Rostran stated that she has her taxes done at another company and does not have Turbo Tax. We do not show her having TT and yet it is on her Credit Card bill. Advised to check with other company and the credit card company to remove the charge.. In order to close, had to use a product. [...]”; *casenumber* = “479085893,” *comment_body* = “[...] cx called in to get a refund for a charge on her bank account. ;Verbatim: I don't have an account with you guys. That's why I was wondering what which helped on my bank account. | Yeah, I don't have an account with you guys. That's why I'm calling because I want my money refunded since I didn't use you guys and it comes from you guys [...]”

¹⁴ Videotaped Deposition of Megan Baburek, *In the Matter of Intuit Inc.*, Docket No. 9408, February 23, 2023 (“Baburek Deposition”), 50:20–51:2 (“Q. And you mentioned customer complaints earlier as one type of data in the CRM. You recognize that there are other types of data in the CRM; right? A. Yes. Q. A CRM might log, for example, technical support calls from a customer; right? A. Yes. Q. It might log sales data or -- it might log sales to a customer; right? A. Yes.”).

¹⁵ In Complaint Counsel’s exhibits prepared by Ms. Baburek and produced on February 15, 2023, *short_description_c* was also analyzed. I note that the content of *short_description_c*, for all but two of approximately 1 million interactions in the CRM 1 Data, is identical to the first 255 characters of *description*.

bu_customer_verbatim__c, what_caused_the_escalation_to_, and what_did_the_customer_need_hel for those recorded in CRM Data 2. My methodology is outlined below.

A. Keywords Unlikely to Be Related to Complaint Counsel's Allegations

[1] To identify customer interactions that are *unlikely* to be related to Complaint Counsel's allegations, I search for keywords in six categories: (i) technical issues; (ii) tax preparation process; (iii) tax filing process; (iv) inquiries after tax filing; (v) incomplete interactions; and (vi) products not at issue. The keyword search is not sensitive to the letter case and identifies the text string regardless of the characters (or spaces) immediately preceding or following them, so that variations of terms are captured: for example, the term "accur" captures "accuracy" as well as "accurate," among others.¹⁶

[2] I use the following keywords to identify customer interactions that could relate to **technical issues**, such as forgotten passwords or login information: access, desktop, disconnect, download, duplicate, error, install, login, logging, mismatch, password, recover, remember, reset, technical, upload, username.

[3] I use the following keywords to identify interactions potentially related to the **tax preparation process**, such as inquiries about customers' adjusted gross income, stimulus checks, amended or rejected returns, status of their refund, or downloading of previous year's returns: agi, advance loan, coronavirus, COVID, credit, crypto, ein, stimulus.

[4] I use the following keywords to identify interactions potentially related to the **tax filing process**, such as customers asking about the address to send their tax return to or about whether they have to print and mail their return: address, bank, extension, paper voucher, print, preauth, refund advance, refund amount, refund loan, ssn.

[5] I use the following keywords to identify interactions potentially related to **inquiries after tax filing**, such as customers asking how to amend their tax return or why they have not received a deposit for their tax return: accur, amend, audit, deposit, outbound, ob sentiment,¹⁷ reject, status.

[6] I use the following keywords to identify **incomplete interactions**, such as a dropped phone call: dropped, drpped, ghost, not responsive, unresponsive. I also consider interactions with all three relevant text fields in the respective CRM Data blank as part of this category.

For the remaining two observations, the content of *short_description__c* is the same as the first 252 or 254 characters of *description*. Hence *short_description__c* is redundant for the purposes of my analysis. See Baburek Deposition, 132:18–24 (“Q. So, in effect, by searching against both the description and the short description field, your analysis effectively double counts any search terms that appear in the first 255 characters of the description field; is that right? [Objection] A. Yes.”).

¹⁶ Exceptions were made for short keywords and abbreviations, such as “agi,” that could be part of longer, unrelated words; and therefore, these words are only counted when there are leading and/or trailing spaces and/or punctuation.

¹⁷ Intuit, “FY’22 KPI Book,” March 2, 2022, INTUIT-FTC-PART3-000485269, p. 15 [REDACTED]

[7] I use the following keywords to identify interactions that potentially reference **products not at issue**, such as TurboTax Desktop products, QuickBooks, and Mint: mint, quickbook, quick book, ttd.

B. Interactions Potentially Relevant to Complaint Counsel's Allegations

[1] To identify interactions potentially relevant to Complaint Counsel's allegations, I search for interactions that contain implicit language that may be suggestive of an expectation that filing would be free and/or mention "free" in conjunction with references to Intuit's marketing or advertising. The keywords I consider can be grouped into three categories, as described below.

[2] For every keyword indicator (as discussed in **Sections II.B.1** through **II.B.3** below), I consider the indicator to be true if its rules apply to any of the three text fields in the CRM Data 1 or any of the three text fields in the CRM Data 2 identified above. The keyword search is not sensitive to the letter case, and I process punctuation and special characters before the search.¹⁸

1. Interactions That Mention "Free"

[1] I look for the word "free"—and certain misspellings—in isolation to exclude interactions where "free" occurs as part of a larger word like "freelance" or "tax-free." I consider spellings of "free" that have only a single "e" (i.e., "fre") and as many as four "e's" (i.e., "freeee").¹⁹ Unlike Complaint Counsel's summary exhibits of the CRM Data that count the number of *instances* the keywords are found, I count the number of *interactions* that contain the keywords.²⁰ I identify 34,706 customer interactions that mention "free" in the CRM Data.

[2] It is worth noting that customer interactions may mention "free" when inquiries are made in the ordinary course of business about certain products.²¹ Hence, I look for interactions that mention the word "free," along with the misspellings specified above, but only in the context of a product name. The names I considered are "Free Edition," "IRS Free File," and "TTO Free." I account for variations in capitalization and misspellings of "free" and exclude any occurrences of "free" that occur independently of a product name. Among the 34,706 interactions that mention "free" at least once, there are 7,685 customer interactions where all mentions of "free" are

¹⁸ Specifically, (i) hyphens and apostrophes are removed; (ii) all non-letter, non-number, non-space characters are replaced with a single space; and (iii) all spaces are singularized.

¹⁹ There are no instances of the word "free" with five or more e's in the CRM Data.

²⁰ The two produced spreadsheets prepared by Ms. Baburek count the number of instances the keywords are found in several fields. If one keyword was found twice in an interaction (either in the same field or in two of the fields used for the search), Ms. Baburek counted this keyword twice. Baburek Deposition, 132:18–24 ("Q. So, in effect, by searching against both the description and the short description field, your analysis effectively double counts any search germs that appear in the first 255 characters of the description field; is that right? MR. [Objection] THE WITNESS: Yes."); Baburek Deposition, 99:9–14 ("Q. In fact, because that customer used the word "free" twice or the record within the CRM data used the word twice, your analysis would count each instance of the term "free" as a separate occurrence, right? A. Yes.").

²¹ Baburek Deposition, 98:24–99:8 ("Q. And you didn't do anything to filter out results, where the only reference to the term 'free' was the name of the product itself; is that right? A. Correct. Q. What about if a customer called Intuit to say, 'I'm so happy that TurboTax Free Edition is free for me'? Would that record have been included in your keyword analysis? A. Yes.").

exclusively in the context of product names. Examples of these interactions include (emphasis added):

- A customer had “a question about the *free edition*.”²²
- Another customer had “trouble with net wages on *IRS free file*”²³
- A different customer who used Free Edition was tracking down her refund: “called with no case pop. used *TTO free*. looking for her refund, suggested wheres my refund @ IRS. its pending.”²⁴

However, customer interactions may contain references to these products using alternative language such as, “the free version” or “the free product.” These instances would not be identified in the product name search described above.

[3] Even when considering customer interactions that mention “free” outside the context of product names, customer interactions may mention “free” in a manner that is unrelated to the at-issue conduct, and are not necessarily relevant to Complaint Counsel’s allegations. For example (emphasis added):

- A customer who is a travel nurse called about “tax *free* stipends from the government.”²⁵
- In another instance, a customer needed “a *free* download for the desktop.”²⁶
- A different customer “wanted to check if military filed *free*.”²⁷
- Another interaction ended with the following: “Please feel *free* to contact us again with any questions. Thank you for using TurboTax.”²⁸

[4] It is also worth noting that during the time period captured in the CRM Data, there were several litigations against Intuit unrelated to the current matter, including a class action,²⁹

²² CRM Data 1, INTUIT-FTC-PART3-000618568–78, *casenumber* = “472571925,” *description* = “i have a question about the free edition.”

²³ CRM Data 1, INTUIT-FTC-PART3-000618568–78, *casenumber* = “477118690,” *comment_body* = “cx is having trouble with net wages on IRS free file walked cx through trouble shooting for a solution.”

²⁴ CRM Data 1, INTUIT-FTC-PART3-000618568–78, *casenumber* = “472579429,” *comment_body* = “called with no case pop. used TTO free. looking for her refund, suggested wheres my refund @ IRS. its pending.”

²⁵ CRM Data 1, INTUIT-FTC-PART3-000618568–78, *casenumber* = “1496898462,” *comment_body* = “[...]Verbatim: So I work as a travel nurse and with that I get like tax free stipends from the government like following the GSA. But I wasn't sure when I'm like filing like do the receipts that I've kept for everything, does that go under my expenses for being a travel nurse or how do I go ahead and make sure that like because I'm I'm not sure [...]”

²⁶ CRM Data 1, INTUIT-FTC-PART3-000618568–78, *casenumber* = “1491753031,” *comment_body* = “CX needs a free download for the desktop.I was given permission but was having system issues.CX will call back to receive free desktop downloadWas on call with cx for 2 hours Reached out to arise chat as well as tier 2 Also did a screen share with arise chat to see why I was not able to push download for cx. There are severa cases open because when I think I was finished and closed the case I will be given the order to do something else which make me reopen the case.”

²⁷ CRM Data 1, INTUIT-FTC-PART3-000618568–78, *casenumber* = “1499120714,” *comment_body* = “cx wanted to check if military filed free.”

²⁸ CRM Data 1, INTUIT-FTC-PART3-000618568–78, *casenumber* = “470343424,” *comment_body* = “[...] Please feel free to contact us again with any questions. Thank you for using TurboTax.”

²⁹ See, e.g., Frankel, Alison, “Judge Breyer Rejects \$40 Million Intuit Class Settlement Amid Arbitration Onslaught,” *Reuters*, December 22, 2020, <https://www.reuters.com/article/idUSKBN28W2M5>, accessed March 9, 2023.

California City Attorney lawsuits,³⁰ and a mass arbitration with over 100,000 claimants.³¹ Publicity surrounding these litigations included numerous reports and articles in the public press,³² and other communications such as a tweet by Senator Warren.³³ Public awareness of these litigations is reflected in the CRM Data, where some customer interactions mention “free” specifically in reference to some of these litigations. For example (emphasis added):

- “Turbo Tax expressedly [sic] guarantees persons earning an AGI (Adjusted Gross Income) of \$34,000 or less the option to file his or her state and federal 2020 taxes for *free*. [...] I have also attached a ProPublica new[s] article [...].”³⁴
- “I believe that I’m entitled to receive a partial refund of money paid to Turbo Tax as a result of a \$141 million settlement against Turbo Tax for defrauding consumers. I used Turbo Tax for many years and I did not know that I qualified for a *free* e file because of my Income level. How do I go about submitting a claim to receive this compensation?”³⁵
- “[...] I was told from online site that filing was *free* [...] I would like my \$55 returned plus my \$271 that was paid, I stated turbotax just had a settlement on wrongfully charges in New York and other states on this same thing.”³⁶

³⁰ See, e.g., State of California Office of the Attorney General, Press Release, “Attorney General Bonta Announces Nationwide Settlement Against Intuit for Deceptive Advertising of “Free” TurboTax Products,” May 4, 2022.

³¹ See, e.g., Frankel, Alison, “Intuit Defends \$40 Million Class Settlement, Attacks Mass Arbitration Firm,” *Reuters*, December 9, 2020, <https://www.reuters.com/article/legal-us-otc-intuit/intuit-defends-40-million-class-settlement-attacks-mass-arbitration-firm-idUSKBN28J34A>, accessed March 9, 2023.

³² See, e.g., Root, Tik, “Why Are Millions Paying Online Tax Preparation Fees When They Don’t Need To?,” *ProPublica*, June 18, 2018, <https://www.propublica.org/article/free-file-online-tax-preparation-fees-intuit-turbotax-h-r-block>, accessed March 9, 2023; Angeles, CBS Los, “California Customers of TurboTax Eligible for \$11.4 Million Settlement in Deceptive Advertising Case,” May 4, 2022, <https://www.cbsnews.com/losangeles/news/california-customers-of-turbotax-eligible-for-11-4-million-settlement-in-deceptive-advertising-case/>; Frankel, Alison, “Intuit Defends \$40 Million Class Settlement, Attacks Mass Arbitration Firm,” *Reuters*, December 9, 2020, <https://www.reuters.com/article/legal-us-otc-intuit/intuit-defends-40-million-class-settlement-attacks-mass-arbitration-firm-idUSKBN28J34A>, accessed March 9, 2023.

³³ @SenWarren, “Intuit Has Raked in Billions by Tricking Americans into Paying for Tax Filing Services That Should Be Free,” May 4, 2022, <https://twitter.com/SenWarren/status/1522026666603819008>.

³⁴ CRM Data 2, INTUIT-FTC-PART3-000618579 - Deal, *id* = “313,” *bu_customer_verbatim_c* = “Dear Better Business Bureau: Turbo Tax expressedly guarantees persons earning an AGI (Adjusted Gross Income) of \$34,000 or less the option to file his or her state and federal 2020 taxes for free. Yet Turbo Tax fraudulently charged me 39.99 to file my federal WA tax for 2020 which was considerably lower than \$34,000 AGI for the 2020 filing year. I have contacted Turbo Tax’s customer support for weeks only to have 2 hour wait times and be told that I would be transferred and then silence as the lines drops. I have also attached a ProPublica new article on this Turbo Tax software being coded to misguide low-income consumers to purchase software that either is not free or a financial burden to consumers [...].”

³⁵ CRM Data 2, INTUIT-FTC-PART3-000618579 - Deal, *id* = “472,” *bu_customer_verbatim_c* = “I believe that I’m entitled to receive a partial refund of money paid to Turbo Tax as a result of a \$141 million settlement against Turbo Tax for defrauding consumers. I used Turbo Tax for many years and I did not know that I qualified for a free e file because of my Income level. How do I go about submitting a claim to receive this compensation? Do you need to see supporting documentation to show that I used Turbo Tax? Thank you for your help. I really appreciat~ It.”

³⁶ CRM Data 2, INTUIT-FTC-PART3-000618579 - Deal, *id* = “476,” *bu_customer_verbatim_c* = “I filed my taxes with Turbo tax on March 19, 2022, I was told from online site that filing was free, before filing, I received

2. Interactions That Contain Implicit Language That May Be Suggestive of an Expectation That Filing Would Be Free

[1] As a second scenario, I look for occurrences of certain phrases that may be implicitly suggestive of the customer having an expectation of filing for free. Note that even if the language identified in these occurrences were implicitly suggestive of the customer having an expectation of filing for free, it would not necessarily mean that this expectation was formed as a result of the customer interaction with Intuit’s advertising campaign for Free Edition.

[2] To identify the customer interactions in which customers might have expressed an expectation of filing for free, I search for sentences that include any of the following verbs preceding the keyword “free” as described in **Section II.B.1**.³⁷ These searches flag any word that starts with the string of letters searched. For example, searches for “guarantee” also retrieve sentences that included the string “guarantees,” “guaranteeing,” or “guaranteed.”

- “expect”
- “guarantee”
- “should”³⁸
- “suppose”³⁹
- “think”⁴⁰

[2] To account for variations in grammar, syntax, and phraseology, I allow for the presence of up to five words between the verb and the “free” keyword. This methodology may flag interactions that are not potentially relevant. For example (emphasis added):

help from turbo tax help, I was informed that our state tax filing could be setup at later time, I stated to online live that's nice, so I decided to file state tax on April 30, 2022. I contacted Indiana Dor and was told, we have a penalty for state taxes owed in which we needed to pay \$550 but since the deadline passed the fee was now \$605 plus. I stated that Turbo tax completed our taxes and the representative stated we could pay at a later time. An Indiana dor representative stated on April 22, 2022 a 10% penalty was added plus interest daily in which an extra \$55.00 was added [...] I would like my \$55 returned plus my \$271 that was paid, I stated turbotax just had a settlement on wrongfully charges in New York and other states on this same thing. [...].”

³⁷ Although Ms. Baburek’s keyword analysis also searches for terms potentially expressing an expectation (e.g., “should be free”) it overstates the number of interactions potentially related to Complaint Counsel’s allegations. For instance, I understand that her search for the phrase “should be free” includes instances where this phrase occurs solely in the subject field. See, e.g., Baburek Deposition, 106:14–107:10 (“Q. Let’s look at Row 5, which is Case Number 468730285. Looking back at Column V, which is the comment body field, do you see that this record captures the following customer interaction, quote, ‘CX has already filed her taxes, but got another W-2 form. Explained to her the process of waiting for the IRS to accept or reject her return and emailed the process for amending the tax return.’ Did I read that correctly? A. Yes. Q. In looking at Column C again, the subject filed, you agree that this record has the same value in that filed that reads, ‘Price adjustment/downgrade/should be free’; right? A. Yes. Q. So looking at this record as a whole, do you agree that the only place where the term ‘should be free’ appears is in Column C, the subject field? And if you need to take a minute to scroll across and look at all the values please do. A. Yes.”).

³⁸ This flag excludes customer service interactions where the *subject* includes the text “Price Adjustment / Downgrade / Should be free,” and there is no additional mention of “free” in either of the remaining two text variables (*description* or *comment_body*).

³⁹ In addition, I also flag customer interactions that have exact mentions of “supposing” before the keyword “free.”

⁴⁰ In addition, I also flag customer interactions that have exact mentions of “thought” before the keyword “free.”

- A customer “stated that he received another W-2 that he was not *expecting*, but the *free* edition of Turbo Tax will not allow him to add another W-2. Customer’s return has been accepted by the IRS, but it has not been processed. Agent informed customer that he would have to wait until the amend option was available.”⁴¹
- Another customer inquired if “there’s a deadline to file free on turbotax,” and the service representative advised that “as long as cx return is within the free return guideline her tax return filing *should be free*.”⁴²
- A different customer inquired about the cost of state returns when using a TurboTax Desktop product: “cx *thought* deluxe included one *free* state download it is free to prepare the tax document but not free to efile.”⁴³

3. Interactions That Reference Advertising

[1] As a third scenario, I look for occurrences of certain phrases potentially related to Intuit’s marketing or advertising among those that mention “free.”^{44,45} To do so, I identify any customer interaction that contains words that start with “advert.” For example, this string of text captures words such as “advertising,” “advertisement,” and “advertised.” In addition, I flag customer interactions that have exact mentions of the following keywords:

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- ⁴¹ CRM Data 1, INTUIT-FTC-PART3-000618568–78, *casenumber* = “1487429999,” *comment_body* = “Importing a W-2 Customer stated that he received another W-2 that he was not expecting, but the free edition of Turbo Tax will not allow him to add another W-2. Customer's return has been accepted by the IRS, but it has not been processed. Agent informed customer that he would have to wait until the amend option was available. SL was initiated by agent [...]”
- ⁴² CRM Data 1, INTUIT-FTC-PART3-000618568–78, *casenumber* = “468298604,” *comment_body* = “Stimulus cx inquired in regards to irs error. advised cx if she didn't received an email from tt to update bank info she was not affected by the error and that the irs deadline to send out stimulus is january 31. advised if cx does not receive funds by then she can claim rebate recovery on 2020 tax return. cx asked if there's a deadline to file free on turbotax, i advised as long as cx return is within the free return guideline her tax return filing should be free.”
- ⁴³ CRM Data 1, INTUIT-FTC-PART3-000618568–78, *casenumber* = “1488516793,” *comment_body* = “[...] Verbatim: Okay. I ordered a TurboTax software online from Amazon and I thought I had ordered the Deluxe edition, which I thought included one state and five federal. But when I went to do a state, they charged me \$20. | Oh okay well last year I got a free state one and it didn't have that federal extra charge. So that's new this year then. [...] cx thought deluxe included one free state download... it is free to prepare the tax document but not free to efile.”
- ⁴⁴ The Complaint alleges that Intuit’s advertising conveys the message that consumers can file their taxes for free and that given Intuit’s advertising reasonable consumers believe that TurboTax products are free for them. Complaint, *United States of America before the Federal Trade Commission in the Matter of: Intuit Inc., A Corporation*, Docket No. 9408, March 28, 2022 (“Complaint”), ¶ 5 (“Much of Intuit’s advertising for TurboTax conveys the message that consumers can file their taxes for free using TurboTax, even going so far as to air commercials in which almost every word spoken is the word ‘free.’”); Complaint, ¶ 35 (“Given this advertising, reasonable consumers may believe that TurboTax products and services Intuit advertises as free are free for them – that they can file their taxes for free using TurboTax.”).
- ⁴⁵ Ms. Baburek’s keyword analysis records are not designed to answer the important question of whether the interaction is related to advertising. See, e.g., Baburek Deposition, 116:6–20 (“Q. And you didn’t make any attempt to filter out reports from consumers who did not mention TurboTax advertising generally; right? A. Correct. Q. So the records that were included in your keywork analyses could include customers who were not complaining about Intuit’s free TurboTax advertising; right? A. Yes. Q. And, in fact, as we’ve seen today, the output file which we’ve been reviewing, which is RX1374, includes records that do not, on their face, mention Intuit’s free TurboTax advertisements at all; right? A. Correct.”).

- “ad” or “ads”
- “marketing”
- “promotion” or “promotions”
- “tv,” “television,” “commercial,” or “commercials”

[2] Similar to the search for “free,” customer interactions may mention advertising-related keywords described above in a manner that is unrelated to Intuit’s advertising of Free Edition specifically, or Intuit’s advertising in general.⁴⁶ For example (emphasis added):

- A customer mentioned “want[ing] to upgrade to TT Live”: “I never, I mean I don’t know if it was for *free* or not. I was just trying to file, but I was trying to figure out I would prefer [...]. I’ve been se[e]ing *commercial* to say turbo li[v]e. Somebody can file for you. I mean like you can file for me, so that’s what I was looking to do the upgrade for that.”⁴⁷
- Another customer expressed concern with the software having “spelling errors” and stated that they were “bothered with all the *ads* [...] all the errors with TT.” They also stated, “since some people get their tax forms late the *free* service should be offered to first time users instead of date restricted.”⁴⁸
- Another customer inquired about the deadline for the “Live” promotion: “[w]ants to add expert help and wants to know the deadline for the *promotion*. of free. adv of deadline of promotion which is found online 2/15. adv how to add. was able to add. deadline is not 2/15. must file by 3/31 for \$0 live expert promotion”⁴⁹

III. MANUAL REVIEW OF RANDOM SAMPLES

[1] To validate my methodology, I review customer interactions from four stratified random samples from the CRM Data. I consider two random samples of 300 interactions each from CRM

⁴⁶ Baburek Deposition, 81:5–9 (“Q. And in order to identify whether a complaint is relevant to complaint counsel’s allegations in this case, you’d actually need to review the complaint to see what the customer was saying; right? A. Correct.”).

⁴⁷ CRM Data 1, INTUIT-FTC-PART3-000618568–78, *casenumber* = “1496835363,” *comment_body* = “cx wants to upgrade to TT live. [...] Verbatim: Yes. Oh I didn't know, I I never, I mean I don't know if it was for free or not. I was just trying to file, but I was trying to figure out I would prefer to file with a lot. You know, I've been sending commercial to say turbo life. Somebody can file for you. I mean like you can file for me, so that's what I was looking to do the upgrade for that, but I didn't want to have to I I want like the self thing has been keeping track of all my mileage and all that kind of stuff. So I didn't I didn't know how to get it to turbo alive. Am I making sense?[...]”

⁴⁸ CRM Data 1, INTUIT-FTC-PART3-000618568–78, *casenumber* = “1497099518,” *comment_body* = “1497099518 software had spelling errors and made cx feel uncomfortable with submitting their return with TT. Cx bothered with all the ads. Cx also bothered with all the errors with TT. Cx was worried to contact live support concerned with being charged with for support from someone who might not know what they are doing. cx stated since some people get their tax forms late the free service should be offered to first time users instead of date restricted.”

⁴⁹ CRM Data 1, INTUIT-FTC-PART3-000618568–78, *casenumber* = “1486595860,” *comment_body* = “[...] Got the alert but CCP still will not allow mic so call dropped.. Wants to add expert help and wants to know the deadline for the promotion. of free. adv of deadline of promotion which is found online 2/15. adv how to add. was able to add. Deadline is not 2/15. Must file by 3/31 for \$0 live expert promotion.”

Data 1: one sample limited to interactions that do not mention “free” and the other drawn from the remaining interactions that do mention “free.” I take a similar approach using two random samples of 30 observations each from CRM Data 2.

[2] After selecting the random samples, I instructed two reviewers to independently read through the following text fields: *description*, *comment_body*, and *subject* for interactions recorded in the CRM Data 1; *bu_customer_verbatim_c*, *what_caused_the_escalation_to_*, and *what_did_the_customer_need_hel* for those recorded in CRM Data 2.

[3] To ascertain the relevance of the interactions in these samples, I instructed the two reviewers to apply the following steps:

- a. Examine the interaction for evidence indicating that the customer or potential customer had an expectation of being able to file for free (and was not related to TurboTax Desktop or IRS Free File offered by TurboTax). If there is no such evidence, mark the interaction as not relevant (“No”); otherwise, consider the next question before marking the interaction.
- b. Examine the interaction for evidence indicating that the customer or potential customer’s expectation was mentioned in connection to Intuit’s marketing or advertising. Mark the response as “Yes,” “Maybe,” or “No.”

[4] Results from the two random samples that do not mention “free” (a total of 330 interactions): Both reviewers independently flagged all interactions as not relevant (that is, they indicated “No” in response to the question of whether there was evidence indicating that the customer or potential customer had an expectation of being able to file for free).

[5] Results from the two random samples that mention “free” (a total of 330 interactions): The two reviewers flagged 11 interactions as relevant, one as possibly relevant, and the rest as not relevant (“Yes,” “Maybe,” and “No,” respectively).

[6] Comparison to systematic analysis outlined above in **Section II**: Using keywords alone, my analysis identified 15 interactions in these samples that mention “free” in conjunction with references to Intuit’s marketing or advertising, compared to 12 identified in the manual review as relevant or possibly relevant. The systematic analysis and the manual review align in 9 of these interactions. In 6 instances the systematic approach is overinclusive and identifies interactions that do not provide evidence that the customer had an expectation of being able to file for free in connection with Intuit’s marketing or advertising. Specifically, two interactions flagged by my keyword search as mentioning words related marketing or advertising were identified because they include a typo (“ad” instead of “add”)⁵⁰ or mention a keyword in an unrelated context;⁵¹ two customers provided extra feedback that also mentioned advertising;⁵² one customer was

⁵⁰ CRM Data 1, INTUIT-FTC-PART3-000618568–78, *casenumber* = “1492728575,” *subject* = “I paid for turbo tax that allows I believe 4 returns? I don’t know how to ad people to this program... need help - this case is created by TDA.”

⁵¹ CRM Data 2, INTUIT-FTC-PART3-000618579 - Deal, *id* = “214,” *bu_customer_verbatim_c* = “[...] This followed my work years ago to launch internet services in Europe, to consult for the European Commission, Citibank and many others, and to co-author a manual on internet marketing. [...]”

⁵² CRM Data 2, INTUIT-FTC-PART3-000618579 - Deal, *id* = “285,” *what_caused_the_escalation_to_* = “Customer had feedback on ease of use and capabilities of product.”; CRM Data 2, INTUIT-FTC-PART3-000618579 - Deal, *id* = “379,” *what_caused_the_escalation_to_* = “Customer wanted to provide extra feedback beyond what he put in the survey.”

seeking help with account recovery;⁵³ and another one was an inquiry related to a desktop product.⁵⁴

[7] Among the three interactions marked “Yes” or “Maybe” identified in my manual review but not in my systematic analysis, two are related to the TurboTax Live products,⁵⁵ while the remaining one was an inquiry about the customer’s federal refund following up on an earlier complaint about fees.⁵⁶

[8] The results of my manual review of the random samples are documented in the file CRM Review.xlsx.

[9] As described in Section IV.A. of my report, the rate at which interactions from the random samples indicate a possibility that customers or potential customers were seeking to file for free because of Intuit’s marketing or advertising does not fundamentally differ from the rate identified through my systematic analysis. If anything, results from my manual review demonstrate that my systematic analysis is on net overinclusive of relevant interactions.

⁵³ CRM Data 1, INTUIT-FTC-PART3-000618568–78, *casenumber* = “1492795586,” *comment_body* = “[...] Cx called in stating that stating that its asking for her 1040 and she doesn’t have it [...]”

⁵⁴ CRM Data 1, INTUIT-FTC-PART3-000618568–78, *casenumber* = “1493701182,” *comment_body* = “[...] when I was doing it on the tax itself before I said file it says federal free and the state \$20. When I file it, it charged me 25 for each state. [...] TurboTax was bought from Costco [...]”

⁵⁵ CRM Data 2, INTUIT-FTC-PART3-000618579 - Deal, *id* = “29,” *what_did_the_customer_need_hel* = “He wanted to know if he could get a refund since the TT fee was higher than they wanted to pay. But did acknowledge that he knew how to go back so he wasn’t charged the amount. And did acknowledge that he did say yes to paying that fee. [...]”; CRM Data 1, INTUIT-FTC-PART3-000618568–78, *casenumber* = “1493814807,” *comment_body* = “[...] cx called in because she was charged for live and she wanted to downgrade. [...] my husband had to go through the same rigamarole and he was able to get someone to waive his fee [...]”

⁵⁶ CRM Data 2, INTUIT-FTC-PART3-000618579 - Deal, *id* = “101,” *bu_customer_verbatim_c* = “I wrote to you earlier to complain about your fees, as repeated below, now I am wondering where my refund is? I was told it would be deposited around March 24. [...]”

**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

[PROPOSED] ORDER

Upon consideration of the appeal briefs submitted in this proceeding, the arguments of counsel for the parties at oral argument, and the record in this matter, pursuant to 16 C.F.R. § 3.54,

IT IS HEREBY ORDERED THAT the Initial Decision dated August 29, 2023, is VACATED; and

IT IS FURTHER ORDERED THAT the Complaint is hereby DISMISSED.

By the Commission.

Date: _____

April Tabor

Secretary of the Commission

CERTIFICATE OF SERVICE

On September 26, 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:

April Tabor
Office of the Secretary
Federal Trade Commission
600 Pennsylvania Avenue, NW
Suite CC-5610
Washington, DC 20580
ElectronicFilings@ftc.gov

The Honorable D. Michael Chappell
600 Pennsylvania Ave., NW, Rm. H-110
Washington, DC 20580

Also on September 26, 2023, I caused the foregoing document to be served via email on:

Roberto Anguizola
Federal Trade Commission
600 Pennsylvania Avenue NW
Washington, DC 20580
ranguizola@ftc.gov
(202) 326-3284

Rebecca Plett
Federal Trade Commission
600 Pennsylvania Avenue NW
Washington, DC 20580
rplett@ftc.gov
(202) 326-3664

James Evans
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580
jevans1@ftc.gov
(202) 326-2026

Sara Tonnesen
Federal Trade Commission
600 Pennsylvania Avenue NW
Washington, DC 20580
stonnesen@ftc.gov
(202) 326-2879

Counsel Supporting the Complaint

April Tabor
Office of the Secretary
Federal Trade Commission
600 Pennsylvania Avenue NW
Suite CC-5610
Washington, DC 20580
ElectronicFilings@ftc.gov

The Honorable D. Michael Chappell
Administrative Law Judge
600 Pennsylvania Ave. NW, Rm. H-110
Washington, DC 20580

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