

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

In the Matter of:

Intuit Inc., a corporation.

Docket No. 9408

**RESPONDENT’S MOTION *IN LIMINE*
TO EXCLUDE SURVEY AND RELATED OPINIONS OF NATHAN NOVEMSKY**

TurboTax Free Edition indisputably *is* free for those eligible to use it—and nearly 15 million taxpayers do use it each year to file their taxes for free. Intuit accurately advertises Free Edition as free for those who qualify, and consumers regularly visit the TurboTax website (as Intuit’s ads encourage) for information on both the free and paid TurboTax product lines. Lacking evidence that the TurboTax ads or website are at all deceptive, Complaint Counsel (CC) commissioned Nathan Novemsky to conduct a survey in hopes of creating such evidence. But rather than run a scientific survey to demonstrate any causal link between the ads or website and the supposed deception, Novemsky conducted a survey in which his 607 respondents were not even shown any of the ads in question. Instead, Novemsky employed what can charitably be described as a pre-baked “memory test” that is unreliable and therefore inadmissible. Respondent respectfully moves to exclude the Novemsky “survey” and to preclude any evidence or testimony derived from it, including his expert report (GX303) and rebuttal report (RX1345).

I. BACKGROUND

Novemsky supervised an online survey that was administered March 11-24, 2022—*i.e.*, near the end of Tax Year 2021 (TY2021). GX303 ¶¶1, 5, 65. As noted, Novemsky did not show respondents any stimulus—*e.g.*, a TurboTax ad—before asking them about their “understanding of filing 2021 income taxes for free using TurboTax.” RX1345 ¶21; *see* Tr.62:6-17, 71:4-6. Nor

did Novemsky show respondents any webpages from the TurboTax website, even though the TY2021 ads then airing either directed viewers to “turbotax.com” or linked to that website—which consumers “would have to see ... before making a purchase,” Tr.59:8-9, and where (as CC have never denied) the Free Edition qualifications are described in detail. *See* Tr.19:17-23:9, 62:18-20, 71:7-9.

Novemsky began his survey by asking respondents for specific details about their personal tax situation that bore on the Free Edition eligibility requirements (which Novemsky himself found on the TurboTax website). Tr.19:17-23:1. Next, he used consumers’ beliefs about their tax situations to exclude anyone who qualified to use Free Edition in TY2021 (a group comprising approximately 59 million people, or 40% of taxpayers). Tr.91:5-92:11. Novemsky also excluded those who had filed their TY2021 tax return before the survey was run in March (a group comprising approximately 107 million people, or 60% of taxpayers). Tr.92:12-93:10. In these respects, the response group was far from representative of the general population.

Throughout the survey, it was clear to respondents that the survey concerned TurboTax. Tr.184:13-185:10, 289:6-13. Moreover, after completing the survey, respondents were told that it was sponsored by the FTC and would be used in “litigation” concerning Intuit’s “potential alleged violations of consumer protection laws.” GX303, App. F, at 32; *see* Tr.111:3-16. After reading this, 164 individuals opted out—over 21% of 771 original respondents. GX303 ¶¶50-51; *see* Tr.112:4-9. These self-selected opt-outs are likely to have been supportive of TurboTax, but Novemsky deleted their survey responses, making it impossible to know. *See* Tr.117:8-118:17. That left 607 respondents—none of whom had used TurboTax that year, and 404 of whom had not used it in the past three years. GX303 ¶71.

The survey asked respondents: “[W]hich of the following best describes your understanding of filing your 2021 income taxes for free using TurboTax online software?” GX303 ¶¶68. The available responses were: (1) “I think I can file” for free, (2) “I don’t think I can file” for free, (3) “I do not have enough information to say,” and (4) “I’m not sure.” *Id.* The survey also asked respondents “to indicate the sources that played a role in forming their impression” as to whether they met Free Edition’s eligibility requirements (which, again, Novemsky never showed them) by choosing from a list. *Id.* ¶¶47. Two potential responses reflected CC’s allegations here—(1) “TurboTax advertisements” and (2) “TurboTax website”—while the others were (3) “Word-of-mouth,” (4) “Advice from a financial professional,” (5) “Information online not from TurboTax,” (6) “Other,” or (7) “Don’t know/Not sure.” *Id.* ¶¶78-79. Other obvious choices, including ones corresponding to Intuit’s contentions here—such as competitors’ ads, consumers’ own experience filing their taxes, or the significant media coverage of litigation against Intuit—were not specifically listed.

Fewer than one-third of the non-opt-out respondents (190 of 607) both stated that they believed they qualified to file for free with TurboTax in TY2021 and chose either “TurboTax advertisements” or “TurboTax website” as a “source[]” of that belief. GX303 ¶¶79; *see* Tr.207:10-208:1. Many of these 190 consumers provided inconsistent responses; one submitted contradictory responses stating that he thought he both could and could not file for free. *See* Tr. 222:7-223:22; RX1017 ¶¶68-69. Again, no respondents were shown a TurboTax ad, the supposed causal source of Novemsky’s “fact of deception” opinion. RX1345 ¶¶199.

II. ARGUMENT

Novemsky’s survey is not “relevant to the task at hand” and does not “rest[] on a reliable foundation.” *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141 (1999). The Court should exclude the survey and any opinions based on it.

A. Novemsky's Survey Is Irrelevant

This proceeding concerns whether a small percentage of TurboTax ads were deceptive. CC's claims thus raise three questions: (1) whether Intuit "disseminated advertisements conveying the claims alleged in the Complaint and challenged in this case"; (2) "whether those Challenged Claims are false or misleading"; and (3) whether any "Challenged Claims found to be false or misleading are material to prospective consumers." *ECM BioFilms, Inc.*, 2015 WL 13021972, at *152 (F.T.C. 2015). Novemsky's survey offers the Court no help in answering these questions or determining any other "fact in issue." Fed. R. Evid. 702(a); *see also LabMD, Inc.*, 2014 WL 2331056, at *3 (F.T.C. May 8, 2014) (Rule 702 governs admissibility of opinions purportedly based on "specialized knowledge"). Indeed, Novemsky's failure to show respondents *any* ads raises many more questions than it answers.

Because they rest on a "perception" survey that failed to show any of the challenged ads, Novemsky's opinions are irrelevant to this case. Novemsky acknowledges that he administered an "unaided" memory test, RX1345 ¶21—*i.e.*, that he asked respondents for their general impressions at the time of the survey without showing them any of the following:

- TurboTax's ads or website, Tr. 62:11-20, 71:4-9, 265:11-266:4;
- The disclosures from the TurboTax ads (including, for TY2021 ads, "for simple tax returns only" and "see if you qualify at TurboTax.com"), Tr.40:16-20, 61:8-11, 62:11-17, 251:11-20; or
- The detailed explanation on the TurboTax website of Free Edition's eligibility criteria, Tr.51:16-20.

These omissions are critical because, "[i]n the real world," Intuit's ads and website "convey additional information"—not considered or tested by Novemsky—that is "important to a consumer's perception" of those sources. *Superior Consulting Servs., Inc. v. Shaklee Corp.*, 2021 WL 4438518, at *12 (11th Cir. Sept. 28, 2021) (unpublished) (affirming exclusion of

survey). Just as “a survey to test likelihood of confusion” in a trademark case “must attempt to replicate the thought processes of consumers encountering the disputed mark ... as they would in the marketplace,” a survey to test whether consumers were deceived by ads or a website must make some effort to replicate real-world market conditions. *Hi-Tech Pharms. Inc. v. Dynamic Sports Nutrition, LLC*, 2021 WL 2185699, at *18 (N.D. Ga. May 28, 2021); *see also THOIP v. Walt Disney Co.*, 690 F. Supp. 2d 218, 236-237 (S.D.N.Y. 2010) (excluding a survey that “did not sufficiently approximate the manner in which consumers encountered the parties’ products in the marketplace”). Instead, Novemsky asked respondents a confusing question seeking their “best understanding,” from memory, of their ability to file for free. Such “memory test[s]” are “useless” to courts. *Instant Media, Inc. v. Microsoft Corp.*, 2007 WL 2318948, at *15 (N.D. Cal. Aug. 13, 2007); *see also Starter Corp. v. Converse, Inc.*, 170 F.3d 286, 297 (2d Cir. 1999) (affirming the exclusion of a survey that “was little more than a memory test”).

In short, because the survey “didn’t show respondents any advertising materials” or webpages, it measured nothing relevant to this case and does not assist the Court in deciding whether Intuit’s ads or website deceived consumers. *Superior*, 2021 WL 4438518, at *12. Put differently, Novemsky’s survey result is “too attenuated” from the subject matter of this proceeding—namely, the perception of Intuit’s ads and website by reasonable consumers (not a curated subset of non-randomly selected consumers)—to assist the Court. *Mier v. CVS Pharmacy, Inc.*, 2022 WL 1599633, at *3 (C.D. Cal. May 9, 2022) (excluding a survey that did not show consumers any allegedly misleading product labels).

B. Novemsky’s Survey Is Unreliable

“[A]t some point, an expert’s methodology becomes so flawed that it is unreliable.” *Superior*, 2021 WL 4438518, at *12. That is the situation here. Even setting aside its irrelevance, Novemsky’s survey is inadmissible because its “methodology and execution” fell

materially short of the “generally accepted standards” of survey-research practices. *Malletier v. Dooney & Bourke, Inc.*, 525 F.Supp.2d 558, 580 (S.D.N.Y. 2007); *see also id.* at 596 (courts must consider the “cumulative effect” of a survey’s flaws).

1. *Sampling and bias*

Diamond’s “Reference Guide on Survey Research”—which Novemsky agrees is an authoritative set of “guidelines for survey research offered in litigation,” GX303 ¶5—explains that effective surveys require “[i]dentification of a survey population ... followed by selection of a sample that accurately represents that population.” RX709 at 380. “[W]hen respondents are not selected randomly from the relevant population,” researchers must take “[s]pecial precautions” to guard against “biased samples.” *Id.* at 382.

Novemsky’s survey does not meet those standards. First, and most concerningly, he allowed over 21% of respondents to opt out—and deleted their responses—after they were told the survey’s sponsor and purpose. *See In re Autozone, Inc.*, 2016 WL 4208200, at *18 (N.D. Cal. Aug. 10, 2016) (excluding a survey because its purpose “was no mystery,” creating “a problem of self-interest bias” and “undermin[ing] any possible inference that the survey responses were objective”), *aff’d*, 789 F.App’x 9 (9th Cir. 2019). Even for those who did not opt out, it was immediately clear to them that the survey related to TurboTax. Tr.184:13-185:10, 289:6-13. The FTC has repeatedly (and correctly) argued that revealing a survey’s sponsor and purpose to respondents introduces fundamental bias in their responses. FTC’s Mot. To Exclude Expert Testimony 7, *FTC v. LendingClub Corp.*, No. 3:18-cv-02454 (N.D. Cal. Feb. 27, 2020), Dkt. 155; FTC’s Reply ISO Mot. for Summ. J. 8, *FTC v. Kutzner*, No. 8:16-cv-00999 (C.D. Cal. Aug. 14, 2017), Dkt. 315.

Other sampling and bias problems abound. For example, the survey inexplicably excluded potential participants who had filed their TY2021 taxes before March 11, 2022, thereby

removing over 107 million taxpayers (60% of the taxpaying public) from the survey population. GX303 ¶¶22; Tr.92:12-19. Although Novemsky did not assess whether their exclusion skewed the survey's results, Tr.93:6-95:8, 143:9-12, there are important reasons to think it did, namely the known differences between the population Novemsky surveyed (taxpayers who had not filed by March 2022) and those he excluded, *see* RX1017 ¶¶40 (early filers “tend to be younger and have lower incomes” and “tend to be owed higher refunds”). Novemsky also excluded 50 million taxpayers who *were* eligible for Free Edition. GX303 ¶¶24-26; Tr.91:5-10. Again, he did not study those consumers or the impact on the survey of their absence, even though none in that group (by definition) could have been deceived by Intuit's advertising of free products. Tr.13:3-14:10.

In addition to these exclusions, Novemsky *included* consumers who potentially introduced bias into his results, without making any effort—much less taking “[s]pecial precautions,” RX709 at 382—to exclude them or test for bias. For example, Novemsky did not ask, and thus has no way of knowing, whether participants were parties to the arbitrations filed in a coordinated mass-arbitration attack against Intuit, Tr.134:13-138:6, 140:17-141:1, or were among the hundreds of thousands of consumers solicited on social media by the mass-arbitration firms, Tr.138:10-139:12. Nor did Novemsky determine whether respondents had heard about the allegations the survey tested (from the class action or from other investigations and lawsuits that have received widespread media coverage). Tr.118:18-122:17, 125:2-126:12, 132:9-134:12, 141:2-5. And as noted, Novemsky did not include any of the foregoing in the survey as possible sources of respondents' impressions. *See* GX303, App. F, at 24, 26.

2. *Lack of test-and-control design*

Novemsky's survey is also unreliable because it lacked a control group or a control question—a defect that courts “routinely” find sufficient to warrant excluding survey evidence as

unreliable. *Valador, Inc. v. HTC Corp.*, 242 F.Supp.3d 448, 463 (E.D. Va.), *aff'd*, 707 F.App'x 138 (4th Cir. 2017). Surveys that, like Novemsky's, aspire "to determine the source" of "attitudes or beliefs or behaviors"—rather than merely "describ[ing]" them—are necessarily trying to "test a causal proposition" and thus must include an appropriate control group. RX709 at 397; *see also id.* at 399 n.178 ("The [FTC] has long recognized the need for some kind of control for closed-ended questions."). A test-and-control design allows for reliable causal inferences because it allows a researcher to isolate the effect of a single condition (*e.g.*, an advertisement) on two otherwise-identical populations. *See id.* at 397-401. Novemsky himself agrees with these principles: He testified in a 2016 false-advertising trial that because an opposing expert's survey "did not contain a control," it was not "a test of what the ad caused consumers to understand or not understand." RX1349 at 1840. He further explained that a "cornerstone of experimental design is that if you're going to draw any causal inference"—such as whether "an ad caused some effect like a consumer understanding of some kind"—"you have to have an experimental design that includes a control and a test group. *Any other design makes causal inference ... impossible.*" *Id.* at 1841 (emphasis added).

Nonetheless, contravening these well-worn principles and Novemsky's own views, Novemsky's survey did not use a test-and-control approach, *see* Tr.77:2-4; GX303 ¶30; RX 1345 ¶17, fundamentally undermining his unscientific claim to have identified the "most likely source of consumer misimpressions," GX303 ¶95; *see also Reinsdorf v. Skechers U.S.A.*, 922 F.Supp.2d 866, 878-879 (C.D. Cal. 2013) (excluding a control-less survey because it lacked "fundamental reliability"). Novemsky's unreliable survey design precludes him from making any scientifically founded causal claims. If any of CC's non-testifying experts conducted a proper survey, CC have not produced it.

Novemsky's rebuttal report defends his approach by arguing that there were no other "credible" potential sources of consumers' misimpressions about their Free Edition eligibility. RX1345 ¶16. However, Novemsky has acknowledged that he "did not use any experimental studies to eliminate" other such possibilities, Tr.90:22-91:4, or conduct a pre-survey interview with consumers to assess whether any other plausible possibilities existed, Tr.165:20-166:22. Novemsky also states that he used no control because he *assumed* consumers would have preexisting impressions about their Free Edition eligibility. GX303 ¶¶31-32. Rule 702 forbids "reliance on unfounded assumptions" of this sort. *Junk v. Terminix Int'l Co.*, 628 F.3d 439, 448 (8th Cir. 2010).

III. CONCLUSION

The Court should exclude Novemsky's survey and any reports or testimony based on it.

Dated: February 10, 2023

Respectfully submitted,

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

In the Matter of:

Intuit Inc., a corporation.

Docket No. 9408

**STATEMENT PURSUANT TO
ADDITIONAL PROVISION 4 OF THE SCHEDULING ORDER**

Pursuant to Additional Provision No. 4 of the April 27, 2022 Scheduling Order, as adopted in the September 12, 2022 First Revised Scheduling Order, Respondent Intuit Inc. respectfully submits this Statement representing that Counsel for Respondent has conferred with Complaint Counsel in a good faith effort to resolve the issues raised by this motion. The parties corresponded by email on February 8 and 9, 2023 concerning this motion but were unable to reach an agreement.

Dated: February 10, 2023

Respectfully submitted,

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

In the Matter of:

Intuit Inc., a corporation.

Docket No. 9408

**[PROPOSED] ORDER GRANTING INTUIT INC.'S MOTION *IN LIMINE*
TO EXCLUDE SURVEY AND RELATED OPINIONS OF NATHAN NOVEMSKY**

Upon consideration of Respondent Intuit Inc.'s February 10, 2023 Motion *In Limine* To Exclude Survey and Related Opinions of Nathan Novemsky,

IT IS ORDERED that the motion is GRANTED.

IT IS FURTHER ORDERED that the survey conducted by Nathan Novemsky and his opinions related to that survey are excluded from evidence in this proceeding, and Complaint Counsel are precluded from offering testimony or other evidence concerning the survey.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date: _____

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

In the Matter of:

Intuit Inc., a corporation.

Docket No. 9408

**DECLARATION OF DEREK A. WOODMAN
IN SUPPORT OF RESPONDENT'S MOTION *IN LIMINE*
TO EXCLUDE SURVEY AND RELATED OPINIONS OF NATHAN NOVEMSKY**

I, Derek A. Woodman, declare as follows:

1. I am counsel at Wilmer Cutler Pickering Hale and Dorr LLP (“WilmerHale”). I represent the respondent, Intuit Inc., in the above-captioned proceeding.
2. I submit this declaration in support of Intuit’s motion *in limine* to exclude the survey and related opinions of Nathan Novemsky, filed on February 10, 2023 (the “Motion”).
3. Attached as **Exhibit A** is a true and correct copy of the transcript of Professor Novemsky’s videotaped deposition in this proceeding, held at the Washington, DC offices of WilmerHale (2100 Pennsylvania Avenue NW) on Wednesday, February 1, 2023. The transcript is cited in the Motion as “Tr.” Information designated as confidential has been redacted. The Motion does not cite to or otherwise rely on that confidential information.
4. Attached as **Exhibit B** is a true and correct copy of the FTC’s Motion To Exclude Expert Testimony in *FTC v. LendingClub Corp.*, No. 3:18-cv-02454 (N.D. Cal. Feb. 27, 2020), Dkt. 155.
5. Attached as **Exhibit C** is a true and correct copy of the FTC’s Reply Memorandum in Support of Summary Judgment in *FTC v. Kutzner, et al.*, No. 8:16-cv-00999 (C.D. Cal. Aug. 14, 2017), Dkt. 315.

6. Attached is a true and correct copy of the public version of **GX303**: Professor Novemsky's expert report dated December 9, 2022. Information designated as confidential has been redacted. The Motion does not cite to or otherwise rely on that confidential information.

7. Attached is a true and correct copy of **RX 709**: Shari Seidman Diamond's "Reference Guide on Survey Research," from the Federal Judicial Center's *Reference Manual on Scientific Evidence* (3d ed. 2011).

8. Attached is a true and correct copy of the public version of **RX 1017**: the expert report of Professor John R. Hauser, dated January 13, 2023. The exhibits and certain appendices (A-D) have been omitted. Information designated as confidential has been redacted. The Motion does not cite to or otherwise rely on that confidential information, or the omitted appendices and exhibits.

9. Attached is a true and correct copy of **RX1345**: Professor Novemsky's rebuttal expert report dated January 27, 2023. Information designated as confidential has been redacted. The Motion does not cite to or otherwise rely on that confidential information.

10. Attached are true and correct excerpts from **RX1349**: Professor Novemsky's July 18, 2016 trial testimony in *State of Oregon ex rel. Rosenblum v. Living Essentials, LLC*, No. 14-cv-09149 (Multnomah County Circuit Court).

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

Executed on this 10th day of February, 2023, in Washington, DC.

By: /s/ Derek A. Woodman
Derek A. Woodman

Exhibit A

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

-----)
IN THE MATTER OF)
INTUIT, INC., a corporation,)
Respondent.)
-----)

Videotaped Deposition of NATHAN NOVEMSKY,
held at the offices of Wilmer Hale
2100 Pennsylvania Avenue NW, Washington,
D.C. 20037, commencing at 9:15 a.m.,
Wednesday, February 1, 2023, before
Tina M. Alfaro, RPR, CRR, RMR and Notary
Public within and for the District of Columbia.

Job No. 5652936
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1 APPEARANCES :

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22 ALSO PRESENT: Ryan Heathcock (videographer)

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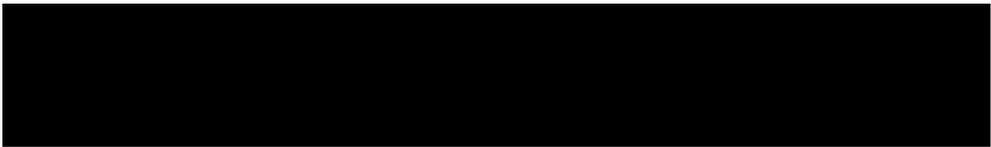
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1 THE VIDEOGRAPHER: Good morning. We are 09:14:56
2 going on the record. The time is 9:15 a.m. 09:14:57
3 Eastern. Please note that the microphones are 09:15:02
4 sensitive and may pick up whispering and private 09:15:05
5 conversations. Please be sure you mute your 09:15:09
6 microphones at this time. Audio and video 09:15:12
7 recording will continue to take place unless all 09:15:14
8 parties agree to go off the record. 09:15:16
9 Today's date is February the 1st, 2023. 09:15:19
10 And so begins media unit No. 1 in the 09:15:23
11 video-recorded deposition of Mr. Nathan Novemsky 09:15:25
12 taken by counsel for the Defendant in the matter of 09:15:29
13 Intuit as an administrative proceeding in the 09:15:33
14 United States of America Federal Trade Commission. 09:15:36
15 This is Case Docket No. 9408. The location of 09:15:39
16 today's deposition is 2100 Pennsylvania Avenue, 09:15:44
17 Northwest, Washington, D.C. 09:15:49
18 My name is Ryan Heathcock representing 09:15:51
19 Veritext Legal Solutions. Our court reporter today 09:15:54
20 is Ms. Tina Alfaro also representing Veritext Legal 09:15:57
21 Solutions. I am not related to any party in this 09:16:02
22 action, nor am I financially interested in the 09:16:04

1 outcome. 09:16:07

2 If there are any objections to proceeding, 09:16:09

3 please state them at the time of your appearance. 09:16:10

4 Counsel and all present, would you now 09:16:14

5 please state your appearances and affiliations for 09:16:15

6 the record beginning with the noticing attorney. 09:16:19

7 MR. PAIKIN: Jonathan Paikin from 09:16:23

8 WilmerHale representing Intuit, and with me today 09:16:26

9 from my law firm are Charles Bridge and Ahmed Rizk. 09:16:28

10 MS. PLETT: Rebecca Plett, Counsel 09:16:32

11 supporting the complaint from the FTC. With me 09:16:34

12 today are my co-counsel Roberto Anguizola and James 09:16:37

13 Evans. 09:16:40

14 MR. PAIKIN: And on the phone. 09:16:40

15 MS. PLETT: And on the phone is Sara 09:16:41

16 Tonnesen also. 09:16:42

17 (Witness sworn.) 09:16:46

18 WHEREUPON: 09:16:46

19 NATHAN NOVEMSKY, 09:16:46

20 called as a witness herein, having been first duly 09:16:46

21 sworn, was examined and testified as follows: 09:16:46

22 09:16:46

1	EXAMINATION	09:16:46
2	BY MR. PAIKIN:	09:16:57
3	Q. And how would you like me to refer to you?	09:16:57
4	Professor Novemsky? Dr. Novemsky? It's whatever	09:16:59
5	your preference is.	09:16:59
6	A. Professor Novemsky is great.	09:17:03
7	Q. Okay. Great.	09:17:06
8	Professor Novemsky, thank you for coming	09:17:07
9	down today for the deposition. I take it you've	09:17:08
10	been deposed in the past and you're generally	09:17:11
11	familiar with the rules of how depositions work?	09:17:13
12	A. I am.	09:17:15
13	Q. So I'll just say briefly if I ask you a	09:17:16
14	question and you don't understand it, let me know.	09:17:18
15	And if you don't say anything, I'm going to assume	09:17:21
16	you understood my question. Is that okay?	09:17:23
17	A. That sounds good.	09:17:25
18	Q. And if you need a break at any time, just	09:17:26
19	let me know.	09:17:28
20	A. Okay.	09:17:29
21	Q. How many people filed their state and	09:17:31
22	federal taxes for free using TurboTax Free Edition	09:17:34

1	in tax year 2021?	09:17:38
2	A. I'd have to look that up. I don't have	09:17:40
3	the number off the top of my head.	09:17:41
4	Q. Approximately how many?	09:17:43
5	A. Filed their state and federal taxes for	09:17:46
6	free in 2021?	09:17:51
7	Q. Using TurboTax Free Edition.	09:17:53
8	A. I would estimate it's around a third of	09:17:56
9	tax filers.	09:17:59
10	Q. Do you have a sense of how many people	09:18:01
11	actually filed on TurboTax Free Edition in 2021?	09:18:04
12	A. I would say the order of magnitude is tens	09:18:11
13	of millions, but I don't have a number off the top	09:18:13
14	of my head.	09:18:15
15	Q. And do you know how many people filed	09:18:15
16	their state and federal taxes for free using	09:18:18
17	TurboTax Free Edition or one of its predecessor	09:18:21
18	free versions between tax year 2014 and tax year	09:18:23
19	2021?	09:18:28
20	A. Again, I don't have that number off the	09:18:28
21	top of my head.	09:18:31
22	Q. Could you estimate?	09:18:31

1 versus charging for it, I think it's okay to offer 09:19:25
2 it for free. 09:19:27

3 Q. And do you believe that consumers that 09:19:28
4 file for free on TurboTax Free Edition were 09:19:30
5 deceived by Intuit's marketing? 09:19:37

6 A. Consumers who file for free on Free 09:19:40
7 Edition, I don't know if they were deceived by 09:19:43
8 Intuit's marketing. They weren't the group I 09:19:46
9 studied either. 09:19:48

10 Q. Do you have any scientific evidence that 09:19:49
11 any of the people who filed their taxes for free 09:19:51
12 using TurboTax Free Edition or one of its 09:19:53
13 predecessor free versions was deceived by Intuit's 09:19:56
14 ads? 09:19:59

15 A. I do not have evidence for that group of 09:20:00
16 people. 09:20:01

17 Q. And do you have scientific evidence that 09:20:02
18 any of the people who filed their taxes for free 09:20:04
19 using TurboTax Free Edition or one of its 09:20:07
20 predecessor free versions was deceived by Intuit's 09:20:10
21 Website? 09:20:15

22 A. Again, I didn't study that group. 09:20:16

1 Q. And you excluded those people from your 09:20:17
2 perception study, correct? 09:20:20

3 A. That's correct. 09:20:21

4 Q. As long as there are appropriate 09:20:26
5 disclosures to consumers as to eligibility to file 09:20:28
6 for free on TurboTax, is there anything wrong with 09:20:32
7 advertising a free product to consumers? 09:20:38

8 A. There's nothing wrong with advertising 09:20:43
9 that says we have a free product and is not 09:20:45
10 deceptive or misleading to consumers. 09:20:49

11 Q. So is it fair to say that a key question 09:20:51
12 in this case is whether the disclosures about 09:20:54
13 eligibility to file on TurboTax were adequate? 09:20:56

14 A. I think it's -- the question to me is not 09:21:03
15 specifically about the disclosures, although they 09:21:06
16 can certainly be part of the answer. The question 09:21:08
17 to me is did consumers take away the wrong message 09:21:10
18 from the marketing campaign writ large, including 09:21:13
19 any disclosures, if there are any, or whatever else 09:21:16
20 was said or done. 09:21:18

21 Q. And what do you include in "whatever else 09:21:19
22 was said or done"? 09:21:21

1 A. So any messages that were communicated 09:21:24
2 through any of the many channels that we know 09:21:25
3 Intuit used. We know they used television 09:21:28
4 advertising, radio, social media, search engine 09:21:31
5 optimization, banner ads, direct e-mails, and a 09:21:35
6 variety of other things. So if some of those 09:21:39
7 things leaves consumers with the wrong impression, 09:21:41
8 that's the ultimate question to me about whether or 09:21:43
9 not the marketing was appropriate. 09:21:45

10 Q. And do you include Intuit's Website in 09:21:46
11 that list of things to be considered? 09:21:49

12 A. I do. 09:21:52

13 Q. And at what point in time -- strike that. 09:21:54

14 What is the relevant point in time in 09:21:59
15 determining whether or not a consumer had a 09:22:02
16 misimpression? 09:22:05

17 A. Any point in time would be relevant in the 09:22:07
18 purchase funnel, whether it's near what we call the 09:22:09
19 top of the funnel or the middle or the bottom of 09:22:12
20 the funnel. If there's deception at some point, 09:22:14
21 that's an issue. 09:22:16

22 Q. If a consumer is not under a misperception 09:22:18

1 at the time that they make the purchase, is that 09:22:23
2 relevant to your analysis? 09:22:26

3 A. Again, I would say deception at any point 09:22:29
4 in the funnel, including up to and maybe even 09:22:31
5 beyond purchase, is relevant to my analysis. So, 09:22:33
6 you know, it's all relevant. 09:22:37

7 Q. At what point in the funnel did you study 09:22:39
8 as part of your survey? 09:22:41

9 A. I studied what I would call -- I don't 09:22:45
10 know the exact point, but I would say the top part 09:22:47
11 of the funnel would be how I would describe it. 09:22:49

12 Q. Could you elaborate on that? 09:22:51

13 A. Sure. So this is when consumers haven't 09:22:52
14 yet filed their taxes. So they certainly haven't 09:22:56
15 made a purchase. Some of them may be considering 09:22:59
16 whether to make a purchase, some of them are still 09:23:01
17 thinking more abstractly about it, what do I want 09:23:03
18 to do in the next of couple weeks as my taxes 09:23:06
19 become due. So it would be people in that kind of 09:23:09
20 frame of mind. 09:23:11

21 Q. And are these people that are at the 09:23:12
22 Website preparing to use the service; is that the 09:23:16

1 point in time that's the focal point of your 09:23:19
2 survey? 09:23:22
3 A. So, again, my survey is broader than that. 09:23:22
4 Some people may have gone to the Website, many may 09:23:24
5 not have. I didn't ask that and I wasn't concerned 09:23:27
6 with whether they had specifically visited the 09:23:30
7 Website or not. So some have and some haven't. 09:23:32
8 Q. And I'm trying to focus on the point in 09:23:35
9 time when -- where that was the focus of your 09:23:36
10 perception study for a consumer's understanding of 09:23:41
11 the eligibility requirements to file on Free 09:23:44
12 Edition, and my question is did you focus on -- at 09:23:49
13 the point of sale? 09:23:52
14 A. I did not focus exclusively on the point 09:23:54
15 of sale. 09:23:57
16 Q. Did your survey that you undertook focus 09:23:57
17 on the time of the point of sale or a time prior to 09:24:00
18 that? 09:24:03
19 A. As I said, it focused on the entire top of 09:24:05
20 the funnel. So I didn't know where consumers were 09:24:08
21 in that process other than to say they hadn't filed 09:24:10
22 yet. 09:24:13

1 Q. I noticed on page 4 of your report you 09:24:15
2 said that "This issue is informed by the likelihood 09:24:21
3 of these taxpayers having the misimpression that 09:24:23
4 they can file their income taxes for free using 09:24:29
5 TurboTax." Do you remember writing that in your 09:24:32
6 report? 09:24:34
7 A. That sounds like it was in my report. 09:24:34
8 Q. And is that an assumption that complaint 09:24:36
9 counsel asked you to make? 09:24:38
10 A. I'm sorry. I'd have to read it again. 09:24:40
11 Q. You said "This issue is informed by the 09:24:43
12 likelihood of these taxpayers having the 09:24:46
13 misimpression that they can file their income taxes 09:24:48
14 for free using TurboTax." 09:24:53
15 A. I don't hear an assumption in that 09:24:55
16 statement. 09:24:57
17 Q. Okay. Where -- as a scientist wasn't your 09:24:57
18 goal to test whether or not there was a 09:25:02
19 misimpression? 09:25:05
20 A. My goal was to test whether and to what 09:25:09
21 extent there was a misimpression among consumers 09:25:11
22 about filing for free with TurboTax, yes. 09:25:13

1 Q. And when you began that analysis you say 09:25:15
2 in your report that your approach to this issue was 09:25:18
3 informed by the likelihood of these taxpayers 09:25:22
4 having the misimpression that they can file their 09:25:25
5 income taxes for free using TurboTax. My question 09:25:28
6 is why did you start with that premise? 09:25:31

7 A. I'd have to see the report and see what 09:25:37
8 the context was for why I was saying that. That 09:25:39
9 sentence in isolation I can't interpret without 09:25:42
10 knowing what came before and after it. 09:25:44

11 Q. As a scientist do you think it's 09:25:46
12 appropriate to start with the answer to the 09:25:48
13 question before you undertake the survey? 09:25:50

14 A. No, but I don't think that sounds like the 09:25:55
15 answer to the questions that I was trying to answer 09:25:57
16 with my survey. 09:25:58

17 Q. In designing your study where did you go 09:26:01
18 to determine the eligibility requirements for Free 09:26:03
19 Edition in tax year 2021? 09:26:08

20 A. I saw them a number of places. They 09:26:13
21 were -- they may have been in the complaint. I 09:26:16
22 don't recall, but they were also on the TurboTax 09:26:18

1 Website. So that's, you know, one of the places I 09:26:20
2 saw them. 09:26:24

3 Q. And one of the things that you did was you 09:26:24
4 set up a series of eligibility requirements for 09:26:26
5 your survey, correct? 09:26:30

6 A. I did screen my participants on certain 09:26:34
7 eligibility requirements based on TurboTax's 09:26:39
8 eligibility requirements, yes. 09:26:40

9 Q. And when you developed those questions, 09:26:41
10 where did you get the information as to what the 09:26:43
11 eligibility requirements were to use TurboTax Free 09:26:47
12 Edition? 09:26:51

13 A. The disclosure of the qualification 09:26:52
14 criteria was in a number of legal documents at that 09:26:54
15 point. I don't remember if -- again, if I got it 09:26:58
16 from the complaint, if I got it from the Website, 09:26:59
17 but it was -- it was in a number of locations that 09:27:01
18 I had seen. 09:27:04

19 Q. You don't recall whether or not you went 09:27:05
20 to the Website to find the eligibility 09:27:06
21 requirements? 09:27:09

22 A. I don't specifically recall at the time 09:27:11

1 that I was making the survey that I went to get 09:27:13
2 them from there because, as I said, I saw them in a 09:27:15
3 number of documents at that point. And so I don't 09:27:18
4 remember specifically two years ago when I was 09:27:20
5 doing this which source informed me of that because 09:27:22
6 I was informed from several places at different 09:27:25
7 times. 09:27:27

8 Q. So the complaint would have been written 09:27:27
9 by the lawyers in this case, correct? 09:27:29

10 A. Yes. 09:27:33

11 Q. And so as you were designing your 09:27:33
12 scientific study to determine the eligibility 09:27:36
13 requirements to use Free Edition, you looked at the 09:27:39
14 complaint that was drafted by the lawyers; is that 09:27:43
15 your testimony? 09:27:46

16 A. So my testimony is that to understand the 09:27:47
17 assignment better what my goal they were asking 09:27:51
18 me -- what they were asking me to do was I did look 09:27:54
19 at the complaint to try to understand what is it 09:27:57
20 they want me to study and learn about. And so part 09:27:59
21 of my development of my survey did involve looking 09:28:02
22 at the complaint. 09:28:04

1 Q. In developing the eligibility requirements 09:28:07
2 for your survey did you validate what the lawyers 09:28:10
3 wrote in the complaint? 09:28:15

4 A. I don't know if I would use the word 09:28:19
5 "validate," but I did -- as I said, I did go to the 09:28:21
6 Website at some point and look at the 09:28:24
7 qualifications for Free Edition on the TurboTax 09:28:26
8 Website. I can't remember the exact moment at 09:28:28
9 which I did that and I probably did it more than 09:28:32
10 once. So that's where I learned about the 09:28:34
11 eligibility requirements. 09:28:39

12 So there were a number of sources that I 09:28:40
13 said, and I never noticed any discrepancy between 09:28:42
14 any of the sources. 09:28:44

15 Q. And can you describe the process that you 09:28:46
16 followed when you went to Intuit's Website? 09:28:48

17 A. This was a long time ago now, over a year, 09:28:53
18 but my memory is that I went to the Website, I may 09:28:57
19 have clicked on various links. If I saw the 09:29:04
20 disclosure for qualification criteria I certainly 09:29:07
21 would have clicked on that one. I don't remember 09:29:11
22 how far into the process I went. As I said, this 09:29:14

1 was a long time ago. 09:29:19

2 Q. Do you recall whether it was hard to find 09:29:20

3 the eligibility requirements on the Website? 09:29:21

4 A. I don't recall. 09:29:27

5 Q. When's the last time that you visited the 09:29:33

6 Website? 09:29:35

7 A. I can't be certain as I've visited a 09:29:38

8 couple of times. I would say it was months ago, 09:29:40

9 but I couldn't give you an exact number. 09:29:43

10 Q. What are the eligibility requirements in 09:29:47

11 tax year 2021 to file on Free Edition? 09:29:51

12 A. So my understanding is that these 09:29:55

13 requirements have moved around from year to year. 09:29:57

14 One of the simpler versions of the requirements 09:29:59

15 that stuck in my head is to file the Form 1040 and 09:30:02

16 no other forms or schedules along with it. 09:30:06

17 Q. Can you tell me in tax year 2021 what the 09:30:13

18 eligibility requirements were to file on Free 09:30:16

19 Edition? 09:30:22

20 A. Again, my understanding is that it's 09:30:22

21 filing a Form 1040 and no additional schedules or 09:30:23

22 forms. 09:30:27

1 Q. Now, you've studied those eligibility 09:30:28
2 requirements pretty closely, haven't you? 09:30:31

3 A. I wouldn't say I've studied them. I'd say 09:30:35
4 I read them for the purpose of coming up with 09:30:37
5 screening questions for my questionnaire. 09:30:40

6 Q. And you specifically designed your study 09:30:42
7 to match the eligibility requirements for your 09:30:44
8 study to the eligibility requirements to file on 09:30:47
9 Free Edition in tax year 2021, correct? 09:30:50

10 A. I wouldn't say I matched them exactly. 09:30:54
11 The goal of my screening questionnaire was to only 09:30:56
12 let in people to the questionnaire who were not 09:30:58
13 eligible to file Free Edition. That was my only 09:31:01
14 goal. I didn't need to match exactly to meet that 09:31:04
15 goal. 09:31:06

16 Q. And the purpose of your study was to 09:31:07
17 determine whether or not consumers had an 09:31:10
18 understanding of the eligibility requirements to 09:31:13
19 file on Free Edition in tax year 2021? 09:31:15

20 A. That's not the goal of my studies. The 09:31:19
21 goals of my study were perhaps related to that, but 09:31:22
22 not the same. The goals of my studies were to 09:31:26

1 understand whether they had a misimpression that 09:31:28
2 they could file for free when, in fact, from my 09:31:31
3 screening questions I knew they couldn't, what the 09:31:35
4 source of that misimpression was, and then lastly 09:31:37
5 whether they thought they had simple returns as 09:31:40
6 TurboTax uses the term. 09:31:42

7 Q. So when you say whether or not they had a 09:31:44
8 misimpression of whether or not they could file for 09:31:45
9 free, how is that different from whether or not 09:31:47
10 they satisfied the eligibility requirements to file 09:31:54
11 for free? 09:31:56

12 A. So I didn't need them to understand the 09:31:58
13 eligibility requirements in full. I needed them to 09:32:00
14 understand their standing vis-a-vis those 09:32:03
15 eligibility requirements. So specifically can you 09:32:05
16 file for free or not. That individual consumer was 09:32:07
17 the focus of my study, not whether they understood 09:32:11
18 all the criteria. 09:32:13

19 Q. And weren't -- wasn't a consideration -- 09:32:17
20 strike that. 09:32:22

21 Weren't you trying to determine whether or 09:32:22
22 not that particular consumer was eligible to file 09:32:25

1 for free on TurboTax? 09:32:28

2 A. So my screening questions would have been 09:32:31

3 with the goal of finding out whether that consumer 09:32:34

4 was eligible for filing for free, yes. 09:32:37

5 Q. And it was an unaided memory test 09:32:40

6 essentially, correct? 09:32:43

7 A. It was asking consumers what I believe was 09:32:45

8 about three questions about their income and/or 09:32:48

9 other parts of their tax situation for the tax year 09:32:51

10 2021. 09:32:55

11 Q. And those consumers were asked to respond 09:32:55

12 whether or not they believed they could file for 09:33:00

13 free on Free Edition, correct? 09:33:03

14 A. They were. 09:33:07

15 Q. And so essentially you were asking them 09:33:08

16 whether or not they believed they were eligible to 09:33:10

17 file on Free Edition, right? 09:33:14

18 A. I think whether or not they were eligible 09:33:18

19 or could file for free are interchangeable. 09:33:19

20 Q. And is it fair to say that you spent some 09:33:23

21 time examining the eligibility requirements to file 09:33:27

22 for free on TurboTax? 09:33:31

1 A. I made myself familiar with them, again, 09:33:35
2 for the purposes of the screening. 09:33:37

3 Q. And without those eligibility requirements 09:33:40
4 in front of you, can you tell me, again, what the 09:33:43
5 eligibility requirements are to file for free on 09:33:46
6 TurboTax in 2021? 09:33:48

7 A. Again, I don't know the full set. I know 09:33:51
8 that it includes -- at some point it included not 09:33:53
9 filing any forms other than the Form 1040, no other 09:33:57
10 schedules or forms, which includes things like you 09:34:00
11 can't itemize deductions, you can't have certain 09:34:02
12 types of income outside of ordinary income, for 09:34:05
13 example, from a W-2. There are also certain kinds 09:34:10
14 of deductions you might not be able to take as a 09:34:13
15 function that could disqualify you for the Free 09:34:16
16 Edition. 09:34:18

17 Q. Anything else? 09:34:19

18 A. Not off the top of my head, no. 09:34:21

19 Q. What tax situations are not covered by the 09:34:23
20 eligibility requirements to use Free Edition in tax 09:34:26
21 year 2021? 09:34:31

22 A. Could you restate the question? 09:34:31

1 Q. Yeah. What tax situations that a consumer 09:34:35
2 finds himself in would make that consumer 09:34:44
3 ineligible to use TurboTax Free Edition in 2021? 09:34:49
4 A. So as I said, there's a number of them. I 09:34:54
5 don't know an exhaustive list, but some things that 09:34:56
6 come to mind is if you itemize deductions you 09:34:58
7 cannot use TurboTax. If you have certain kinds of 09:35:01
8 income, maybe if you own your own business. 09:35:03
9 There -- maybe unemployment income has sometimes 09:35:06
10 been in bounds and sometimes been out of bounds 09:35:09
11 over the years. I don't recall in 2021 whether it 09:35:13
12 was in bounds or out of bounds. And there were a 09:35:16
13 number of other requirements. 09:35:18
14 Q. And sitting here today, what other 09:35:19
15 requirements can you recall? 09:35:22
16 A. I'd have to look at my report. I have 09:35:25
17 screening questions in there. I don't remember 09:35:27
18 them all word for word. 09:35:29
19 Q. Professor Novemsky, I'm handing you a 09:35:45
20 document that's been previously marked in this case 09:35:56
21 as RX-3. Take a moment to review it. 09:35:57
22 (Witness reviewing document.) 09:36:56

1 BY MR. PAIKIN: 09:36:56

2 Q. Have you seen Exhibit RX-3? 09:36:56

3 A. I have. 09:36:59

4 Q. When have you seen it? 09:37:00

5 A. Probably a number of times over the time 09:37:03

6 that I was preparing my survey and report. 09:37:05

7 Q. And did you use RX-3 in the preparation of 09:37:08

8 your report? 09:37:12

9 A. I believe I did. 09:37:15

10 Q. In what capacity? 09:37:16

11 A. I don't recall offhand. I'd have to look 09:37:20

12 at my report. 09:37:22

13 Q. Do you recall whether or not you cited to 09:37:24

14 RX-3 for the eligibility requirements to file for 09:37:26

15 free on TurboTax Free Edition? 09:37:31

16 A. Again, I don't remember because there are 09:37:35

17 a number of places I could have cited to. I don't 09:37:37

18 know if I cited this specific version or a 09:37:39

19 different one. 09:37:41

20 Q. Can you describe the allegedly deceptive 09:37:42

21 ads that Intuit ran in tax year 2014? 09:37:49

22 A. I don't know them tax year by tax year, 09:37:54

1 but certainly my understanding of the allegedly 09:37:57
2 deceptive ads is there are a lot of versions, but 09:38:00
3 one most that stands out in my mind is the 09:38:03
4 television version. And so it's a 30-second video 09:38:07
5 ad where the word "free" is repeated, you know, 40 09:38:10
6 or 50 times and little else is said. 09:38:14

7 Q. What year did that ad run? 09:38:17

8 A. I don't remember every year that that ad 09:38:18
9 ran, but it ran in recent years. I don't know if 09:38:19
10 it ran as far as back as 2014. 09:38:22

11 Q. What years did that ad run that you can 09:38:26
12 recall? 09:38:28

13 A. So I believe some version of that ad -- 09:38:30
14 and there were a number of instantiations of it -- 09:38:32
15 was running in the early 2020s and in the late -- 09:38:38
16 in 2019, 2018, around that time. 09:38:41

17 Q. And what -- can you describe the substance 09:38:43
18 of that ad? 09:38:45

19 A. I think I did, but I can try again. 09:38:47

20 Q. Well, was it -- what were the actors on 09:38:50
21 the ad doing? 09:38:54

22 A. So there were a number of different things 09:38:55

1 they were doing. In some they were in what looked 09:38:57
2 like a dance class, in some they were in what 09:39:00
3 looked like an auction, and there were a number of 09:39:05
4 other settings where they basically were saying 09:39:08
5 free over and over again. 09:39:10

6 Q. Okay. Now, I'm going to ask you specific 09:39:12
7 questions. If you don't remember, that's fine, but 09:39:14
8 I do want to know what you recall with respect to 09:39:16
9 ads that were run in each year. 09:39:18

10 So can you describe the ads -- can you 09:39:22
11 describe the allegedly deceptive ads that Intuit 09:39:25
12 ran for tax year 2014? 09:39:28

13 A. Again, I don't have knowledge about 09:39:32
14 exactly which ad ran in exactly which year. So 09:39:34
15 that's not how I remembered them. I remember the 09:39:37
16 locus of ads that I heard "that's" so I added the 09:39:39
17 dashes I'm understanding was run in the relevant 09:39:42
18 period of time. That's the extent of my 09:39:47
19 understanding. 09:39:49

20 Q. Did you review tax year 2014 ads in 09:39:49
21 connection with the preparation of your report? 09:39:52

22 A. Again, the ads I reviewed, I don't know 09:39:54

1 in that year. 09:41:54

2 Q. Did you show any of Intuit's tax year 2017 09:41:55

3 ads to the participants in your perception 09:41:59

4 survey? 09:42:01

5 A. No. 09:42:02

6 Q. Can you describe the allegedly deceptive 09:42:03

7 ads that Intuit ran for tax year 2018? 09:42:06

8 A. Again, I don't know which were run in 09:42:10

9 which specific year. So I don't know which ones 09:42:13

10 were run specifically in 2018. Many of the ads I 09:42:15

11 saw may well have run in 2018. 09:42:18

12 Q. Did you review Intuit's tax year 2018 09:42:20

13 advertisements in connection with the preparation 09:42:26

14 of your report? 09:42:27

15 A. Again, I don't know. I reviewed a number 09:42:28

16 of ads, some of them probably ran in 2018, but I 09:42:30

17 don't know for sure which ones ran in that 09:42:34

18 particular year. 09:42:36

19 Q. Did you show any of Intuit's tax year 2018 09:42:37

20 ads to the participants in your perception study? 09:42:41

21 A. No. 09:42:45

22 Q. Can you describe the allegedly deceptive 09:42:46

1 ads that Intuit ran for tax year 2019? 09:42:49

2 A. I think it's likely that some of the ads I 09:42:55
3 reviewed were from 2019, the ones I just described 09:42:57
4 to you about saying free over and over again in a 09:43:00
5 variety of contexts, but I can't say for certain 09:43:04
6 sitting here which ads specifically ran in 2019. 09:43:06

7 Q. Did you show any of Intuit's tax year 2019 09:43:10
8 ads to the participants in your perception study? 09:43:13

9 A. No. 09:43:16

10 Q. Can you describe the ads that Intuit ran 09:43:17
11 in tax year 2020? 09:43:20

12 A. Again, I'm fairly confident that some of 09:43:25
13 the ads I saw were run in 2020, but I can't say 09:43:28
14 specifically which ads ran in exactly that year. 09:43:31

15 Q. Did you show any of Intuit's tax year 2020 09:43:33
16 ads to the participants in your perception study? 09:43:37

17 A. No. 09:43:39

18 Q. Can you describe the ads that Intuit ran 09:43:40
19 for tax year 2021? 09:43:42

20 A. I think a number of the ads that I studied 09:43:47
21 were from tax year '21. I think the spelling bee 09:43:49
22 and some of the others that said free over and over 09:43:57

1 again were run in 2021. 09:44:00

2 Q. Did you show any of Intuit's tax year 2021 09:44:03

3 ads to the participants in your study? 09:44:07

4 A. No. 09:44:11

5 Q. Have you seen any of the ads that Intuit 09:44:13

6 will be running this year, for tax year 2022? 09:44:15

7 A. I don't know if the ads I saw will be 09:44:21

8 running this year. 09:44:24

9 Q. Have you seen any ads that, to your 09:44:30

10 understanding, Intuit will be running for tax year 09:44:33

11 2022? 09:44:37

12 A. Again, I don't know which ads they plan to 09:44:39

13 run in 2022. 09:44:41

14 Q. Do you have any opinion about the ads that 09:44:44

15 Intuit will be running this year? 09:44:47

16 A. I don't know what the ads are. So it's 09:44:50

17 hard to have an opinion about them. 09:44:52

18 Q. Do you recall what disclosures were 09:45:00

19 contained in Intuit's television ads that ran for 09:45:02

20 tax year 2021? 09:45:07

21 A. I do. 09:45:10

22 Q. What are they? 09:45:11

1 A. My understanding is that for most of the 09:45:14
2 ads, at some point toward the end of the ad there 09:45:16
3 was on screen -- usually in smaller font near the 09:45:19
4 bottom or underneath the central claims, there was 09:45:23
5 a phrase saying "for simple tax returns only." 09:45:25
6 Q. Anything else? 09:45:31
7 A. Not that I recall. 09:45:35
8 Q. Do you recall whether or not there was a 09:45:39
9 written disclosure on Intuit's 2021 television ads 09:45:40
10 that said see if you qualify at TurboTax.com? 09:45:44
11 A. I don't remember whether that was in 2021 09:45:51
12 or not. 09:45:54
13 Q. Do you recall seeing any ads where Intuit 09:45:59
14 included a written disclosure that said see if you 09:46:04
15 qualify at TurboTax.com? 09:46:08
16 A. I did see that in Professor Hauser's 09:46:11
17 disclosure efficacy survey where he had some Intuit 09:46:17
18 ads. 09:46:21
19 Q. In your own review of the ads in 09:46:21
20 preparation for your report, did you see ads from 09:46:26
21 2021 that contained a written disclosure see if you 09:46:30
22 qualify at TurboTax.com? 09:46:33

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1 A. Again, I can't be sure what ads were run 09:46:38
2 in what year. It does sound familiar that TurboTax 09:46:41
3 recently started adding that additional disclosure. 09:46:44
4 Whether it was in tax year 2021 on a specific video 09:46:47
5 ad I don't recall. 09:46:49

6 Q. Did you undertake any study as to a 09:46:50
7 consumer's understanding of the written disclosure 09:46:52
8 see if you qualify at TurboTax.com? 09:46:56

9 A. I did not take -- undertake any study, but 09:46:59
10 very fortunately Professor Hauser did. He has a 09:47:02
11 disclosure efficacy survey that was very much about 09:47:06
12 the efficacy of disclosure that included see if you 09:47:09
13 qualify. And so the evidence there was pretty 09:47:13
14 clear to me that it didn't do anything to people's 09:47:17
15 understanding of their qualification. 09:47:20

16 Q. Okay. We'll get to Professor Hauser's 09:47:22
17 study later, but I want to focus on the work that 09:47:25
18 you did. Did you undertake any study to determine 09:47:28
19 consumer perception of the written disclosure in 09:47:32
20 Intuit's TurboTax ads see if you qualify at 09:47:35
21 TurboTax.com? 09:47:38

22 A. I did not. 09:47:40

1 Q. Do you recall whether or not Intuit's 09:47:42
2 TurboTax 2021 -- tax year 2021 ads included a 09:47:47
3 voice-over? 09:47:52

4 A. I believe they did not include -- when you 09:47:53
5 say "a voice-over," maybe I need to understand what 09:47:56
6 you mean. 09:47:58

7 Q. Strike that. 09:47:58

8 Do you recall whether or not Intuit's 2021 09:48:01
9 tax year television ads included a verbal 09:48:05
10 voice-over disclaimer that said "see details at 09:48:08
11 TurboTax.com"? 09:48:13

12 A. I do not recall that being part of the 09:48:14
13 2021 ads. 09:48:16

14 Q. And you did not show any of the ads for 09:48:20
15 tax year 2021 to the participants in your 09:48:23
16 perception study, right? 09:48:26

17 A. That's correct, I did not show my 09:48:27
18 participants any ads. 09:48:30

19 Q. And so you did not show any of the 09:48:30
20 participants in your survey any of the disclosures 09:48:33
21 that TurboTax ran as part of its ads in tax year 09:48:38
22 2021; isn't that right? 09:48:42

1 A. I did say to my consumers in one of the 09:48:47
2 questions that TurboTax defines simple returns do 09:48:49
3 you think you have a simple return as TurboTax 09:48:56
4 defines it. So to that extent I did put the idea 09:48:57
5 that simple returns -- that TurboTax uses the term 09:49:01
6 "simple returns" in front of them. 09:49:04

7 Q. That wasn't my question, though. My 09:49:06
8 question is did you show any of the disclosures 09:49:08
9 that ran as part of the TurboTax's 2021 tax year 09:49:12
10 ads to any of the participants in your study? 09:49:16

11 A. Again, my understanding is that simple 09:49:20
12 returns was one of the disclosures that was run as 09:49:22
13 part of the ads in that tax year, and I did ask 09:49:25
14 consumers whether they had a simple return as 09:49:29
15 defined by TurboTax. 09:49:33

16 Q. And did you show in any way any of the 09:49:34
17 other disclosures that appeared in Intuit's tax 09:49:37
18 year 2021 television ads to any of the participants 09:49:44
19 in your survey? 09:49:45

20 A. I did not. 09:49:46

21 (Exhibit RX-1345 was marked 09:49:47

22 for identification.) 09:49:47

1 BY MR. PAIKIN: 09:49:47

2 Q. I'm going to hand you so you have in front 09:49:47

3 of you your expert report and your rebuttal report 09:49:53

4 in this matter. I'm handing you what has 09:49:55

5 previously been marked as Government Exhibit 303, 09:50:13

6 which I believe is your expert report in this 09:50:18

7 matter, and I'm handing you what has been marked 09:50:35

8 RX-1345, which I believe to be the rebuttal expert 09:50:39

9 report that you did in this matter. 09:50:53

10 MR. PAIKIN: Off the record for one 09:51:05

11 second. 09:51:06

12 (Whereupon a discussion was had 09:51:31

13 off the record.) 09:51:31

14 (Exhibit RX-1346 was marked 09:51:31

15 for identification.) 09:51:31

16 BY MR. PAIKIN: 09:51:32

17 Q. And I'm also going to hand you what I've 09:51:32

18 marked as RX1346. What is Government Exhibit 303? 09:51:35

19 A. That's my report in this matter. 09:51:58

20 Q. And what is RX-1345? 09:52:01

21 A. That is my rebuttal report in this matter. 09:52:06

22 Q. And can you describe what RX-1346 is? 09:52:08

1 A. RX-1346 is a correction of errors in my 09:52:15
2 rebuttal report, which is RX-1345. 09:52:21

3 Q. And other than the corrections that appear 09:52:25
4 on RX-1346, do you have any other corrections to 09:52:28
5 either Government Exhibit 303 or RX-1345? 09:52:34

6 A. Not at this time, no. 09:52:39

7 Q. And are the opinions that you're going to 09:52:46
8 offer as part of this case contained in Government 09:52:48
9 Exhibit 303, RX-1346, and RX-1345? 09:52:53

10 A. They are. 09:52:59

11 Q. Are there any opinions that you're going 09:52:59
12 to offer in this case that are not contained in 09:53:01
13 those exhibits? 09:53:04

14 A. If I learn something new between now and 09:53:05
15 the trial I might, but based on what I know now, 09:53:07
16 these are my opinions. 09:53:09

17 Q. Can you turn in your rebuttal report, 09:53:13
18 which is RX-1345, to page 122, paragraph 287. 09:53:19

19 MR. ANGUIZOLA: Do you have a copy of the 09:53:45
20 rebuttal? Thanks. 09:53:48

21 A. Okay. 09:54:06

22 Q. I'm going to ask you a question about a 09:54:06

1 sentence that appears at the bottom of paragraph 09:54:08
2 287, but take a minute to sort of familiarize 09:54:10
3 yourself with the context and let me know when 09:54:14
4 you're ready to answer questions. 09:54:16

5 A. Okay. 09:54:17
6 Okay. 09:55:56

7 Q. I want to focus on the sentence that says 09:55:57
8 at the bottom of paragraph 287 "Upon arriving, they 09:56:00
9 could have encountered information indicating that 09:56:05
10 their impression about their ability to file for 09:56:08
11 free was indeed false"; do you see that? 09:56:10

12 A. I do. 09:56:13

13 Q. And when you say "upon arriving," do you 09:56:14
14 mean upon arriving at the TurboTax Website? 09:56:22

15 A. I do. 09:56:25

16 Q. And what did you mean by information that 09:56:25
17 a consumer would have encountered indicating that 09:56:30
18 their impression about their ability to file for 09:56:33
19 free was indeed false? 09:56:35

20 A. So I said they could have encountered such 09:56:37
21 information, and that information would have been 09:56:39
22 the qualification criteria located behind the 09:56:41

1 file your taxes for free," right? 10:00:05

2 A. It is. 10:00:07

3 Q. So this article appeared on CNBC's Website 10:00:09

4 about six days after you concluded your survey? 10:00:15

5 A. That sounds right. 10:00:21

6 MS. PLETT: Objection. I think the 10:00:25

7 document you've shown shows that it's updated 10:00:28

8 Wednesday, March 30th, 2022. So it 10:00:31

9 mischaracterizes the document. 10:00:35

10 MR. PAIKIN: Okay. Fair -- fair enough. 10:00:36

11 BY MR. PAIKIN: 10:00:39

12 Q. So it's likely that this article appeared 10:00:39

13 at some point prior to March 30th, 2022, correct? 10:00:41

14 A. I'll assume that's what updated means 10:00:46

15 unless they did the update in the same day, which I 10:00:48

16 don't know when -- how frequently they update. 10:00:50

17 Q. Okay. So it's fair to say that this 10:00:53

18 article appeared on CNBC's Website by Wednesday, 10:00:55

19 March 30th, 2022 or at some point prior to that 10:01:01

20 date, correct? 10:01:07

21 A. That sounds correct. 10:01:07

22 Q. Have you done a search to see what news 10:01:09

1 stories were available in March of 2022 to help 10:01:13
2 people file their taxes? 10:01:16

3 A. I did instruct Cornerstone, a research 10:01:20
4 firm that helped me with this matter, to search for 10:01:22
5 a variety of things. So they may have searched 10:01:25
6 indeed for that. 10:01:27

7 Q. And what types of articles did they find 10:01:28
8 that you considered that provided information to 10:01:32
9 people to help them file their taxes in 2022? 10:01:37

10 A. I'm not sure I understand the question. 10:01:42

11 Q. Well, you had said that you had directed 10:01:45
12 Cornerstone to undertake some research, correct? 10:01:47

13 A. I did. 10:01:50

14 Q. And what -- what did they find as a result 10:01:50
15 of their research? 10:01:53

16 A. They found on-line articles, blog posts, 10:01:54
17 maybe some reviews that talked about TurboTax. 10:01:58

18 Q. And are those articles that would have 10:02:02
19 been available to consumers in the marketplace? 10:02:06

20 A. Yes. 10:02:12

21 Q. And did you ask any of the participants in 10:02:12
22 your survey whether or not they had reviewed any of 10:02:15

1 the media articles? 10:02:18

2 A. I did in the sense that I asked them what 10:02:21

3 their impression was based on, and I offered media 10:02:23

4 articles like this as an option for them to respond 10:02:26

5 with. 10:02:29

6 Q. Do you see on page 2 of Exhibit RX-1329 at 10:02:32

7 the bottom of the page it says "When you sign up 10:02:38

8 for a tax service like H&R Block or TurboTax you 10:02:47

9 can view the requirements needed to qualify for a 10:02:52

10 simple return and details on what is included"; do 10:02:55

11 you see that? 10:02:58

12 A. I do. 10:02:58

13 Q. And do you believe that's an accurate 10:02:59

14 statement? 10:03:00

15 A. I don't know very much about H&R Block's 10:03:03

16 Website, I didn't study it very carefully, but for 10:03:06

17 TurboTax I would say you can view the requirements 10:03:09

18 needed to qualify for a simple tax return on their 10:03:14

19 Website. So that part is true. 10:03:17

20 Q. And do you see on page 3 of RX-1329? 10:03:23

21 A. I see page 3, yes. 10:03:32

22 Q. And do you see that it lists a number of 10:03:33

1 other tax providers that allow consumers to file 10:03:37
2 their taxes for free on their Websites? 10:03:40
3 A. I do. 10:03:45
4 Q. And it lists TurboTax as the best overall 10:03:46
5 tax software, correct? 10:03:50
6 A. It does. 10:03:53
7 Q. And the runner-up is H&R Block? 10:03:54
8 A. Yes. 10:03:57
9 Q. And what's listed as the best free tax 10:03:57
10 software? 10:04:00
11 A. Credit Karma Tax. 10:04:02
12 Q. And what's listed as the best affordable 10:04:04
13 tax software? 10:04:06
14 A. TaxSlayer. 10:04:08
15 Q. And what is listed as the best for 10:04:09
16 accuracy guarantee? 10:04:12
17 A. TaxAct. 10:04:18
18 Q. Do you know whether or not the eligibility 10:04:19
19 requirements to file for free on H&R Block were 10:04:21
20 identical to the eligibility requirements to file 10:04:27
21 for free on TurboTax in 2021, tax year 2021? 10:04:28
22 A. I don't know whether they were 10:04:34

1 identical. 10:04:35

2 Q. Do you know whether or not the eligibility 10:04:38

3 requirements to file your taxes for free on Credit 10:04:39

4 Karma Tax in 2021 were identical to the eligibility 10:04:44

5 requirements to file for free on TurboTax in tax 10:04:47

6 year 2021? 10:04:50

7 A. I don't know if they were identical. 10:04:51

8 Q. Do you know whether or not the eligibility 10:04:53

9 requirements to file for free on TaxSlayer in 2021 10:04:55

10 were identical to the eligibility requirements to 10:05:00

11 file for free on TurboTax in tax year 2021? 10:05:02

12 A. No, I don't. 10:05:06

13 Q. And do you know whether or not the 10:05:07

14 eligibility requirements to file for free in tax 10:05:09

15 year 2021 On TaxAct were identical to the 10:05:13

16 eligibility requirements to file for free on 10:05:16

17 TurboTax in tax year 2021? 10:05:18

18 A. I do not. 10:05:21

19 Q. Did you undertake to study the eligibility 10:05:24

20 requirements for any of TurboTax's competitors? 10:05:29

21 A. I did not study them carefully. I may 10:05:34

22 have seen them at some point in looking at 10:05:36

1 different advertisements, but I did not study them 10:05:38

2 specifically. 10:05:41

3 Q. Did you study whether or not a consumer's 10:05:42

4 misimpression as to whether or not they could file 10:05:47

5 for free on TurboTax could have been a 10:05:50

6 misunderstanding based on different eligibility 10:05:55

7 requirements to file for free on one of TurboTax's 10:05:59

8 competitors? 10:06:01

9 A. I did do some research about whether they 10:06:05

10 got their impression about filing for free on 10:06:08

11 TurboTax from a competitor. For example, I present 10:06:12

12 in my rebuttal report an iSpot analysis of share of 10:06:14

13 voice that shows that TurboTax was the dominant 10:06:18

14 share of voice in all messaging, in particular in 10:06:22

15 free messaging around on-line tax filing providers. 10:06:25

16 Q. You didn't provide the eligibility 10:06:29

17 requirements to file for free on any of TurboTax's 10:06:32

18 competitors in tax year 2021 to any of the 10:06:35

19 participants in your survey, did you? 10:06:38

20 A. I did not. 10:06:40

21 Q. Do you see on page 2 of RX-1329? 10:06:49

22 A. I see page 2. 10:06:57

1 Q. And you see the header "What's a simple 10:06:58
2 tax return"? 10:07:00

3 A. I do. 10:07:01

4 Q. And can you read what it says underneath 10:07:01
5 that? 10:07:04

6 A. "A simple tax return is the most basic 10:07:05
7 type of tax return you can file. Each tax filing 10:07:07
8 program defines simple tax returns differently, but 10:07:11
9 they generally include W-2 income, limited interest 10:07:13
10 in dividend income, standard deductions, 10:07:17
11 unemployment income. Many on-line tax filing 10:07:21
12 programs also include earned income tax credit, 10:07:23
13 child tax credits, student loan/education 10:07:27
14 deductions. When you sign up for a tax service 10:07:32
15 like H&R Block or TurboTax, you can view the 10:07:35
16 requirements needed to qualify for a simple return 10:07:37
17 and details on what is included." 10:07:40

18 Q. And of the list of bullet points that are 10:07:42
19 set forth for the way different tax services define 10:07:48
20 a simple tax return, do you know without looking at 10:07:59
21 RX-3 which one of those bullet points apply to 10:08:03
22 TurboTax? 10:08:10

1 A. I know you can file W-2 income with 10:08:13
2 TurboTax. I believe they have limitations on 10:08:16
3 interest and dividend income that you can file for 10:08:19
4 free with TurboTax. I believe they require a 10:08:22
5 standard deduction rather than an itemized 10:08:26
6 deduction to file on TurboTax for free. The 10:08:29
7 unemployment income, as I said in my memory, some 10:08:33
8 years it was in and some years it was out. 10:08:40
9 Q. I want to know about tax year 2021. 10:08:42
10 A. I can't recall whether in tax year '21 it 10:08:44
11 was in or out at this moment. I don't recall 10:08:46
12 whether student loan, child tax credits, and earned 10:08:53
13 income credits were in or out for that year for 10:08:56
14 TurboTax. 10:09:00
15 Q. And do you recall whether or not the items 10:09:00
16 listed in the bullet points on page 2 of RX-1329 10:09:02
17 were applicable to -- strike that. 10:09:10
18 With respect to H&R Block, do you know 10:09:16
19 which of the items set forth in the bullet points 10:09:18
20 on page 2 of RX-1329 applied -- 10:09:21
21 A. I do not. 10:09:26
22 Q. -- for a simple tax return? 10:09:27

1 A. I do not. 10:09:29

2 Q. And with respect to Credit Karma Tax, do 10:09:29

3 you know which of the bullet points on page 2 of 10:09:32

4 RX-1329 applied for eligibility to file for free? 10:09:34

5 A. I do not. 10:09:38

6 Q. And with respect to TaxSlayer, do you know 10:09:38

7 which of the eligibility requirements set forth on 10:09:41

8 RX-1329 applied to eligibility to file for free? 10:09:44

9 A. I do not. 10:09:49

10 Q. And with respect to TaxAct, do you know 10:09:49

11 which of the bullet points on page 2 of RX-1329 10:09:52

12 applied to eligibility requirements to file for 10:09:57

13 free? 10:09:59

14 A. I do not. 10:09:59

15 Q. And if you were to try to determine which 10:10:00

16 of the eligibility requirements set forth on page 2 10:10:05

17 of 1329 applied to file for free on each one of 10:10:09

18 those various tax provider services, where would 10:10:14

19 you go to find out that information? 10:10:19

20 A. I don't know. I haven't tried yet. Off 10:10:23

21 the top of my head, I can imagine I would hear 10:10:27

22 about it in an advertisement, maybe it's somewhere 10:10:28

1 in this article that I'm reading. I don't know. 10:10:31

2 Or maybe it's on their Website or maybe somewhere 10:10:34

3 else. I don't know. 10:10:38

4 Q. And it says in this ad, it tells consumers 10:10:39

5 on the bottom of page RX-1329 "You can view the 10:10:43

6 requirements needed to qualify for a simple tax 10:10:47

7 return and details on what is included when you 10:10:50

8 sign up for a tax service like H&R Block or 10:10:53

9 TurboTax," right? 10:10:57

10 A. It does say that. 10:10:58

11 Q. Would a consumer reviewing this article 10:11:06

12 have a perfect understanding as to what the 10:11:10

13 eligibility requirements were to file for free on 10:11:14

14 any one of the tax service providers that we 10:11:19

15 discussed? 10:11:22

16 A. I don't know. I didn't study how this 10:11:23

17 article influences consumers' understanding. 10:11:25

18 Q. What understanding do you believe a 10:11:29

19 consumer would have with respect to what a simple 10:11:30

20 tax return is? 10:11:34

21 A. I think consumers could have many 10:11:37

22 different understandings of what a simple tax 10:11:39

1 return is. So I can't answer that in general. I 10:11:42
2 know from my study that many consumers who don't 10:11:44
3 have a simple tax return as defined by many of 10:11:47
4 these bullet points would indeed still think they 10:11:49
5 have a simple tax return. That's the extent that I 10:11:52
6 know what consumers think about simple tax 10:11:54
7 returns. 10:11:58

8 Q. Well, would they think they have a simple 10:11:58
9 tax return specific to the eligibility requirements 10:12:02
10 for each one of those specific services? 10:12:04

11 A. I don't -- what I know about what they 10:12:10
12 would know about simple tax returns vis-a-vis 10:12:12
13 eligibility requirements is if they thought one of 10:12:14
14 these tax services required a simple return, then 10:12:17
15 they might apply their own belief or understanding 10:12:20
16 of what a simple return is, and as I said, that can 10:12:22
17 vary from consumer to consumer and I certainly have 10:12:27
18 evidence that many consumers do not understand it 10:12:29
19 the way TurboTax specifically understands it. I 10:12:31
20 haven't studied other aspects of that question. 10:12:33

21 Q. Do you believe that some people in your 10:12:36
22 survey who thought they might be eligible to use 10:12:38

1 TurboTax Free Edition may have been eligible to 10:12:42
2 file for free on TaxSlayer, TaxAct, Credit Karma, 10:12:44
3 or H&R Block? 10:12:48
4 A. Sorry. Could you restate the question? 10:12:50
5 Q. Do you know whether or not any of the 607 10:12:52
6 people who participated in your survey were 10:12:57
7 eligible to file for free on TaxSlayer, TaxAct, 10:13:02
8 Credit Karma, or H&R Block? 10:13:08
9 A. I don't know specifically how many would 10:13:12
10 be eligible. My understanding is that the criteria 10:13:14
11 are similar across these Websites. And so the 10:13:16
12 screening questions I used to screen out free 10:13:20
13 filers from TurboTax likely screened out most free 10:13:23
14 filers from most Websites, but I can't say 10:13:26
15 specifically that all 607 couldn't possibly file 10:13:28
16 for free on any of those other Websites. I don't 10:13:30
17 know that. 10:13:33
18 Q. So it's possible that a participant in 10:13:34
19 your survey may have filed in tax year 2020 on H&R 10:13:37
20 Block, right? 10:13:49
21 A. It is possible. 10:13:49
22 Q. And they would have formed an 10:13:50

1 understanding as to what a simple tax return is 10:13:53

2 with respect to the qualifications on H&R Block? 10:13:53

3 A. I have no idea if they would have formed 10:13:55

4 an understanding of a simple return or if H&R Block 10:13:58

5 uses that term as much as TurboTax uses that term. 10:14:01

6 Q. And that's because you haven't studied H&R 10:14:06

7 Block's Website, correct? 10:14:08

8 A. I have not studied H&R Block's Website. 10:14:10

9 MR. PAIKIN: Yeah. Let's take a break. 10:14:15

10 THE VIDEOGRAPHER: The time is 10:14 a.m. 10:14:18

11 Eastern. We are now off the record. 10:14:20

12 (A break was had.) 10:27:36

13 THE VIDEOGRAPHER: This is the beginning 10:27:51

14 of media unit No. 2 in the video-recorded 10:27:51

15 deposition of Mr. Nathan Novemsky. The time is 10:27:55

16 10:27 a.m. Eastern. We are now back on the record. 10:27:59

17 Counsel, you may proceed. 10:28:02

18 BY MR. PAIKIN: 10:28:05

19 Q. Professor Novemsky, at the time that a 10:28:05

20 consumer decides to file their taxes on TurboTax, 10:28:07

21 they do it on the Website; is that right? 10:28:12

22 A. Yes, that's generally right. I believe 10:28:17

1 they may have some other options like a CD-ROM or 10:28:19
2 something where you can put the software on your 10:28:22
3 computer, but the one I'm focused on is the on-line 10:28:24
4 software. 10:28:28

5 Q. So a consumer would see the Website before 10:28:28
6 making a purchasing decision, correct? 10:28:31

7 A. They may make the decision before they see 10:28:34
8 the Website. They would have to see the Website 10:28:38
9 before making a purchase. 10:28:40

10 Q. And when they watch a television 10:28:42
11 commercial, they can't file their taxes without 10:28:43
12 visiting the Website; is that right? 10:28:46

13 A. To use the on-line software, they cannot 10:28:48
14 file without visiting the Website. 10:28:51

15 Q. So a consumer would see more than just a 10:28:53
16 television commercial before paying any money to 10:28:56
17 TurboTax, right? 10:28:59

18 A. A consumer generally would see the Website 10:29:02
19 when paying money to TurboTax. 10:29:04

20 Q. I'm going to hand you what's been 10:29:10
21 previously marked as RX-210. 10:29:12

22 (Witness reviewing document.) 10:30:04

1 BY MR. PAIKIN: 10:30:06

2 Q. Have you seen Exhibit RX-210 prior to this 10:30:06
3 deposition? 10:30:08

4 A. It looks like the TurboTax pricing and 10:30:09
5 products page. I certainly have seen that page 10:30:13
6 prior to this deposition. 10:30:15

7 Q. And this was the pricing and products page 10:30:16
8 for tax year 2021? 10:30:18

9 MS. PLETT: Objection, lack of 10:30:22
10 foundation. 10:30:22

11 MR. PAIKIN: I'm asking him do you know. 10:30:23

12 A. I can't tell looking at this what year 10:30:25
13 it's from. 10:30:29

14 Q. Okay. I'll represent to you that it was 10:30:30
15 and it's been previously marked as an exhibit. 10:30:31

16 Do you see that on -- do you know when in 10:30:35
17 the process of visiting TurboTax's Website a 10:30:39
18 consumer would encounter the pricing page? 10:30:43

19 A. I don't know exactly. I think consumers 10:30:48
20 can vary in their flow through the Website. So I 10:30:50
21 don't know exactly when it would be. 10:30:53

22 Q. Do you know whether or not it would be 10:30:54

1 prior to entering tax information? 10:30:56

2 A. I'm not sure if they're all forced to see 10:31:00

3 it prior to entering tax information, but if they 10:31:02

4 saw it, they would likely do that. Although they 10:31:05

5 could also see it after entering tax information, 10:31:09

6 for example, if they hit a hard stop or an upgrade 10:31:12

7 screen. 10:31:15

8 Q. And did you show any of the participants 10:31:16

9 in your survey RX-210? 10:31:17

10 A. I did not show any participants in my 10:31:22

11 survey RX-210. 10:31:23

12 Q. And do you see that on RX-210 there's some 10:31:34

13 information at the bottom of the page with respect 10:31:38

14 to eligibility requirements for use of Free 10:31:42

15 Edition? 10:31:45

16 MS. PLETT: Counsel, which page are you 10:31:48

17 referring to? Is it the first page of the exhibit? 10:31:49

18 MR. PAIKIN: First page. 10:31:52

19 MS. PLETT: Okay. 10:31:53

20 A. I see some information on the right-hand 10:32:00

21 side of the bottom panel on the first page. 10:32:02

22 Q. And can you read the first check mark. 10:32:05

1 A. "Free filing of your simple federal and 10:32:08
2 state tax returns only." 10:32:12

3 Q. And can you read the second check mark. 10:32:14

4 A. "Covers W-2 income, earned income tax 10:32:16
5 credit, EIC, and child tax credits." 10:32:19

6 Q. And as part of your perception survey, you 10:32:38
7 were trying to determine a consumer's understanding 10:32:42
8 of whether or not they could file for free on 10:32:44
9 TurboTax Free Edition, correct? 10:32:48

10 A. Correct. 10:32:49

11 Q. And you didn't show those consumers any of 10:32:50
12 TurboTax ads, right? 10:32:53

13 A. That's right. 10:32:55

14 Q. And you didn't show those consumers any of 10:32:55
15 the disclosures that appeared on TurboTax ads, 10:32:58
16 correct? 10:33:02

17 A. Correct. 10:33:02

18 Q. And you didn't show any of those consumers 10:33:02
19 TurboTax's Web page, correct? 10:33:05

20 A. Correct. 10:33:07

21 Q. Do you recall serving as an expert in a 10:33:13
22 case styled as In The Matter of Integrity 10:33:15

1 Advance? 10:33:20

2 A. Yes. 10:33:20

3 Q. And what was that case about? 10:33:20

4 A. That case was about consumer understanding 10:33:27

5 of a financial product. 10:33:28

6 Q. Do you recall which financial product it 10:33:31

7 was? 10:33:32

8 A. I believe it was something commonly 10:33:33

9 referred to as a payday loan. 10:33:34

10 Q. And what was the substance of your expert 10:33:37

11 opinion in that case? 10:33:39

12 A. So my opinion was to draw an opinion about 10:33:42

13 someone else's opinion. So it's a rebuttal 10:33:46

14 opinion. And so my opinion was entirely about an 10:33:48

15 opinion offered on behalf of the CFPB, if I 10:33:51

16 remember. 10:33:56

17 Q. And do you recall who the expert was that 10:33:56

18 offered that opinion on behalf of the CFPB? 10:33:57

19 A. I believe it was Manoj Hastak. 10:34:01

20 Q. And do you recall what critiques you 10:34:04

21 offered of Dr. Hastak's opinion in that case? 10:34:06

22 A. It was many years ago. So I don't have a 10:34:11

1 detailed memory of the opinions that I offered. 10:34:13

2 Q. Generally what do you recall? 10:34:16

3 A. I recall that he was making claims without 10:34:20

4 evidence for them, and I was pointing out that 10:34:22

5 those claims weren't founded on reliable or 10:34:24

6 scientific evidence. 10:34:27

7 Q. And what claims was he making? 10:34:28

8 A. I don't recall the details of his claims 10:34:31

9 at this point. It was something to do with 10:34:33

10 consumers' understanding of the payday loan 10:34:35

11 arrangement. 10:34:38

12 Q. And when you say your critique was that he 10:34:39

13 didn't have evidence, can you elaborate? 10:34:43

14 A. He didn't have evidence for the -- I don't 10:34:45

15 know what else to say, but he didn't have evidence 10:34:48

16 or data or didn't probe consumer understanding but 10:34:50

17 I believe was making claims about consumer 10:34:55

18 understanding. Again, the details of it are fuzzy. 10:34:56

19 This was a number of years ago. 10:35:00

20 (Exhibit RX-1347 was marked 10:35:21

21 for identification.) 10:35:21

22 BY MR. PAIKIN: 10:35:21

1 Q. I'm going to hand you what's been marked 10:35:21
2 as RX-1347, and I'm not going to ask you any 10:35:25
3 substantive questions about it. I just want you to 10:35:31
4 take a minute to review it and let me know if that 10:35:33
5 is the expert report that you offered in that case. 10:35:37
6 (Witness reviewing document.) 10:36:19
7 A. It appears to be. Without reading the 10:36:20
8 substance of it, it looks like my report from that 10:36:22
9 case. 10:36:24
10 Q. And if you turn to page 16 of 10:36:25
11 Exhibit RX-1347, is that your signature? 10:36:28
12 A. That does appear to be my signature, 10:36:33
13 yes. 10:36:37
14 Q. Do you recall whether or not you gave a 10:36:37
15 deposition in that matter? 10:36:38
16 A. My memory is that I did give a deposition 10:36:41
17 in that matter. 10:36:46
18 (Exhibit RX-1348 was marked 10:36:49
19 for identification.) 10:36:49
20 BY MR. PAIKIN: 10:36:53
21 Q. I'm handing you what's been marked as 10:36:53
22 RX-1348. Can you review it and let me know whether 10:36:56

1 or not that is the deposition that you gave in the 10:37:02
2 matter of Integrity Advance. 10:37:11
3 (Witness reviewing document.) 10:37:15
4 A. It would appear to be the deposition. 10:37:32
5 Q. Could you turn to page 46 of that 10:37:35
6 deposition, and do you see the question that begins 10:37:38
7 "Could you replicate consumers' experience with 10:37:52
8 knowing how Integrity Advance's loan agreements 10:37:55
9 appeared on-line"? 10:38:00
10 A. I'm sorry. We must be a different 46. My 10:38:01
11 46 does not have questions on it. 10:38:04
12 Q. So if you look -- it's actually page -- 10:38:05
13 A. You mean page 46 of the deposition. 10:38:09
14 THE REPORTER: Guys. 10:38:11
15 THE WITNESS: I'm sorry. I was at 46 of 10:38:12
16 the document. I'm sorry. You mean page 46 in the 10:38:18
17 deposition numbering? 10:38:20
18 Q. Correct. 10:38:21
19 A. I'm sorry. 10:38:22
20 Q. Which I believe appears on page 12 of the 10:38:23
21 Min-U-Script. 10:38:25
22 A. Okay. I'm there now. 10:38:26

1 Q. Do you see the question that says "Could 10:38:28
2 you replicate consumers' experience without knowing 10:38:31
3 how Integrity Advance's loan agreements appeared 10:38:33
4 on-line"? 10:38:40

5 A. I do. 10:38:41

6 Q. And could you read what your response was 10:38:42
7 to that question at your sworn deposition. 10:38:44

8 A. Sure. "So when you do a consumer survey 10:38:47
9 for the purpose of understanding what consumers 10:38:51
10 take away from a loan agreement, let's say you do 10:38:53
11 your best to replicate as many aspects of the 10:38:56
12 experience you are interested in as possible. You 10:38:59
13 never replicate all of them exactly, that's 10:39:02
14 generally impossible, but you replicate them as 10:39:04
15 closely as you can given the factors you think are 10:39:06
16 influencing them and then you draw conclusions 10:39:09
17 based on as near replication as you can do of the 10:39:11
18 experience. It's never perfect." 10:39:14

19 Q. Can you turn to page 66 of the sworn 10:39:20
20 deposition that you gave in that case, and do you 10:39:23
21 see the question at the top of that page "And would 10:39:35
22 it affect your ability to do a valid survey if not 10:39:39

1 every Integrity Advance customer saw a loan 10:39:42
2 agreement when they obtained a loan?" Could you 10:39:45
3 read your sworn answer to that question at your 10:39:48
4 deposition. 10:39:51

5 A. Okay. "Let me be clear about what the 10:39:52
6 purpose of a survey would be. If the purpose of a 10:39:54
7 survey would be to say what consumers do" -- sorry. 10:39:57
8 Let me start over. 10:40:01

9 "Let me be clear about what the purpose of 10:40:03
10 a survey would be. If the purpose of a survey 10:40:05
11 would be to say what consumers do understand when 10:40:07
12 faced with this loan agreement, then I would 10:40:11
13 present them that loan agreement and take some 10:40:13
14 measures to try to ascertain what it is they 10:40:17
15 understand following viewing that loan agreement. 10:40:19
16 I'm not sure what survey one would be interested in 10:40:23
17 if we thought consumers did not see the loan 10:40:26
18 agreement. So you would have to start with what is 10:40:29
19 the purpose of the survey." 10:40:31

20 Q. And on page 67 of your deposition, the 10:40:33
21 question that says "Do you think you would have any 10:40:40
22 difficulties in conducting a survey that would 10:40:44

1 attempt to replicate the experience between 10:40:47
2 Integrity Advance and its customers in originating 10:40:49
3 the loan?" There's an objection and then the 10:40:53
4 question says "You can answer." Can you read your 10:40:55
5 response to that question. 10:40:58
6 A. "If I were to perform a survey for the 10:41:00
7 purpose of replicating consumers' understanding 10:41:02
8 when originating a loan with Integrity Advance, I 10:41:04
9 would show them all the things that I believe they 10:41:07
10 had seen at the time in whatever context they had 10:41:09
11 seen them at the time and try to draw conclusions 10:41:12
12 from that." 10:41:14
13 Q. And in this case when you were trying to 10:41:16
14 determine what a customer understood at the time 10:41:20
15 that they used TurboTax Free Edition, did you show 10:41:26
16 them all of the things that they would have had in 10:41:30
17 front of them by the time that they made that 10:41:34
18 purchase decision? 10:41:37
19 A. That was a multi-part question. I'm 10:41:41
20 sorry. I didn't understand all of it. 10:41:44
21 Q. Well, for purposes of the survey that you 10:41:45
22 did in this case, did you show the consumers the 10:41:50

1 information that they would have had in front of 10:41:53
2 them at the time that they made the purchase 10:41:55
3 decision? 10:41:56

4 A. I was not trying to replicate their 10:41:57
5 decision at the moment of decision. I was trying 10:42:01
6 to understand their impression of whether they 10:42:03
7 could file TurboTax at an earlier point in the 10:42:06
8 funnel. 10:42:09

9 Q. And that would have been at a time prior 10:42:10
10 to having seen the Website? 10:42:13

11 A. That would have been a time that, as I 10:42:16
12 said, is indeterminate as to whether or not they 10:42:18
13 saw the Website. Some consumers certainly may have 10:42:21
14 seen it, some may not have. All I know is that 10:42:23
15 they didn't purchase yet on the Website. 10:42:26

16 Q. And you don't know whether or not the 10:42:27
17 consumers in your survey saw any Intuit TurboTax 10:42:28
18 ads that year either, do you? 10:42:31

19 A. I do have some indication that they saw 10:42:35
20 TurboTax ads because many of my respondents said 10:42:37
21 the reason they believed they could file for free 10:42:40
22 with TurboTax is precisely because they saw the 10:42:43

1 ads. In facts, I think it was roughly half of them 10:42:45
2 that said that. So I believe that many of them saw 10:42:48
3 TurboTax advertisements. 10:42:50
4 Q. And you didn't show any of them the ads, 10:42:52
5 though, correct? 10:42:54
6 A. I did not show them the ads. 10:42:55
7 Q. And you didn't show any of them the 10:42:57
8 Website, right? 10:42:59
9 A. I did not show any of them the Website. 10:43:00
10 Q. Are you familiar with a concept called 10:43:02
11 experimental design? 10:43:04
12 A. Very familiar. 10:43:05
13 Q. And what does experimental design mean in 10:43:06
14 the context of testing an advertisement? 10:43:10
15 A. Experimental design just means that you 10:43:16
16 can -- one way to study consumers or anything else 10:43:18
17 is to run an experiment, and experimental design as 10:43:20
18 I understand it refers to the principles for 10:43:24
19 designing a proper or good experiment from which 10:43:27
20 you can draw reliable conclusions. 10:43:30
21 Q. And what would a proper, good experiment 10:43:32
22 entail if you were going to test an advertisement? 10:43:36

1 A. So I would need more information. When 10:43:40
2 you say you're going to test an advertisement, 10:43:42
3 that's not specific enough yet for me to design a 10:43:45
4 survey -- or sorry, an experiment. 10:43:47

5 Q. And what is a control group in connection 10:43:51
6 with an experimental design? 10:43:54

7 A. So a control group is typically the group 10:43:56
8 in an experiment from which you withhold something 10:43:58
9 that you're trying to determine the influence of. 10:44:02
10 That thing you withhold is typically provided in 10:44:05
11 the noncontrol groups. The experimental or test 10:44:07
12 groups would see some version of that thing that 10:44:10
13 you're trying to test the influence of if your 10:44:12
14 experiment is designed to test the influence of a 10:44:16
15 particular stimulus, as often they are. 10:44:16

16 Q. Do you recall serving as an expert in a 10:44:19
17 case styled State of Oregon versus Living 10:44:21
18 Essentials that was pending in the Circuit Court of 10:44:25
19 the State of Oregon for the County of Multnomah? 10:44:28

20 A. That does sound familiar. 10:44:32

21 Q. And what was that case about? 10:44:33

22 A. That was, again, a case about consumers' 10:44:35

1 understanding of some kind of marketing materials 10:44:37
2 relevant to an energy drink. I don't remember a 10:44:40
3 lot of details about what the marketing materials 10:44:45
4 were. 10:44:46
5 Q. And what was the nature of your expert 10:44:47
6 opinion in that case? 10:44:50
7 A. I don't recall. 10:44:51
8 Q. Do you have a general recollection? 10:44:53
9 A. No. 10:44:54
10 Q. Do you recall whether you testified at 10:44:56
11 trial in that case? 10:44:57
12 A. I recall that I did testify at trial. 10:44:59
13 Q. And do you have any recollection of the 10:45:01
14 substance of your testimony in that case? 10:45:04
15 A. Not sitting here today I don't. 10:45:06
16 (Exhibit RX-1349 was marked 10:45:22
17 for identification.) 10:45:22
18 BY MR. PAIKIN: 10:45:22
19 Q. I'm handing you what's been marked as 10:45:22
20 RX-1349. Let me know whether or not you recognize 10:45:27
21 that as the trial testimony that you gave in that 10:45:30
22 matter? 10:45:34

1 (Witness reviewing document.) 10:45:38

2 A. It appears to be the testimony I gave in 10:46:22

3 that matter. 10:46:25

4 Q. Can you turn to page 1833 of Exhibit 13 -- 10:46:25

5 RX-1349. 10:46:30

6 A. Okay. 10:46:42

7 Q. Do you see the question, "So you're not 10:46:43

8 trained to understand and comprehend what's in the 10:46:46

9 brain of consumers, say, when they see a TV 10:46:48

10 commercial"; do you see that question? 10:46:52

11 A. I see that question. 10:46:54

12 Q. And can you read your sworn response to 10:46:54

13 that question. 10:46:56

14 A. "I'm indeed trained to try to understand 10:46:57

15 it, but the way we understand it is not by looking 10:47:00

16 in our own heads and saying, well, what I think 10:47:02

17 is" -- sorry. Let me say that again. 10:47:05

18 "We don't look in our own heads and 10:47:08

19 saying, well, what do I think is in their heads. 10:47:10

20 We've been trained to say that doesn't work. We 10:47:13

21 need to actually run a study to find out what's in 10:47:15

22 people's heads. We don't even know what's in our 10:47:17

1 own heads is what a lot of recent psychology 10:47:20
2 studies have revealed." 10:47:22

3 Q. Can you explain what you meant by that 10:47:25
4 testimony? 10:47:26

5 A. To understand what a consumer takes 10:47:31
6 from -- I guess in this context it seems like a TV 10:47:33
7 commercial, it is best to do a study, not to just 10:47:36
8 introspect as a researcher into my own head to 10:47:39
9 assume that what's in my head is going to 10:47:41
10 correspond to what's in a consumer's head. 10:47:43

11 Q. Why do you need to do that? 10:47:46

12 A. Because psychology has shown for many 10:47:48
13 years that there are limits to introspection, 10:47:50
14 limits to perspective taking. And so the 10:47:53
15 understanding of what's in someone else's head is 10:47:54
16 not something you ascertain typically through 10:47:56
17 introspection. You ascertain it through some kind 10:47:58
18 of scientific study. 10:48:04

19 Q. And further down on that page do you see 10:48:04
20 the question "First of all, are you familiar with a 10:48:09
21 concept called experimental design?" And you say 10:48:13
22 "I surely am." And the question then is "Could you 10:48:16

1 explain what that means to the Court, please"; do 10:48:20

2 you see that? 10:48:24

3 A. I do. 10:48:25

4 Q. Can you read your sworn response to that 10:48:25

5 question which appears on page 1834 of the 10:48:28

6 transcript. 10:48:30

7 A. Okay. "Sure. So any time you're trying 10:48:31

8 to identify any effect in the marketplace or 10:48:34

9 otherwise, you would have to do an experiment. An 10:48:38

10 experiment involves usually a control group and one 10:48:40

11 or more experimental groups where you show the 10:48:42

12 control group one set of things, you show the 10:48:45

13 experimental group a different set of things, 10:48:47

14 usually with one thing varied, critically that 10:48:49

15 thing you're trying to understand the cause, its 10:48:52

16 role as a causal agent. Then you measure things 10:48:55

17 from those consumers in the control group as well 10:48:58

18 as in the test group and then you can draw an 10:49:00

19 inference about causality. Without a control 10:49:02

20 group, there is no way to draw that inference of 10:49:05

21 what's causing what. So experimental design in 10:49:07

22 control groups are fundamental to every single 10:49:09

1 paper I've ever submitted to any journal." 10:49:12

2 Q. Was the perception study that you ran in 10:49:16

3 this case an experimental and control group test? 10:49:20

4 A. It did not have a test control design, no. 10:49:26

5 Q. Can you turn to page 1840 of your 10:49:40

6 transcript, which is RX-1349, and in this part of 10:49:47

7 the transcript I believe you're discussing the 10:50:01

8 survey that was undertaken by the adversary's 10:50:04

9 expert in that case, and the question says "All 10:50:10

10 right. So you mentioned something about control 10:50:13

11 earlier in your testimony. Did you consider 10:50:15

12 whether or not this survey contained a control?" 10:50:18

13 Can you read your sworn response to that question. 10:50:21

14 A. "I did. I was surprised to find out that 10:50:25

15 the survey actually did not contain a control. So 10:50:28

16 typically if you're trying to test does this TV 10:50:31

17 commercial cause a particular understanding in 10:50:34

18 consumers, you would show a set of consumers in a 10:50:36

19 test condition that tested it and you would show 10:50:39

20 other consumers a control ad and then you would 10:50:41

21 measure the consumer understanding, both for the 10:50:44

22 control group and for the test group, and make 10:50:46

1 comparisons that way to draw any causal inference. 10:50:49

2 Here there was no control group, and so it to me 10:50:52

3 doesn't seem like a test of what the ad caused 10:50:55

4 consumers to understand or not understand." 10:50:58

5 Q. And can you turn to page 1841 of RX-1349. 10:51:00

6 The question is "Okay. And is this part of the 10:51:12

7 experimental design that you were -- or process of 10:51:16

8 experimental design that you were describing to the 10:51:19

9 Court earlier?" Can you read your sworn response 10:51:22

10 to that question. 10:51:25

11 A. "Yes. It's a cornerstone of experimental 10:51:27

12 design is that if you're going to draw any causal 10:51:31

13 inference of something like an ad" -- sorry. I 10:51:34

14 misread that. 10:51:41

15 "Yes. It's a cornerstone of experimental 10:51:42

16 design that if you're going to draw any causal 10:51:44

17 inference of something like an ad caused some 10:51:47

18 effect like a consumer understanding of some kind, 10:51:50

19 you have to have an experimental design that 10:51:53

20 includes a control group and a test group. Any 10:51:56

21 other design makes causal inference, you know, 10:51:59

22 impossible." 10:52:02

1 Q. And do you still agree with the sworn 10:52:03
2 testimony that you gave in that case? 10:52:07

3 A. I would say there are some things I agree 10:52:13
4 with and some nuances that I've learned in the five 10:52:14
5 years since to do consumer studies. 10:52:17

6 Q. What do you disagree with what you said in 10:52:21
7 your sworn response that you just read? 10:52:26

8 A. What I would disagree with is there are 10:52:34
9 other methods that one can use to get at the effect 10:52:36
10 of a commercial. I think it's -- you know, what I 10:52:40
11 agree with is it's still the best way to get at the 10:52:45
12 effect of a single commercial, but, for example, in 10:52:48
13 the current matter I was not trying to get at the 10:52:51
14 effect of a particular commercial on consumers. I 10:52:53
15 was trying to get at the effect of a marketing 10:52:56
16 campaign. 10:53:00

17 It turns out, and I hadn't run into at 10:53:01
18 that point, a piece of marketing that was at issue 10:53:03
19 where you couldn't easily replicate it in control 10:53:04
20 design. And so when you are up against a 10:53:07
21 feasibility constraint, you do other things. So I 10:53:11
22 still value test control as a design for making 10:53:14

1 causal inference, I think it's a very good one, but 10:53:17
2 when it's infeasible, I think we turn to other 10:53:20
3 methods, and in this matter it certainly was 10:53:23
4 infeasible. 10:53:26

5 Q. And what other methods are available that 10:53:27
6 are scientific to allow you to form a conclusion of 10:53:34
7 causation? 10:53:40

8 A. There are a number of methods available. 10:53:46
9 It depends on what you're -- it depends on the 10:53:49
10 context and the question they're asking. As I said 10:53:51
11 in one of the depositions you just had me read, if 10:53:54
12 you're going to design a study, the first question 10:53:57
13 you have to ask is what is the purpose of that 10:53:59
14 study. 10:54:00

15 And so when you say, you know, causal 10:54:02
16 inference, that's a big category. So I would want 10:54:05
17 to know more context about what exactly is the 10:54:08
18 consumer understanding question we're trying to get 10:54:10
19 information about. With that question I could then 10:54:13
20 think about what are the possible studies to 10:54:16
21 design. 10:54:18

22 Q. And what scientific methodologies are 10:54:19

1 available to determine whether or not an ad caused 10:54:23
2 deception other than the experimental design? 10:54:26
3 A. So one way to know if an ad caused 10:54:33
4 deception is to ask consumers for their 10:54:35
5 understanding of the issue that you think they're 10:54:38
6 being deceived about, either showing them the ad 10:54:41
7 yourself potentially in an experimental design or 10:54:46
8 otherwise or knowing that they've seen the ad 10:54:48
9 elsewhere. 10:54:51
10 Q. And can you make a scientific conclusion 10:54:51
11 with respect to causation from doing that? 10:54:55
12 A. You can. You can be confident that the ad 10:54:59
13 caused -- so another way to get at causality is to 10:55:02
14 find an association between two things and then 10:55:07
15 show that other likely causes aren't the cause. 10:55:10
16 And so one way we typically in academic research, 10:55:14
17 for example, talk about getting causation without 10:55:19
18 test control experimental design -- and this 10:55:21
19 happens in many academic papers, not in mine but in 10:55:24
20 other people's academic papers where they actually 10:55:28
21 don't use experimental design, but one of the key 10:55:31
22 things they do is they talk about what are the 10:55:33

1 other possible causes and then they try to rule 10:55:35
2 them out. 10:55:37

3 Q. Can you turn to paragraph 32 of your 10:55:40
4 report. 10:55:42

5 A. Do you mean my original report or my 10:55:45
6 rebuttal report? 10:55:46

7 Q. Original report, and specifically in that 10:55:47
8 paragraph on the bottom you say "It is likely not 10:56:18
9 possible to find an appropriate control group 10:56:20
10 untouched by Intuit's marketing"; do you see 10:56:24
11 that? 10:56:27

12 A. I do. 10:56:27

13 Q. And you undertook a preliminary study 10:56:28
14 before you ran your main study; isn't that right? 10:56:31

15 A. That's right. 10:56:34

16 Q. And do you recall whether or not any of 10:56:34
17 the participants in the preliminary study said that 10:56:38
18 they didn't have enough information about 10:56:40
19 TurboTax's Website? 10:56:45

20 A. I don't recall the specific counts in the 10:56:49
21 results of my preliminary study. 10:56:52

22 Q. Do you recall whether or not there were 10:56:54

1 people that participated in the preliminary study 10:56:56

2 who said they were not sure about their 10:56:58

3 understanding of filing their 2021 income taxes for 10:57:03

4 free with TurboTax? 10:57:07

5 A. Again, I don't recall the specific results 10:57:08

6 of my preliminary study. 10:57:10

7 Q. Do you recall that 38 out of 208 people 10:57:12

8 said that they don't have enough information or 10:57:15

9 they're not sure about their understanding of 10:57:18

10 filing your 2021 income taxes for free with 10:57:22

11 TurboTax? 10:57:25

12 A. I didn't recall that number. You told it 10:57:28

13 to me. I don't recall it, but... 10:57:29

14 Q. And that would be about 18 percent of the 10:57:33

15 people in your preliminary study? 10:57:35

16 A. I'll trust your math. That sounds about 10:57:39

17 right. 10:57:43

18 Q. So would it have been impossible to find 10:57:43

19 people in the general population who don't have 10:57:45

20 enough information or aren't sure about filing 10:57:48

21 their 2021 income taxes for free with TurboTax? 10:57:51

22 A. So that's not the goal. The goal wasn't 10:57:55

1 to select on people whose answer to the do I know 10:57:57
2 whether to file question, in fact, that would be a 10:58:01
3 terrible approach because that's using the 10:58:04
4 dependent variable to select your sample. What I 10:58:05
5 was trying to sample on was not people who had a 10:58:08
6 particular response to my main questions of 10:58:10
7 interest. It's people who had not been exposed to 10:58:12
8 TurboTax's marketing campaign about filing for 10:58:16
9 free. 10:58:18

10 Q. And you did not run an experimental design 10:58:20
11 and control study in this case, right? 10:58:23

12 A. I did not. 10:58:26

13 Q. And why didn't you run an experimental 10:58:27
14 design and control study of a single ad? 10:58:33

15 A. I wasn't tasked with measuring the effect 10:58:38
16 of a single ad. 10:58:39

17 Q. And why didn't you run an experimental 10:58:41
18 design and control study by showing participants to 10:58:45
19 the survey multiple ads? 10:58:51

20 A. The reason I didn't run a control test 10:58:55
21 design here is because the marketing campaign that 10:58:57
22 I was looking to measure the effects of wasn't 10:59:02

1 something I could replicate easily in a survey 10:59:03

2 context. Whether it's one ad or five ads, it 10:59:07

3 wouldn't -- neither of those would be a good 10:59:09

4 replication of the many things that Intuit has done 10:59:12

5 to communicate free filing to consumers. 10:59:15

6 Q. And why didn't you run a test and control 10:59:19

7 study using a disguise of the -- of the provider of 10:59:22

8 the tax service? 10:59:27

9 A. Using a disguise doesn't solve the problem 10:59:29

10 I just described. 10:59:31

11 Q. And did you consider running a test and 10:59:35

12 control study disguising TurboTax's identity? 10:59:38

13 A. I don't know if I considered it. I may 10:59:42

14 have considered it briefly at some point, but as I 10:59:43

15 said, it doesn't solve the problem that I was 10:59:46

16 trying to solve. 10:59:48

17 Q. Do you know whether complaint counsel ran 10:59:50

18 a test and control study of any TurboTax ads? 10:59:54

19 A. I am not aware of complaint counsel 10:59:56

20 running a study of -- a test control study of any 10:59:59

21 TurboTax ads. 11:00:03

22 Q. Are there people at Cornerstone qualified 11:00:04

1 to conduct a test and control study of TurboTax 11:00:07

2 ads? 11:00:10

3 A. I would imagine there are. 11:00:10

4 Q. And do you know whether Cornerstone has 11:00:11

5 done a test and control study of any TurboTax 11:00:14

6 ads? 11:00:18

7 A. I'm not aware of TurboTax ads being tested 11:00:19

8 by Cornerstone in a control test design. 11:00:21

9 Q. Are there people at GBK that are qualified 11:00:25

10 to conduct a test and control study of TurboTax 11:00:28

11 ads? 11:00:31

12 A. There might be. I'm not sure. 11:00:32

13 Q. Do you know whether GBK has done an 11:00:33

14 experimental test and control study of Intuit's 11:00:36

15 TurboTax ads? 11:00:39

16 A. I'm not aware of GBK doing any test 11:00:41

17 control study of TurboTax ads. 11:00:43

18 Q. Can you turn to your rebuttal report, 11:01:03

19 which is 13 -- RX-1345, page 12, paragraph 21. 11:01:09

20 MS. PLETT: Counsel, the exhibit we were 11:01:26

21 just talking about, can you clarify for the record 11:01:27

22 the exhibit number. That was GX-303; is that 11:01:29

1 right? 11:01:34

2 MR. PAIKIN: His expert report? Yeah, his 11:01:35

3 expert report is GX-303. Now we're running to 11:01:38

4 RX-1345. 11:01:41

5 A. I'm sorry. Can you repeat where in this 11:01:42

6 report you want me to turn? 11:01:44

7 Q. On page 12, paragraph 21. 11:01:45

8 You say in your report where it says "For 11:02:17

9 example, Professor Hauser states that 'without 11:02:20

10 stimuli, the Novemsky survey is simply an unaided 11:02:24

11 test of respondents' impressions at the time of the 11:02:27

12 survey.' That is accurate and was precisely my 11:02:30

13 goal." 11:02:33

14 A. I do see that. 11:02:37

15 Q. Can you explain what you mean by that? 11:02:37

16 A. I was -- in my survey what I was trying to 11:02:42

17 do was to test consumers' understanding of whether 11:02:47

18 or not they could file for free with TurboTax from 11:02:50

19 whatever marketing they may have seen from TurboTax 11:02:54

20 in the world without me supplying them with 11:02:56

21 anything. Hence the description as unaided recall, 11:02:59

22 meaning, you know, given what you know prior to 11:03:03

1 coming to the survey, what is your understanding of 11:03:05

2 whether or not you can file for free. 11:03:07

3 Q. Does your study test in a scientific way a 11:03:11

4 causal relationship between the specific TurboTax 11:03:14

5 ads and consumer understanding? 11:03:20

6 A. There are a number of pieces of evidence 11:03:21

7 that point -- some in my survey, some beyond my 11:03:23

8 survey, that point to a causal relationship between 11:03:26

9 marketing from Intuit and TurboTax and consumers' 11:03:29

10 understanding. [REDACTED] 11:03:33

11 [REDACTED] 11:03:35

12 [REDACTED] 11:03:39

13 [REDACTED] 11:03:41

14 In my study we also have evidence from 11:03:45

15 consumers indicating that they think they can file 11:03:49

16 for free and indicating specifically as a source of 11:03:52

17 that TurboTax ads. In fact, about half of them who 11:03:54

18 had that understanding that they could file for 11:04:02

19 free erroneously did indeed indicate TurboTax ads 11:04:04

20 as the source. 11:04:07

21 So I consider those two important pieces 11:04:08

22 of evidence that indeed TurboTax ads caused the 11:04:11

1 evidence for TurboTax ads influencing consumers' 11:05:21

2 understanding of whether or not they can file for 11:05:27

3 free with TurboTax. 11:05:29

4 Q. Focusing in solely on your study, exclude 11:05:32

5 everything else in the world, does your study by 11:05:36

6 itself in a scientific way establish a causal 11:05:39

7 relationship between the specific TurboTax ads and 11:05:41

8 consumer understanding, yes or no? 11:05:44

9 A. So, again, I agree that there is 11:05:47

10 evidence -- I would say to use your terms, yes, 11:05:49

11 because half of the consumers pointing to TurboTax 11:05:53

12 ads as the source of their understanding and the 11:05:58

13 absence of any other analysis saying here's a more 11:06:01

14 plausible or a likely alternative cause, which is 11:06:05

15 part of how scientific analysis is done, includes 11:06:09

16 the consideration of other possible causes. 11:06:11

17 So including that necessary analysis, yes, 11:06:13

18 I would say there is evidence -- scientifically 11:06:15

19 founded evidence in my survey that says that indeed 11:06:19

20 ads contributed to consumers' misunderstanding of 11:06:21

21 their ability to file for free with TurboTax. 11:06:25

22 Q. Did you, yourself undertake any other 11:06:27

1 experimental studies to determine whether or not 11:06:31
2 other possibilities could be eliminated? 11:06:35
3 A. I did not use any experimental studies to 11:06:39
4 eliminate other possibilities. 11:06:41
5 Q. Let's talk a little bit about your 11:06:49
6 perception survey. Am I right that you excluded 11:06:52
7 anyone who is eligible to file for free on Free 11:06:54
8 Edition? 11:06:58
9 A. That was certainly the goal of the 11:06:58
10 screening. 11:07:00
11 Q. Did you do any study with respect to how 11:07:01
12 this group of people understood the eligibility 11:07:04
13 requirements for TurboTax Free Edition? 11:07:08
14 A. There was a place for them to explain why 11:07:11
15 they thought they could file for free or not file 11:07:13
16 for free. So that would have been an opportunity 11:07:16
17 for them if they wanted to to talk about the 11:07:17
18 eligibility requirements. 11:07:21
19 Q. So my question wasn't clear. I'm focusing 11:07:22
20 in on the people who you excluded from your study. 11:07:25
21 A. Oh. 11:07:28
22 Q. The people who were eligible to file for 11:07:29

1 free on Free Edition. With respect to that group, 11:07:31
2 did you do any study to determine their 11:07:35
3 understanding of the eligibility requirements for 11:07:38
4 TurboTax Free Edition? 11:07:41
5 A. I did not. 11:07:42
6 Q. And did you do any study with respect to 11:07:44
7 the group of people who were eligible to file for 11:07:47
8 Free Edition as to the source of any understanding 11:07:53
9 they may have formed with respect to eligibility 11:07:54
10 requirements for TurboTax Free Edition? 11:07:58
11 A. I did not. 11:08:00
12 Q. You also excluded anyone who had filed 11:08:03
13 their tax year 2021 taxes before taking the survey 11:08:05
14 that was run between March 11th, 2022 and 11:08:10
15 March 24th, 2022, correct? 11:08:14
16 A. That's correct. 11:08:16
17 Q. And that excluded approximately 60 percent 11:08:17
18 of tax filers; is that right? 11:08:20
19 A. That's my understanding. 11:08:22
20 Q. And I believe there are approximately 11:08:25
21 179 million tax filers in tax year 2021. Does that 11:08:27
22 sound about right? 11:08:32

1 respondents who filed earlier in the tax season, 11:09:38
2 prior to March 11, 2022, and who are not part of 11:09:43
3 your sample are similar to the respondents who 11:09:46
4 filed later in the tax season and are part of your 11:09:49
5 sample? 11:09:52
6 A. I did not run a test for that. 11:09:52
7 Q. Do you know whether or not the earlier 11:09:58
8 filers are generally younger than later filers? 11:10:01
9 A. My understanding is they might be. 11:10:06
10 Q. And do you have an understanding as to 11:10:08
11 whether or not early filers are generally owed 11:10:10
12 higher refunds than later tax filers? 11:10:14
13 A. My understanding is they might be. 11:10:18
14 Q. Do you agree that if these later filers 11:10:20
15 are different, the timing of the survey would 11:10:22
16 result in a nonrepresentative sample of taxpayers 11:10:25
17 who did not qualify to use TurboTax Free Edition 11:10:28
18 under Intuit's criteria? 11:10:31
19 A. The question of representativeness that 11:10:34
20 you're talking about goes to the measures that I'm 11:10:36
21 taking, which are can they file for free or not 11:10:39
22 being the key one. It's not clear to me that the 11:10:43

1 two things you said, being younger, being likely to 11:10:47
2 have a greater refund, would make them less 11:10:50
3 representative of their impression of whether or 11:10:54
4 not they could file for free. 11:10:56

5 Q. But you didn't undertake any study to 11:10:57
6 determine whether that was the case or not, 11:11:01
7 correct? 11:11:03

8 A. Correct. 11:11:05

9 Q. You also excluded people that did file 11:11:06
10 their taxes on TurboTax before they took the survey 11:11:08
11 between March 11, 2022 and March 24, 2022, correct? 11:11:11

12 A. People who did file with TurboTax prior to 11:11:16
13 that time? I did exclude them, yes. 11:11:18

14 Q. And those are people who would have 11:11:20
15 visited the TurboTax Website in order to file their 11:11:22
16 taxes within the last three months prior to your 11:11:26
17 survey, correct? 11:11:28

18 A. To file in 2021 you would have had to file 11:11:34
19 I presume after January 1st and before March 11th 11:11:37
20 to be with TurboTax or anyone else, and you would 11:11:41
21 be excluded from my survey. 11:11:44

22 Q. So you excluded people who would have 11:11:45

1 visited the TurboTax Website three months prior to 11:11:50
2 your survey to file their taxes, right? 11:11:52
3 A. I did not exclude them if they visited the 11:11:56
4 Website. I excluded them if they filed their taxes 11:11:57
5 prior to March 11th whether or not they visited the 11:12:00
6 Website. 11:12:04
7 Q. And this is a population that would have 11:12:05
8 recent experience with the TurboTax Website, 11:12:07
9 correct? 11:12:09
10 A. Let me understand your population again. 11:12:12
11 Q. Let me -- let me reask the question. 11:12:15
12 The people that filed their taxes between 11:12:18
13 January 1st, 2022 and March 11, 2022 would have had 11:12:20
14 recent experience with TurboTax's Website, correct? 11:12:24
15 A. Those -- only those who had filed with 11:12:28
16 TurboTax in that period, they would have had -- 11:12:30
17 many of them would have had recent experience with 11:12:33
18 the Website. Again, I believe there's another 11:12:35
19 product that's not on-line that they also could 11:12:37
20 have filed with. 11:12:39
21 Q. And this group of people who filed their 11:12:40
22 taxes on TurboTax Website between January 1st, 2022 11:12:42

1 and March 11, 2022 would have had an understanding 11:12:46
2 of the eligibility requirements from their 11:12:51
3 action -- interaction with that Website, wouldn't 11:12:54
4 they? 11:12:56

5 A. If those consumers, as you say, had gotten 11:12:57
6 all the way to the point of filing, they would have 11:13:01
7 understood whether they could pay or not for 11:13:03
8 TurboTax's product. 11:13:06

9 Q. And you excluded every one of those people 11:13:06
10 from your study, correct? 11:13:08

11 A. Correct. 11:13:10

12 Q. And you included people who are not 11:13:11
13 eligible to file for free on TurboTax, right? 11:13:15

14 A. Right. 11:13:19

15 Q. Do you know whether or not those people at 11:13:20
16 the time that they filled out responses to your 11:13:23
17 survey had gathered all of their tax forms in one 11:13:26
18 place? 11:13:29

19 A. I do not know if they have done that. 11:13:30

20 Q. So do you know whether or not those people 11:13:32
21 understood their own tax situations at the time 11:13:35
22 that they took the survey? 11:13:37

1 A. I have some information about their 11:13:40
2 understanding. So we ran a pilot of the survey, 11:13:41
3 and in that pilot, people seemed to have no problem 11:13:44
4 answering our screening questions. So to the 11:13:46
5 extent that is a part of their understanding of 11:13:49
6 their tax situation, they seemed to demonstrate 11:13:51
7 comfort and understanding with that piece of their 11:13:53
8 tax situation. 11:13:56

9 Q. Separately in your report you said that 11:13:59
10 consumers are cognitive misers, right? 11:14:00

11 A. Consumers are cognitive misers, correct. 11:14:03

12 Q. That's your term, correct? 11:14:06

13 A. That is mine in the field that I work in. 11:14:08
14 It's not my unique term. 11:14:09

15 Q. Do you know whether or not the consumers 11:14:11
16 that were actually answering your survey undertook 11:14:13
17 at the point in time that they were answering the 11:14:17
18 questions to gather all of their tax information to 11:14:20
19 understand their own tax situations? 11:14:23

20 A. I don't know if they gathered all their 11:14:26
21 tax information at the time they were answering my 11:14:27
22 survey. 11:14:29

1 Q. So you have no basis to know whether or 11:14:30
2 not the people that were participating in your 11:14:32
3 survey actually understood their own tax 11:14:34
4 situations, correct? 11:14:37

5 A. I'm not sure I know what you mean by 11:14:38
6 "understood their own tax situations." 11:14:40

7 Q. Well, at the time that people who were 11:14:45
8 participating in your survey, you don't know 11:14:47
9 whether or not they had gathered the information 11:14:50
10 necessary to file a tax return, correct? 11:14:52

11 A. I don't know if they had gathered the 11:14:55
12 information necessary to file a tax return, that is 11:14:56
13 correct. 11:14:59

14 Q. And the survey that you took took place in 11:14:59
15 2022 and focused on people that were planning to 11:15:03
16 file an income tax return for tax year 2021, 11:15:05
17 correct? 11:15:10

18 A. That's correct. 11:15:11

19 Q. And can you extrapolate from this group 11:15:12
20 what people's impressions were in prior years? 11:15:16

21 A. There's some -- to the extent there's 11:15:25
22 similarity from year to year, the impressions are 11:15:27

1 probably similar. To the extent there are 11:15:29
2 differences from year to year, the impressions are 11:15:31
3 probably different. So I'd have to think carefully 11:15:33
4 about what has varied from year to year, and I have 11:15:36
5 not done that analysis. 11:15:39

6 Q. So you have not tested what people's 11:15:40
7 impressions were in years prior to 2022, correct? 11:15:43

8 A. For tax year 2021 I have not tested their 11:15:49
9 understanding prior to the tax year 2021, yes. 11:15:52

10 Q. And so from your study, do you have 11:15:58
11 information as to what consumers understood in 11:16:05
12 March of 2021 with respect to their ability to file 11:16:10
13 their taxes for free on TurboTax? 11:16:15

14 A. Yes. That's precisely what my study has 11:16:20
15 is information about whether they think they can 11:16:22
16 file for free in March of 2020 -- I'm sorry. I may 11:16:24
17 be confusing the years -- of 2022. I misspoke. 11:16:30

18 So I understand from March 2022 if the 11:16:33
19 question was about March 2021 -- sorry. I get 11:16:36
20 confused between tax year and calendar year. If 11:16:40
21 it's for March 2021, I do -- the information I 11:16:43
22 have, again, is what I said a moment ago, which is 11:16:46

1 to the extent it was a similar environment, 11:16:48
2 information environment, similar marketing, and 11:16:50
3 other things, then I would expect some similarity. 11:16:53
4 So to that extent I have some information, but I 11:16:56
5 didn't study tax year 2020 as different from tax 11:16:58
6 year 2021. 11:17:03
7 Q. So you didn't undertake a survey to 11:17:04
8 understand people's understanding of their 11:17:06
9 tax -- strike that. 11:17:11
10 You didn't undertake a survey to 11:17:14
11 understand people's understanding of their ability 11:17:15
12 to file for free on TurboTax in tax year 2015? 11:17:18
13 A. I did not. 11:17:26
14 Q. And you didn't undertake a study to 11:17:27
15 determine people's understanding of their ability 11:17:29
16 to file for free on TurboTax in tax year 2016? 11:17:30
17 A. Again, not as different from their 11:17:35
18 understanding in 2021, no. 11:17:37
19 Q. What was the age group of people that 11:17:43
20 participated in your study? 11:17:45
21 A. They had to be over 18, including and over 11:17:46
22 18. 11:17:49

1 Q. Approximately what percentage of the 11:17:51
2 population in your study were 18? 11:17:53

3 A. I don't remember the age distribution. It 11:17:57
4 wasn't a focal part of my analysis. 11:17:59

5 Q. And in someone who was 18 at the time that 11:18:05
6 they took your study, how old would they have been 11:18:08
7 in 2015? 11:18:11

8 A. At that same time in 2015 they would have 11:18:15
9 been 11. 11:18:16

10 Q. Do you think that in answering your survey 11:18:17
11 questions 18-year-old participants would have been 11:18:19
12 drawing on information from 2015? 11:18:24

13 A. I don't believe that people would be 11:18:29
14 drawing on tax information from when they were 11 11:18:31
15 years old, no. 11:18:34

16 Q. Are you aware that there was a settlement 11:18:37
17 between Intuit and the 50 state attorney generals 11:18:40
18 in the District of Columbia? 11:18:44

19 A. I am aware that there was some settlement 11:18:47
20 with the states and Intuit. 11:18:49

21 Q. Have you reviewed that settlement? 11:18:50

22 A. Not closely. 11:18:52

1 Q. Have you reviewed it at all? 11:18:52

2 A. I don't believe I've seen a detailed legal 11:19:02

3 document about what the settlement was. I may have 11:19:03

4 read about it in the media or somewhere. I don't 11:19:06

5 recall reviewing a detailed document about it. 11:19:08

6 Q. And do you have an understanding as to 11:19:11

7 whether or not that settlement requires Intuit to 11:19:12

8 make certain changes to its marketing practices? 11:19:15

9 A. I understand that it did require Intuit to 11:19:19

10 make certain changes to its marketing practices. 11:19:21

11 Q. And have you undertaken any study with 11:19:23

12 respect to consumer perception of Intuit ads that 11:19:29

13 are going to be run after the settlement with the 11:19:34

14 state attorney generals? 11:19:37

15 A. As I said earlier, I haven't undertaken 11:19:41

16 such a study, but Professor Hauser has. 11:19:43

17 Q. So have you undertaken any study to assess 11:19:49

18 consumer perceptions of tax year 2022 ads? 11:19:51

19 A. I have not undertaken a study of tax year 11:19:56

20 2022 ads, no. 11:19:59

21 Q. Have you undertaken any study to assess 11:20:00

22 consumer perceptions of tax year 2022 Website? 11:20:01

1 Q. Is it possible that some of the 11:21:05
2 respondents in group B had not used TurboTax in the 11:21:07
3 last three years? 11:21:09
4 A. It's possible. 11:21:13
5 Q. You can't exclude that possibility, 11:21:14
6 correct? 11:21:16
7 A. I can't, but with -- it's a standard 11:21:18
8 scientific method that I use to survey them. So 11:21:21
9 scientific datasets are often built on these kinds 11:21:26
10 of responses. So I trust it as I would a different 11:21:28
11 scientific dataset, but no set of responses is 11:21:31
12 100 percent full proof and perfect. They are human 11:21:35
13 beings who are filling out the survey. So they can 11:21:39
14 make errors. 11:21:41
15 Q. Why do you consider only the last three 11:21:41
16 years of a respondent's experience with paid 11:21:43
17 TurboTax products to be relevant for your survey? 11:21:45
18 A. One thing you try to do in the survey is 11:21:51
19 you try to ask them questions that they can 11:21:54
20 remember. If you're asking about their memory, 11:21:57
21 going back more than three years might be hard for 11:22:01
22 them to remember, number one. Number two, their 11:22:03

1 tax situation over a long enough span may have 11:22:06
2 changed enough that their eligibility for a free 11:22:09
3 TurboTax product may be in flux. 11:22:13
4 So I was trying to pick a window where 11:22:15
5 they didn't have any recent experience so that 11:22:18
6 TurboTax marketing would be likely to be their main 11:22:21
7 source of understanding of whether they could file 11:22:23
8 for free or not, but also not so long that maybe 11:22:25
9 their tax situation had changed. 11:22:28
10 Q. Is it possible that a customer who used a 11:22:31
11 paid TurboTax product more than three years ago 11:22:34
12 would remember that experience and use it in 11:22:36
13 forming their belief as to whether TurboTax was 11:22:38
14 free to them? 11:22:40
15 A. It's possible. 11:22:43
16 Q. Is it possible for a consumer to arrive at 11:22:47
17 the TurboTax Website without seeing Intuit's 11:22:50
18 advertising? 11:22:54
19 A. It's possible. 11:22:56
20 Q. Did you examine the channels through which 11:22:56
21 consumers with alleged misimpressions arrived at 11:22:59
22 the Website? 11:23:04

1 year 2021 advertising. Then assume that that 11:24:23
2 customer also has expectations that are consistent 11:24:25
3 with his ineligibility but chooses to visit the 11:24:30
4 Website and purchase TurboTax Deluxe. Do you 11:24:34
5 understand that hypothetical? 11:24:39
6 A. I do. 11:24:40
7 Q. How would you expect observable data from 11:24:41
8 that customer's interaction with TurboTax to differ 11:24:44
9 from a customer who expected to file for free but 11:24:48
10 was deceived into paying? 11:24:51
11 A. When you say TurboTax's data, what do you 11:24:56
12 mean? 11:24:59
13 Q. Well, the question is how would you expect 11:25:03
14 the customer who fully understands the eligibility 11:25:06
15 requirements and goes to the Website and decides to 11:25:11
16 file with TurboTax Deluxe, the paid product, how 11:25:15
17 would you expect their behavior to be different 11:25:19
18 from a customer that goes to the Website expecting 11:25:25
19 to file for free but was deceived? 11:25:29
20 A. So one clear aspect of their behavior that 11:25:33
21 would be different would be the product they would 11:25:35
22 start in. So one consumer would start in Free 11:25:37

1 Edition, the other consumer would presumably start 11:25:40
2 in Deluxe. 11:25:42

3 Q. Why would that be the case? 11:25:45

4 A. If I understand your hypothetical 11:25:49
5 correctly -- and I'm not certain I do, but if I do, 11:25:50
6 then one customer is coming with the idea that they 11:25:54
7 are eligible for Free Edition. So they would 11:25:57
8 presumably start in Free Edition. The other 11:25:59
9 customer knows they are not eligible for Free 11:26:02
10 Edition. So they would start in a different 11:26:04
11 product, perhaps TurboTax Deluxe. 11:26:06

12 Q. And do you know that whether or not people 11:26:09
13 that ultimately pay for the product are often 11:26:13
14 encouraged to start in Free Edition? 11:26:19

15 A. Could you ask that question again? I'm 11:26:23
16 sorry. 11:26:26

17 Q. I'm trying to understand why do you think 11:26:27
18 it is that these two sets of people would function 11:26:28
19 differently on the TurboTax Website? 11:26:32

20 A. To me it's very clear that if you come in 11:26:36
21 knowing you can't file with Free Edition, you 11:26:38
22 wouldn't spend time on the Website with Free 11:26:42

1 Appendix F. And are you there? 11:43:24

2 A. Yeah. 11:43:45

3 Q. And what is -- could you describe what's 11:43:45
4 set forth here on page 32 of Appendix F? 11:43:56

5 A. Sure. So Appendix F, page 32 is a 11:44:01
6 description of the opt-out. This I understand to 11:44:04
7 be a requirement whenever a federal agency 11:44:07
8 commissions a consumer survey. They're required to 11:44:09
9 offer consumers the opportunity to not participate 11:44:13
10 and to reveal -- and they're required also to 11:44:17
11 reveal that it is indeed commissioned by the 11:44:21
12 federal government. 11:44:23

13 Q. And is the slide that appears on page 32 11:44:23
14 of Exhibit F a slide that was shown to the 11:44:28
15 participants of your survey? 11:44:31

16 A. That's my understanding, yes. 11:44:33

17 Q. What is your understanding of the legal 11:44:35
18 requirement -- or do you -- I mean, I'm not -- I'm 11:44:38
19 really not trying to be unfair because I honestly 11:44:43
20 don't understand it. Do you have an understanding 11:44:46
21 of where the legal requirement comes from, or is 11:44:47
22 that just something that complaint counsel told 11:44:50

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1 fair to say that with respect to all of the other 11:48:07
2 questions that were asked in your survey it may 11:48:10
3 have also had some effect? 11:48:12
4 A. I don't know if it had any effect on that 11:48:14
5 question or any other question. What I was putting 11:48:16
6 was an upper bound on any possible effect, and 11:48:18
7 similarly one could do that math for the other 11:48:21
8 questions in my survey. 11:48:25
9 Q. Isn't there a significant potential for 11:48:28
10 selection bias resulting from respondents being 11:48:30
11 able to opt-out out of the survey after completion? 11:48:34
12 A. I don't know what you mean by "significant 11:48:37
13 potential." There is a potential for it and that 11:48:39
14 bias could go in either direction for any of the 11:48:42
15 questions that I asked. 11:48:44
16 Q. And do you think respondents with positive 11:48:45
17 views of TurboTax are more likely to exit the 11:48:48
18 survey after learning it was designed to be used 11:48:51
19 against TurboTax? 11:48:53
20 A. I don't know. They could also equally 11:48:57
21 plausibly be more likely to opt in or to not opt 11:49:03
22 out so as to have their data recorded and included 11:49:03

1 perhaps on TurboTax's behalf. 11:49:07

2 Q. And that's because you have no information 11:49:08

3 one way or the other, right? 11:49:11

4 A. I know nothing about the opt-in -- excuse 11:49:12

5 me -- the opt-out participants. 11:49:16

6 Q. You say in your report that it was a 11:49:17

7 fraction, right, 164 out of the 771 is a fraction. 11:49:21

8 What is that fraction? 11:49:32

9 A. I'd have to do the math. I don't know off 11:49:34

10 the top of my head. 11:49:36

11 Q. Is it -- I think it's 21.3 percent of the 11:49:38

12 survey participants opted out, right? 11:49:41

13 A. That sounds like it's in the ballpark to 11:49:44

14 be correct. 11:49:48

15 Q. I'm handing you what's been marked -- 11:50:08

16 previously marked as Exhibit RX-709. I'm going 11:50:11

17 to -- it's a long document. I'm going to direct 11:50:26

18 you to a specific part and I'll give you an 11:50:28

19 opportunity to read the context around it, but just 11:50:31

20 let me ask you, do you recognize RX-709? 11:50:33

21 A. Yes. This appear to be -- appears to be 11:50:41

22 Shari Diamond's treatise on survey evidence in 11:50:47

1 litigation context. 11:50:49

2 Q. And this RX-709 is something that you cite 11:50:50

3 and rely on in your report? 11:50:52

4 A. It is. 11:50:55

5 Q. Could you turn to page 383 of RX-709, and 11:50:57

6 the paragraph that's in section D, which is titled 11:51:15

7 "What is the evidence that nonresponse did not bias 11:51:20

8 the results of the survey"; do you see that 11:51:23

9 section? 11:51:25

10 A. I do. 11:51:26

11 Q. And the second paragraph that begins "The 11:51:26

12 key to evaluating the effect"; do you see that 11:51:28

13 paragraph? 11:51:33

14 A. I do. 11:51:33

15 Q. Okay. And then the sentence appears -- 11:51:34

16 says, that is, and I'm quoting, "The difficult 11:51:44

17 question to address is the extent to which 11:51:48

18 nonresponse has biased the pattern of responses by 11:51:51

19 undermining the representativeness of the sample 11:51:55

20 and if it has the direction of that bias"; do you 11:51:58

21 see that? 11:52:01

22 A. I do. 11:52:02

1 Q. And then the next sentence says "It is 11:52:03
2 incumbent on the expert presenting the survey 11:52:07
3 results to analyze the level and sources of 11:52:09
4 nonresponse and to assess how that nonresponse is 11:52:12
5 likely to have affected the results"; do you see 11:52:16
6 that sentence? 11:52:19

7 A. I do. 11:52:20

8 Q. And you did not in this circumstance 11:52:20
9 analyze the impact the opt-outs, did you? 11:52:26

10 A. So that paragraph says, you know, tell as 11:52:38
11 much as you can about the respondents, and I did an 11:52:40
12 analysis. So I -- having no information about the 11:52:42
13 respondents per the regulation, I did the best 11:52:44
14 thing I could, which was assume the bias goes 11:52:47
15 directly against my conclusions, assume it goes 11:52:50
16 maximally so, and what would it do to my 11:52:53
17 conclusions. So that 37 percent I revealed to you 11:52:56
18 earlier was one part of that particular analysis. 11:52:59
19 So to me that is understanding the upper bound on a 11:53:01
20 possible bias from nonresponse given the dearth of 11:53:04
21 information I have about who those people are and 11:53:08
22 what they think. 11:53:09

1 Q. And the reason why you can't study what 11:53:12
2 the behavior of those opt-outs would have been is 11:53:17
3 because there's no information that was retained 11:53:19
4 with respect to their responses, correct? 11:53:24
5 A. Correct. 11:53:26
6 Q. And that was at the direction of complaint 11:53:29
7 counsel? 11:53:32
8 A. That was my understanding of the 11:53:33
9 regulations as told to me by complaint counsel, 11:53:35
10 yeah. 11:53:38
11 Q. And is there any reason you couldn't have 11:53:38
12 saved those responses on an anonymized basis -- 11:53:40
13 anonymized basis? 11:53:46
14 A. My understanding from complaint counsel 11:53:47
15 was the regulation requires that we not retain data 11:53:48
16 from people who tell us not to include them in a 11:53:51
17 federally commissioned study. 11:53:55
18 Q. You did not -- my understanding is you did 11:54:02
19 not -- changing topics. My understanding is you 11:54:05
20 did not screen participants who were aware of the 11:54:08
21 allegations in the lawsuits that have been brought 11:54:11
22 against Intuit; is that right? 11:54:14

1 respondents responded to survey stimuli and 11:55:14
2 questions? 11:55:16

3 A. It can, as can knowledge of, you know, 11:55:18
4 many things about the world. If they happen to be 11:55:21
5 an H&R Block customer, that could bias them. If 11:55:23
6 they happen to have, you know, some particular tax 11:55:26
7 situation, that could bias them. There are many 11:55:29
8 things that could potentially bias people in a 11:55:32
9 survey, and I can't screen them all out. And so 11:55:34
10 you screen out the things where you have a 11:55:37
11 reasonable and plausible or likely hypothesis about 11:55:40
12 a particular bias, and then you would, you know, 11:55:43
13 focus on those. 11:55:47

14 Q. And you didn't test that question here, 11:55:47
15 did you? 11:55:49

16 A. Test what question? 11:55:50

17 Q. Whether or not litigation-aware 11:55:51
18 respondents would have responded differently to the 11:55:54
19 survey stimuli in questions that were asked? 11:55:57

20 A. I did not test that. 11:56:00

21 Q. You did not identify the litigation-aware 11:56:01
22 respondents in the survey to assess whether they 11:56:04

1 may have provided different responses than 11:56:07

2 respondents who were not litigation aware, right? 11:56:09

3 A. That's correct. 11:56:11

4 Q. And you would agree that the focus of your 11:56:16

5 survey was on TurboTax, right? 11:56:18

6 A. Yes. 11:56:21

7 Q. And do you think that the focus on 11:56:21

8 TurboTax might have had an impact on respondents' 11:56:23

9 answers separate and apart from how they understand 11:56:27

10 TurboTax's advertising if they were litigation 11:56:30

11 aware? 11:56:33

12 A. I'm sorry. I'm not sure I follow that 11:56:34

13 question. 11:56:36

14 Q. Well, let me strike that. 11:56:38

15 Are you aware that the issues involved in 11:56:40

16 this lawsuit have received substantial media 11:56:42

17 attention? 11:56:45

18 A. I understood they received some. I 11:56:46

19 don't -- I'm not aware that it was substantial. 11:56:48

20 Q. Are you familiar with a Netflix show 11:56:52

21 called Patriot Act with Hasan Minhaj? 11:56:55

22 A. No. 11:57:00

1 Q. Are you aware that he did a half-hour 11:57:01
2 political comedy show on June 28th, 2020 called 11:57:03
3 "Why Doing Taxes Is So Hard"? 11:57:08
4 A. No. 11:57:10
5 Q. Are you aware that the description of that 11:57:11
6 show is Hasan exposes how TurboTax pushes taxpayers 11:57:12
7 away from its free service to a paid option and why 11:57:17
8 efforts to simplify filing have repeatedly 11:57:21
9 failed? 11:57:23
10 A. I don't know anything about that episode 11:57:25
11 or that show. 11:57:26
12 Q. And just before this deposition I looked 11:57:28
13 on YouTube and I saw that that -- that show had 11:57:31
14 1.7 million views on YouTube. Did you do any 11:57:36
15 analysis to determine whether or not any of the 11:57:43
16 participants in your study had seen that show? 11:57:45
17 A. I did not. 11:57:50
18 (Exhibit RX-1350 was marked 11:58:17
19 for identification.) 11:58:17
20 BY MR. PAIKIN: 11:58:23
21 Q. I'm handing you what's been marked 11:58:23
22 RX-1350, and this is a article that appeared in 11:58:26

1 ProPublica initially on April 22nd, 2019, and this 11:58:53
2 exhibit shows an updated version from March 24th, 11:58:58
3 2021. It's titled "Here's how TurboTax just 11:59:02
4 tricked you into paying to file your taxes." 11:59:05
5 Are you aware that the allegations against 11:59:28
6 TurboTax received significant coverage in 11:59:30
7 ProPublica? 11:59:34
8 A. I was not aware they had significant 11:59:35
9 coverage, no. 11:59:37
10 Q. And have you seen articles that were in 11:59:38
11 the media with respect to the allegations in this 11:59:44
12 lawsuit prior to conducting your survey? 11:59:47
13 A. I don't recall if I saw them prior to 11:59:53
14 conducting my survey. 11:59:54
15 Q. Did complaint counsel make you aware that 11:59:56
16 there was significant media coverage of allegations 11:59:59
17 against TurboTax prior to you preparing your 12:00:01
18 survey? 12:00:04
19 A. I don't recall. 12:00:06
20 Q. Do you know whether or not any of the 12:00:09
21 participants in your survey reviewed RX-1350 prior 12:00:11
22 to completing your survey? 12:00:16

1 A. I asked them where their understanding 12:05:14
2 about their filing came from, and that allowed them 12:05:17
3 to point to media in a closed-ended question. So 12:05:20
4 that would have been a related question. It was 12:05:24
5 not exactly the question you just asked. I didn't 12:05:26
6 ask the question exactly as you asked it. 12:05:29

7 Q. Are you aware that the allegations against 12:05:31
8 TurboTax not only appeared in print media but also 12:05:32
9 appeared on television? 12:05:36

10 A. I was aware there was some media coverage. 12:05:41
11 I wasn't clear about what channel of media it had 12:05:43
12 gone through. 12:05:46

13 (Exhibit RX-1354 was marked 12:05:57
14 for identification.) 12:05:57

15 BY MR. PAIKIN: 12:05:57

16 Q. In the course of this deposition I'm going 12:05:57
17 to play some videos that have been premarked, and 12:05:59
18 I'm going to hand to the complaint counsel two 12:06:05
19 flash drives that contain the videos that we're 12:06:09
20 going to show. And let me also get -- and I'm also 12:06:13
21 marking as RX-1354 an index that we've prepared 12:06:26
22 that sets forth exhibit numbers for each one of the 12:06:32

1 videos and a description of the video as it appears 12:06:37
2 on the flash drive, the date as stated on the Web 12:06:41
3 page for when the video ran, a column that has the 12:06:46
4 date of the video file capture with respect to each 12:06:51
5 exhibit, and the Website from which we downloaded 12:06:54
6 the video. 12:06:58

7 All of that's prelude -- I'm now going to 12:07:04
8 play for you RX-1342, which is a May 6th, 2019 12:07:09
9 broadcast on NBC Nightly News. 12:07:26

10 MS. PLETT: Objection, lack of foundation. 12:07:32
11 (Whereupon a video was played 12:08:03
12 for the witness.) 12:08:04

13 BY MR. PAIKIN: 12:08:32

14 Q. And that's an example of media that 12:08:32
15 appeared on the national media, on NBC Nightly 12:08:34
16 News. Did you, yourself, do you recall seeing that 12:08:39
17 broadcast? 12:08:44

18 A. I do not. 12:08:45

19 Q. And do you know whether or not any of the 12:08:45
20 participants in your survey saw that broadcast? 12:08:46

21 A. I do not. 12:08:49

22 MR. PAIKIN: And let's play RX-1343. 12:08:51

1 MS. PLETT: Similar objection for lack of 12:08:55
2 foundation. 12:08:56
3 (Whereupon a video was played.) 12:08:58
4 BY MR. PAIKIN: 12:10:24
5 Q. Do you know whether or not any of the 12:10:24
6 participants in your survey had seen RX-1343? 12:10:26
7 A. I do not know. 12:10:32
8 Q. Go back to RX-1351 for a minute and turn 12:10:35
9 to the third page of RX-1351. The bottom paragraph 12:10:50
10 says "In a tweet Friday, Warren" -- and it's 12:11:02
11 referring to Senator Elizabeth Warren, a senator 12:11:06
12 from Massachusetts -- "said the Federal Trade 12:11:11
13 Commission should investigate whether 'hiding free 12:11:15
14 file is unfair and deceptive and if the companies 12:11:16
15 colluded to rip off taxpayers' and IRS should end 12:11:23
16 its agreements with them and get refunds for 12:11:25
17 taxpayers who paid for services because of these 12:11:26
18 abuses"; do you see that? 12:11:28
19 A. I do see that. 12:11:29
20 MS. PLETT: Objection, lack of 12:11:30
21 foundation. 12:11:31
22 Q. Do you know how many followers Senator 12:11:32

1 Elizabeth Warren has on her Twitter account? 12:11:37

2 A. I do not. 12:11:39

3 Q. And did you undertake any efforts to 12:11:40

4 determine whether or not any of the participants in 12:11:43

5 your survey are subscribers to Senator Warren's 12:11:46

6 Twitter account? 12:11:55

7 A. I have no idea which participants in my 12:11:56

8 survey might be subscribers to Elizabeth Warren's 12:11:58

9 Twitter account. 12:12:05

10 Q. Do you know whether or not any of the 12:12:07

11 participants in your survey may have heard about 12:12:08

12 the allegations against Intuit from any 12:12:09

13 communications from any congressman or senator? 12:12:13

14 A. I do not know. 12:12:19

15 Q. Do you see above in that same article it 12:12:21

16 says "And now both Democrats and Republicans on the 12:12:23

17 Senate Finance Committee want to know whether the 12:12:27

18 program is accomplishing what it's supposed to. 12:12:30

19 Committee Chairman Chuck Grassley, Republican from 12:12:33

20 Iowa, and Ranking Member Ron Wyden, Democrat from 12:12:35

21 Oregon, sent a letter on Monday to IRS Commissioner 12:12:38

22 Charles Rettig expressing concerns, The Hill 12:12:41

1 reports"; do you see that? 12:12:44

2 A. I see that. 12:12:45

3 Q. Do you know whether or not any of the 12:12:46

4 participants in your survey were aware of the 12:12:49

5 concerns that had been expressed with respect to 12:12:53

6 Intuit by members of Congress? 12:12:57

7 A. I do not. 12:12:59

8 (Exhibit RX-1355 was marked 12:13:15

9 for identification.) 12:13:15

10 BY MR. PAIKIN: 12:13:19

11 Q. I'm handing you what's been marked as 12:13:19

12 RX-1355, and RX-1355 is an article titled 12:13:21

13 "TurboTax, H&R Block used unfair and abusive 12:13:49

14 practices to get more money out of people, state 12:13:52

15 regulator finds." It's dated July 15th, 2020 and 12:13:55

16 it appeared in The Hill. And have you seen RX-1355 12:14:00

17 before? 12:14:13

18 A. I don't recall whether I've seen this 12:14:15

19 particular document before. 12:14:16

20 Q. And in RX-1355 it discusses a report that 12:14:17

21 was issued by the New York State Department of 12:14:28

22 Financial Services; do you see that? 12:14:31

1 MS. PLETT: Objection, lack of 12:14:33
2 foundation. 12:14:34
3 A. Where is it? 12:14:35
4 Q. In the first paragraph. It says "Five tax 12:14:36
5 prep companies deliberately hid information about 12:14:40
6 free programs available to eligible, disadvantaged 12:14:42
7 taxpayers in an effort to upsell customers to pay 12:14:45
8 for their services, the New York State Department 12:14:48
9 of Financial Services said Wednesday"; do you see 12:14:51
10 that? 12:14:53
11 A. I do. 12:14:53
12 Q. And then in the next paragraph "The state 12:14:54
13 regulator concluded in a report released on the tax 12:14:56
14 filing deadline after a year-long investigation 12:14:59
15 that Intuit, which is the maker of TurboTax, H&R 12:15:02
16 Block, TaxSlayer, TaxHawk, and Drake Enterprises 12:15:07
17 engaged in 'unfair and abusive practices that 12:15:09
18 undermine the U.S. International Revenue Service's, 12:15:14
19 IRS, free file program intended to aid 12:15:19
20 disadvantaged taxpayers"; do you see that? 12:15:26
21 A. I do. 12:15:28
22 Q. And were you aware of the New York State 12:15:28

1 Department of Financial Services' report prior to 12:15:30
2 putting together the survey that you did? 12:15:36
3 A. I was not. 12:15:37
4 Q. And did you undertake any efforts to 12:15:38
5 determine whether or not the participants in your 12:15:40
6 survey were aware of the New York State Department 12:15:42
7 of Financial Services report? 12:15:47
8 A. I did not. 12:15:48
9 Q. Are you aware that there was a class 12:15:50
10 action lawsuit that was filed against Intuit 12:15:52
11 arising out of allegations in connection with free 12:15:55
12 filing on TurboTax? 12:15:58
13 A. I was not. 12:16:00
14 Q. Complaint counsel didn't make you aware of 12:16:03
15 the class action lawsuit that had been filed 12:16:05
16 against Intuit? 12:16:08
17 A. That's my recollection, that they did not. 12:16:09
18 Q. Could you play -- we're going to play 12:16:23
19 RX-1344, which is a broadcast on WXYZ-TV Detroit 12:16:25
20 that was called "TurboTax facing class action 12:16:32
21 lawsuit" and it aired on June 10th, 2019. 12:16:34
22 MS. PLETT: Objection, lack of foundation 12:16:38

1 for this exhibit. 12:16:39

2 (Whereupon a video was played.) 12:16:42

3 BY MR. PAIKIN: 12:18:27

4 Q. Did you undertake any effort to determine 12:18:27

5 whether or not the participants in your survey were 12:18:30

6 aware of the class action lawsuit that had been 12:18:33

7 filed against Intuit? 12:18:36

8 A. I did not. 12:18:37

9 (Exhibit RX-1356 was marked 12:18:43

10 for identification.) 12:18:43

11 BY MR. PAIKIN: 12:18:44

12 Q. And I'm handing you what's been marked as 12:18:44

13 RX-1356. Exhibit 1356 is an article that appeared, 12:18:47

14 looks like, on December 22nd, 2020 in Reuters 12:19:21

15 titled "Judge Breyer rejects \$40 million Intuit 12:19:29

16 class settlement amid arbitration onslaught." 12:19:33

17 Were you aware that Judge Breyer had 12:19:51

18 rejected a 40-million-dollar class action 12:19:55

19 settlement that Intuit had entered into with 12:19:58

20 certain Plaintiffs? 12:20:02

21 A. No, I was not aware. 12:20:04

22 Q. Were you aware that that rejection of that 12:20:06

1 settlement received significant media attention? 12:20:08

2 A. I was not aware. 12:20:12

3 Q. And that's not something that complaint 12:20:16

4 counsel told you? 12:20:17

5 A. I don't recall them telling me about this. 12:20:19

6 Q. You didn't undertake any effort to screen 12:20:21

7 the participants in your survey to determine 12:20:24

8 whether or not they had knowledge of the 12:20:28

9 allegations in the class action lawsuit? 12:20:31

10 A. I did not screen them, but they did get 12:20:33

11 many open-ended questions that they answered and I 12:20:36

12 don't recall lawsuits being a part of that. 12:20:40

13 Q. Are you familiar with mass arbitrations? 12:20:41

14 A. Not that -- that term does not sound 12:20:47

15 familiar to me. 12:20:50

16 Q. Okay. Are you aware that a Plaintiff's 12:20:50

17 firm -- well, strike that. 12:20:54

18 Are you aware that a number of Plaintiffs' 12:20:56

19 firms solicited hundreds of thousands of individual 12:20:58

20 claimants to bring individual arbitrations against 12:21:02

21 Intuit arising out of TurboTax free filing? 12:21:05

22 A. I am not aware of that. 12:21:09

1 Q. Do you see in Exhibit 1356 one, two, 12:21:14
2 three, four, five, six pages in, in the paragraph 12:21:26
3 this is quoting from Judge Breyer. "I don't know 12:21:51
4 any Bar rule that says, excuse me, you can't use 12:21:55
5 social media or, excuse me, you can't use DocuSign, 12:21:59
6 the judge said. I'm of a different generation. 12:22:03
7 Lawyers didn't advertise when I was a baby lawyer. 12:22:06
8 Well, they sure do now and my guess is that you 12:22:09
9 don't, Mr. Cole, but in the plaintiff's Bar they do 12:22:12
10 and that's a way that is recognized and 12:22:15
11 sanctioned"; do you see that? 12:22:18
12 A. I do see that. 12:22:20
13 MS. PLETT: Objection, lack of foundation. 12:22:20
14 Q. Well, that was going to be my next 12:22:23
15 question. Do you know whether or not plaintiffs' 12:22:26
16 firms undertook a social media campaign to solicit 12:22:29
17 clients in connections with arbitration against 12:22:35
18 Intuit? 12:22:37
19 A. I'm not aware of it. 12:22:37
20 Q. Did you undertake any effort to determine 12:22:39
21 whether or not any of the participants in your 12:22:40
22 survey were parties to an arbitration against 12:22:43

1 Intuit? 12:22:45

2 A. Again, the only place I would see that in 12:22:47

3 my survey is if it had come in through the 12:22:49

4 open-ended questions. 12:22:51

5 Q. I'm handing you what's been previously 12:23:19

6 marked as RX-384, and I'm also going to hand you 12:23:21

7 what's been previously marked as RX-385. And 12:23:26

8 RX-384 is a confidential settlement agreement that 12:23:46

9 was entered into between Intuit and the Keller 12:23:51

10 Lenkner and Troxel Law law firms. And I take it 12:23:54

11 you've never seen this document before? 12:23:58

12 A. I not recall ever seeing this document. 12:24:00

13 Q. Okay. And the one thing I'm going to 12:24:02

14 ask -- well, a couple things I'm going to ask. 12:24:07

15 Were you aware that there had been a 12:24:10

16 settlement between Intuit and the Keller Lenkner 12:24:12

17 and Troxel Law firm? 12:24:18

18 A. I was not aware of that. 12:24:20

19 Q. And do you see in the second paragraph of 12:24:22

20 this settlement agreement it says that claimants' 12:24:25

21 counsel represents 197,719 individuals who have 12:24:31

22 filed or are prepared to file arbitration demands 12:24:34

1 with the American Arbitration Association asserting 12:24:37
2 claims against Intuit? 12:24:41
3 A. I see that. 12:24:43
4 Q. Did you undertake any effort to determine 12:24:45
5 whether or not any of the 607 participants in your 12:24:48
6 survey were one of the 197,719 individuals who had 12:24:51
7 filed arbitration demands against Intuit? 12:24:59
8 A. Again, beyond it coming through the open 12:25:03
9 ends, I did not. 12:25:06
10 Q. And if you turn to RX-385, this is a 12:25:07
11 confidential settlement agreement that Intuit 12:25:14
12 entered into with the Davis & Norris law firm; do 12:25:18
13 you see that? 12:25:21
14 A. I see that. 12:25:21
15 Q. And do you see that in the second 12:25:22
16 paragraph Davis & Norris represents 21,695 12:25:24
17 individuals who have filed or are prepared to file 12:25:31
18 arbitration demands with the American Arbitration 12:25:34
19 Association asserting claims against Intuit; do you 12:25:38
20 see that? 12:25:39
21 A. I see that. 12:25:40
22 Q. Did you undertake any effort to determine 12:25:41

1 whether or not any of the 607 survey respondents in 12:25:43
2 your survey were one of the 21,695 individuals 12:25:49
3 represented by Davis & Norris? 12:25:55
4 A. Again, beyond it bubbling up in the 12:25:58
5 open-ended responses, I did not undertake any other 12:26:00
6 effort. 12:26:05
7 (Exhibit RX-1357 was marked 12:26:05
8 for identification.) 12:26:05
9 BY MR. PAIKIN: 12:26:05
10 Q. I'm handing you what's been marked as 12:26:32
11 RX-1357, and RX-1357 is part of the social media 12:26:34
12 solicitations that were sent to -- as part of the 12:27:01
13 Plaintiffs' firms' effort to recruit clients in 12:27:08
14 connection with their arbitrations; do you see 12:27:12
15 that? 12:27:16
16 MS. PLETT: Objection, lack of foundation. 12:27:17
17 A. I take your representation that that's 12:27:21
18 what it is. I don't know what it is. 12:27:22
19 Q. And we've looked at two settlement 12:27:27
20 agreements and there are approximately 220,000 12:27:31
21 Claimants that were represented as part of that 12:27:38
22 settlement by one of those two Plaintiffs' firms, 12:27:40

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1 right? We've seen that? 12:27:44

2 A. Those are the two agreements you just 12:27:45

3 showed me, yes. 12:27:47

4 Q. Right. And do you think it's fair to say 12:27:48

5 that there were other people that were solicited by 12:27:50

6 those Plaintiffs' firms as part of the social media 12:27:55

7 campaign who did not sign up to be clients with 12:27:58

8 those law firms? 12:28:01

9 MS. PLETT: Objection, lack of 12:28:02

10 foundation. 12:28:04

11 A. I have no idea how many people would have 12:28:04

12 been solicited. 12:28:08

13 Q. And the survey that you ran, the 12:28:08

14 participants that -- well, strike that. 12:28:16

15 The respondents that participated in your 12:28:20

16 survey were recruited by Dynata and Schlesinger 12:28:23

17 Group, correct? 12:28:28

18 A. That's correct. 12:28:30

19 Q. Do you know how Dynata and Schlesinger 12:28:30

20 Group recruit participants for the survey? 12:28:34

21 A. I'm not sure what you mean by how. 12:28:36

22 Q. Well, do you know, did they use social 12:28:38

1 media, did they use -- what are the mechanisms that 12:28:40
2 they follow in order to find participants to take 12:28:43
3 part in the survey that you ran? 12:28:49
4 A. I'm not sure of the specific vehicles they 12:28:51
5 use to assemble their panels. 12:28:53
6 Q. Do you know whether or not they used 12:28:56
7 social media to try to identify potential 12:28:58
8 participants in the survey? 12:29:03
9 A. Again, I don't know what specific vehicles 12:29:06
10 they use. 12:29:07
11 Q. Do you know whether or not the methods 12:29:08
12 that they used on social media would be similar to 12:29:10
13 the methods that were used by the Plaintiffs' firms 12:29:15
14 in order to recruit clients for their arbitrations? 12:29:19
15 A. I don't know what methods they used, 12:29:23
16 social media or otherwise. 12:29:26
17 Q. And of the 607 participants in your survey 12:29:28
18 do you know whether any one of them was a party to 12:29:32
19 an arbitration against Intuit? 12:29:35
20 A. I don't know. Again, the only indicator I 12:29:39
21 would have would be bubbling up in the open ends, 12:29:42
22 and I don't recall that being something that I 12:29:45

1 saw. 12:29:46

2 Q. And of the 607 participants in your survey 12:29:46

3 do you know whether they were aware of any of the 12:29:51

4 litigation that's been pending against Intuit? 12:29:53

5 A. I don't know if they were aware. 12:29:57

6 Q. Let's turn to your report, paragraph 5. 12:30:05

7 A. My original or rebuttal report? 12:30:09

8 Q. The original report, which is GX-303. 12:30:11

9 Okay. Paragraph 5 of GX-303, which is at page 5. 12:31:21

10 You say that "The results of the survey can be 12:31:29

11 generalized to the population at large with a 12:31:33

12 degree of scientific certainty"; do you see that? 12:31:35

13 A. I do. 12:31:42

14 Q. Okay. Can you explain what you mean by 12:31:42

15 that? Specifically, what is the population at 12:31:44

16 large to which you're referring? 12:31:50

17 A. So in this case the population would be 12:31:53

18 taxpayers who are not eligible for free file -- 12:31:57

19 sorry -- for Free Edition by TurboTax and who -- 12:32:02

20 yeah, I guess that's it. So it would be taxpayers 12:32:13

21 who are not eligible in tax year 2021 for Free 12:32:16

22 Edition by TurboTax. 12:32:21

1 Q. And would it be people that filed prior to 12:32:22
2 March 2nd, 2022? 12:32:29

3 A. So it might generalize to them. It would 12:32:34
4 depend on, you know, finding some hypothesis about 12:32:36
5 why people prior to 2020 -- sorry -- filing prior 12:32:41
6 to March 11th, 2022 would be different in our key 12:32:45
7 metrics of understanding whether they can file for 12:32:50
8 free versus the people who came after March 11th, 12:32:53
9 2022. Absent such information, we could generalize 12:32:56
10 to that group as well. 12:32:58

11 Q. Well, but -- so that's what I'm trying to 12:33:01
12 figure out here. I'm just trying to understand 12:33:04
13 your opinion because you say that you can 12:33:06
14 generalize to the population at large with a degree 12:33:08
15 of scientific certainty. So you're putting this 12:33:10
16 degree of scientific certainty stamp now on your 12:33:13
17 opinion, and I understand there's other information 12:33:16
18 and other arguments that could be made and you 12:33:20
19 considered some evidence and you disregarded others 12:33:22
20 and we've talked a bunch already about -- about the 12:33:25
21 population. And so I just want to make sure I 12:33:29
22 understand what is your opinion of what population 12:33:32

1 at large is covered by the results of your survey? 12:33:38

2 A. So I would say the most direct population 12:33:41

3 for the results of my survey is, again, those who 12:33:44

4 are not eligible for Free Edition by TurboTax and 12:33:48

5 are filing after March 11th, but we could also 12:33:51

6 generalize to those filing before March 11th absent 12:33:55

7 a hypothesis about why they would be different on 12:33:59

8 these particular dimensions. 12:34:01

9 Q. And you haven't studied whether or not you 12:34:03

10 can extend that one way or the other, right? 12:34:08

11 A. I have not studied the population who 12:34:11

12 filed prior to March 11th, 2022. 12:34:13

13 Q. And there are other populations that you 12:34:17

14 didn't study as well that we discussed earlier in 12:34:19

15 the deposition, right? 12:34:22

16 A. I don't recall what specific populations 12:34:24

17 you mean. 12:34:26

18 Q. Well, there were people who had filed on 12:34:27

19 TurboTax for free, right? 12:34:31

20 A. Is there a question? I'm sorry. 12:34:38

21 Q. Well, I'm just asking you didn't study 12:34:39

22 those -- that's another example of a group that you 12:34:41

1		13:38:10
2	THE VIDEOGRAPHER: This is the beginning	13:39:20
3	of media unit No. 4 in the video-recorded	13:39:21
4	deposition of Mr. Nathan Novemsky. The time is	13:39:26
5	1:39 p.m. Eastern. We are now back on the record.	13:39:29
6	Counsel, you may proceed.	13:39:33
7	BY MR. PAIKIN:	13:39:38
8	Q. Let's talk about question TAT-240 in your	13:39:38
9	survey. So why don't we turn to Appendix C in your	13:39:45
10	report, which is GX-303 at page E?	13:39:50
11	A. Sorry. Can you give me the appendix and	13:40:08
12	page again.	13:40:11
13	Q. I think it's Appendix E, E as in Edward.	13:40:12
14	A. Okay.	13:40:24
15	Q. Okay. And what is Appendix E, first of	13:40:25
16	all? Let's just start there.	13:40:30
17	A. Appendix E seems to be the perception	13:40:33
18	survey that I ran in this matter.	13:40:35
19	Q. And these are the questions that were	13:40:36
20	provided to survey participants as part of the	13:40:40
21	survey, right?	13:40:43
22	A. Correct.	13:40:44

1 Q. Okay. And I want to focus in, as I said, 13:40:44
2 on question TAT-240. Do you see that in front of 13:40:51
3 you? 13:40:56
4 A. I see that. 13:40:56
5 Q. Okay. And the question -- well, why don't 13:40:57
6 you read the question and the answers just so we're 13:40:59
7 all clear we're on the same page? 13:41:02
8 A. Okay. "You may have already said this 13:41:02
9 above, but please tell us again which of the 13:41:04
10 following best describes your understanding of 13:41:06
11 filing your 2021 income taxes for free using 13:41:08
12 TurboTax online" -- 13:41:18
13 THE REPORTER: I'm sorry. Income taxes -- 13:41:19
14 THE WITNESS: I'm sorry. Let me just read 13:41:20
15 the whole thing. 13:41:21
16 "You may have already said this above, but 13:41:23
17 please tell us again which of the following best 13:41:25
18 describes your understanding of filing your 2021 13:41:27
19 income taxes for free using TurboTax on-line 13:41:32
20 software. Select only one." 13:41:37
21 Response No. 1, "I think I can file my 13:41:43
22 2021 income taxes for free using TurboTax on-line 13:41:45

1 software." 13:41:48

2 Response 2, "I don't think I can file my 13:41:50

3 2021 income taxes for free using TurboTax on-line 13:41:53

4 software." 13:41:59

5 Response 3, "I do not have enough 13:42:00

6 information to say whether or not I can file my 13:42:02

7 2021 income taxes for free using TurboTax on-line 13:42:05

8 software." 13:42:08

9 Response 4, "I'm not sure." 13:42:10

10 Q. And in Appendix E certain words are 13:42:14

11 underlined and other words are not. Did the 13:42:20

12 underlined -- underlining appear in the question 13:42:24

13 and answers as they were presented to the survey 13:42:28

14 participants? 13:42:31

15 A. I believe they were. 13:42:32

16 Q. And is this question trying to get at 13:42:41

17 whether or not a respondent understands that 13:42:42

18 their -- that they meet the eligibility 13:42:48

19 requirements to file for free on Free Edition in 13:42:51

20 tax year 2021? 13:42:57

21 A. Yes. 13:43:02

22 Q. The beginning of the question says -- 13:43:02

1 well, strike that. Sorry. 13:43:12

2 Let me ask you, isn't it a common issue in 13:43:27

3 surveys that respondents do not like to admit that 13:43:29

4 they do not know the answer to something and are 13:43:32

5 prone to guessing, especially if they're encouraged 13:43:36

6 to do so? 13:43:38

7 A. I don't know how to answer that in 13:43:41

8 general. Certainly in this case they were not 13:43:43

9 encouraged to guess. I'm not sure I understand the 13:43:46

10 rest of the question. 13:43:50

11 Q. Well, is a common issue that you need to 13:43:51

12 deal with in designing surveys to try to avoid 13:43:54

13 respondents guessing answers to the questions? 13:43:57

14 A. When you design a survey, you do consider 13:44:01

15 the possibility that respondents could guess in 13:44:03

16 answer to a question, yes. 13:44:04

17 Q. And would you agree that the phrasing in 13:44:06

18 TAT-240 "which of the following best describes your 13:44:12

19 understanding" encourages guessing if a respondent 13:44:17

20 is unsure? 13:44:21

21 A. No. To think about what encourages 13:44:24

22 guessing you certainly have to take the phrase that 13:44:28

1 you took in context. So in this context we're 13:44:31
2 offering explicitly "I'm not sure." So if they're 13:44:38
3 not sure and they presumably read all options 13:44:41
4 before they choose one, they would see that 13:44:43
5 they're -- we're clearly offering them, you know, 13:44:45
6 the thing that probably fits them best, and we ask 13:44:47
7 for their best understanding. Best understanding 13:44:49
8 plus response option "I'm not sure" I think will 13:44:52
9 funnel people without certainty to "I'm not sure." 13:44:55
10 Second to that we have "I don't have 13:44:59
11 enough information," which is a flavor of "I'm not 13:45:00
12 sure." So that explicit answer also will funnel 13:45:02
13 people there. 13:45:07
14 In addition to all that, at the beginning 13:45:08
15 of the survey, you know, as part of the context for 13:45:11
16 this we're telling people we really don't want you 13:45:13
17 to guess. Do you agree with these, you know, that 13:45:16
18 you won't guess, and they had to affirmatively 13:45:20
19 check a box or something like that to say, okay, I 13:45:23
20 agree that I'm not going to guess during this 13:45:26
21 survey. 13:45:28
22 So with all those pieces together, I don't 13:45:29

1 think the phrase "which of the following best 13:45:32
2 describes your understanding" would encourage 13:45:33
3 significant guessing. 13:45:36
4 (Whereupon a discussion was had 13:45:52
5 off the record.) 13:45:52
6 BY MR. PAIKIN: 13:45:53
7 Q. Did you test whether or not asking the 13:45:53
8 question saying describe your understanding instead 13:46:01
9 of asking for them to best describe their 13:46:09
10 understanding would have made a difference in 13:46:14
11 responses from survey participants? 13:46:18
12 A. I'm sorry. Could you restate that? 13:46:24
13 Q. Well, you asked the question "which of the 13:46:26
14 following best describes your understanding," 13:46:31
15 right? 13:46:33
16 A. Yes. 13:46:34
17 Q. And you're asking for their best 13:46:34
18 understanding, not just to describe their 13:46:37
19 categorical understanding, right? 13:46:41
20 A. I'm not sure I understand the distinction 13:46:43
21 that you're drawing. 13:46:45
22 Q. You don't see a distinction between asking 13:46:46

1 someone for their best understanding and what their 13:46:48
2 certain understanding is? 13:46:52
3 A. One could use the word "certain." I 13:46:55
4 certainly didn't use that here. So yeah, that 13:46:58
5 would be a different word that would have a 13:47:00
6 different response potentially. 13:47:02
7 Q. Do you understand the difference between 13:47:03
8 the meanings of "best understanding" and "your 13:47:04
9 understanding"? 13:47:11
10 A. I'm not sure how you're meaning that 13:47:12
11 difference. 13:47:14
12 Q. Let me ask you this way. Did you test 13:47:16
13 TAT-240, the question without the word "best," to 13:47:19
14 see whether or not it led to different responses 13:47:24
15 from survey respondents? 13:47:28
16 A. I did not. 13:47:30
17 Q. The answers are also framed as "I think I 13:47:34
18 can file," "I don't think I can file"; do you see 13:47:37
19 that? 13:47:41
20 A. I do. 13:47:42
21 Q. And you underlined "I think I can file" 13:47:42
22 and "I don't think I can file" in what was 13:47:46

1 presented to the recipients -- the respondents, 13:47:50

2 correct? 13:47:52

3 A. Correct. 13:47:53

4 Q. And you didn't frame the question as just 13:47:53

5 a yes or no, correct? 13:47:55

6 A. No. I framed it as we see it here. 13:47:58

7 Q. You framed it as I think I can file, 13:48:01

8 right? 13:48:03

9 A. That was one of the response options, yes. 13:48:04

10 Q. And doesn't the "I think" qualifier 13:48:06

11 encourage respondents who have some doubt to select 13:48:08

12 that response rather than "I do not have enough 13:48:13

13 information"? 13:48:17

14 A. So the "I think" modifier encourages 13:48:19

15 people who think they can file to select that 13:48:23

16 option. That may be a slightly different question 13:48:25

17 than I am sure I can file for free or not for free, 13:48:28

18 and we thought that was the relevant standard here, 13:48:32

19 because if I think I can file, that's the one 13:48:36

20 that's most likely to affect them in the 13:48:39

21 marketplace as consumers. 13:48:41

22 Q. Did you test TAT-240 by providing 13:48:42

1 TAT-240 omitting the words "I think" from response 13:48:53
2 option 1? 13:49:00
3 A. I don't believe I did, no. 13:49:02
4 Q. Did you test TAT-240 by providing 13:49:04
5 responses to survey participants that deleted from 13:49:10
6 option 2 the words "I don't think"? 13:49:16
7 A. I don't believe I ran that test. 13:49:20
8 Q. So you don't know whether or not those 13:49:22
9 words had an impact one way or the other, right? 13:49:23
10 A. That's right. 13:49:28
11 Q. On page 32 of your report, paragraph 81, 13:49:35
12 you say in there -- take a minute to read it. I'll 13:49:51
13 tell you -- let me wait until you get there. It's 13:49:54
14 on page 32. And, again, your report is GX-303, 13:49:57
15 page 32, paragraph 81, and specifically I want to 13:50:08
16 focus in on your statement in that paragraph "Many 13:50:18
17 consumers in the digital age are conditioned to 13:50:21
18 expect that on-line products can be free." 13:50:23
19 A. Where is that in the paragraph? Oh, there 13:50:36
20 it is. 13:50:38
21 Q. You see it? It's about five lines up from 13:50:39
22 the bottom of the paragraph. 13:50:42

1 are free, but I have no doubt they know many more 13:51:41
2 products that are not free. 13:51:43

3 Q. Of the 607 respondents to your survey, did 13:51:46
4 you test whether or not they were one of the many 13:51:52
5 consumers in the digital age who are conditioned to 13:51:57
6 expect that on-line products can be free? 13:51:59

7 A. I'm not sure I understand what such a test 13:52:05
8 would be. 13:52:07

9 Q. You could ask them. Did you ask them in 13:52:08
10 an open-ended question as to whether or not they 13:52:11
11 believe that on-line products can be free -- 13:52:15

12 A. I did not -- 13:52:21

13 Q. -- in the digital age? 13:52:23

14 A. I did not ask that question. 13:52:24

15 Q. Now, there were 404 respondents in 13:52:25
16 group A, right? 13:52:27

17 A. That sounds right. 13:52:29

18 Q. Okay. And they were selected because they 13:52:30
19 have not filed with a TurboTax product in the prior 13:52:34
20 three years, right? 13:52:38

21 A. Correct. 13:52:40

22 Q. So they likely would not have visited the 13:52:40

1 Website to see the eligibility requirements, right? 13:52:42

2 A. That I don't know. They may have visited 13:52:44

3 seeing the eligibility requirements or even tried 13:52:48

4 to file and been -- hit a hard stop and left. So 13:52:49

5 they could have left -- they could have been at the 13:52:53

6 TurboTax Website for any period of time up until 13:52:55

7 filing in the last three years. I don't know how 13:52:57

8 much of that went on. 13:53:00

9 Q. But you don't know one way or the other, 13:53:01

10 right? 13:53:02

11 A. I don't. 13:53:03

12 Q. Because you didn't solicit that 13:53:03

13 information, correct? 13:53:05

14 A. That's correct. 13:53:06

15 Q. So if one of those respondents in group A 13:53:07

16 had not been to the TurboTax Website in the prior 13:53:11

17 three years, don't you believe they would be more 13:53:15

18 likely to guess than someone who had? 13:53:17

19 A. I don't see how that would influence their 13:53:21

20 guessing. Their source of knowledge could be the 13:53:24

21 TurboTax Website, but it could be many other 13:53:27

22 things, notably the TurboTax marketing like 13:53:30

1 advertisements. So it's not clear to me that 13:53:32
2 Website visitation is going to be a particular 13:53:34
3 influence on guessing behavior. 13:53:36

4 Q. Well, do you believe that it would 13:53:40
5 influence somebody's guessing behavior whether or 13:53:43
6 not they had reviewed the eligibility requirements 13:53:46
7 to file for TurboTax before filling out your 13:53:51
8 survey? 13:53:54

9 A. Not clear to me. Again, the thing you're 13:53:56
10 saying they might be guessing about is their belief 13:53:59
11 that they think they can file for free or not file 13:54:02
12 for free. That can be influenced by many things. 13:54:06
13 Someone who looks at the eligibility requirements 13:54:09
14 might look at that and say, wow, I don't understand 13:54:10
15 that, I'm not sure. So they could go to the fourth 13:54:14
16 option, "I'm not sure." Someone who doesn't look 13:54:16
17 at that and sees the free ad could say, oh, pretty 13:54:19
18 sure I could file for free, I'm going to choose 13:54:20
19 option -- or response No. 1. 13:54:24

20 So the net effect of going to the Website 13:54:26
21 or seeing the qualification requirements on any 13:54:27
22 potential guessing behavior if there is any is not 13:54:30

1 clear if it's increasing it or decreasing it. 13:54:32

2 Again, I did many things to reduce guessing. So I 13:54:35

3 don't think there's much guessing in any 13:54:38

4 information flow consumers may have seen prior to 13:54:40

5 taking my survey, but I certainly couldn't opine as 13:54:43

6 to which direction that influences the things you 13:54:46

7 talked about would drive their behavior. 13:54:51

8 Q. I take it you teach undergraduate classes 13:54:52

9 or graduate classes? 13:54:55

10 A. Primarily graduate classes. 13:54:57

11 Q. Graduate classes. And in your experience 13:54:58

12 is there more guessing on an open-book test or a 13:55:01

13 closed-book test? 13:55:04

14 A. Is there more guessing? That's a question 13:55:10

15 I've never pondered. So you'll have to give me a 13:55:12

16 moment to think about it. I don't think there's a 13:55:14

17 lot of guessing on the exams that I administer to 13:55:20

18 be honest with you. So I don't have a good sense 13:55:22

19 of whether there would be more guessing on an 13:55:24

20 open-book or a closed-book test. 13:55:26

21 Q. Can you turn -- let's look at your 13:55:29

22 rebuttal report on page 40, paragraph 82, which is 13:55:32

1 RX-1345. 13:56:09

2 A. The pages are sticking together. There we 13:56:16

3 go. Okay. 13:56:18

4 Q. Okay. Paragraph 82, specifically I want 13:56:22

5 to ask you about the sentence that says "Professor 13:56:31

6 Hauser ignores that consumers act on their own 13:56:36

7 understanding and on what they think. Therefore, 13:56:38

8 whether consumers think they can or cannot file for 13:56:42

9 free is a relevant standard to determine whether 13:56:45

10 consumers might act on their beliefs"; do you see 13:56:48

11 that? 13:56:50

12 A. I see that. 13:56:51

13 Q. Okay. Now, group A respondents have not 13:56:52

14 used TurboTax in the past three years, correct? 13:56:56

15 A. Correct. 13:56:59

16 Q. So irrespective of their understanding, 13:57:00

17 you'd agree that they had not acted on their 13:57:05

18 understanding that TurboTax is free for them, 13:57:09

19 correct? 13:57:11

20 A. No, I don't agree with that. They may 13:57:11

21 well have thought TurboTax was free, gone to the 13:57:17

22 Website, maybe entered some or all of their 13:57:18

1 information, hit a hard stop, and left. All I know 13:57:20
2 for sure is they didn't file with TurboTax. I 13:57:23
3 don't know how much time they would have interacted 13:57:26
4 with the TurboTax Website. 13:57:27

5 Q. So what action -- how did they act on it? 13:57:28
6 They didn't act in a way that they paid, right? 13:57:31

7 A. Their action could have been going to the 13:57:34
8 Website, filling out all their tax information, and 13:57:35
9 then at some point hitting a hard stop and then 13:57:39
10 leaving the Website. That could be one action. 13:57:43
11 There are probably others. 13:57:46

12 Q. But they didn't act to then go forward and 13:57:46
13 pay TurboTax any money, correct? 13:57:49

14 A. Our group A, as far as I understand, 13:57:51
15 should not have paid TurboTax any money in the last 13:57:54
16 three years, that's right. 13:57:56

17 Q. Okay. Switching topics, do you think that 13:58:00
18 at the time that people are filing their taxes, 13:58:03
19 they're in a good mood or a bad mood generally? 13:58:07

20 A. All things equal, I'd say they're in a bad 13:58:12
21 mood. 13:58:14

22 Q. I think that's probably fair. 13:58:16

1 On your CV you list an article that you 13:58:19
2 wrote called "When Do Incidental Mood Effects Last, 13:58:21
3 Lay Beliefs Versus Actual Effects." Do you recall 13:58:26
4 that article? 13:58:29
5 A. I do. 13:58:30
6 Q. Can you briefly summarize what the 13:58:31
7 conclusions are of that article? 13:58:33
8 A. That article was about, as the title says, 13:58:35
9 incidental mood effects. These are effects of 13:58:38
10 something other than the thing you're doing on your 13:58:41
11 mood. To give a simple example to make it easier 13:58:44
12 for people to follow, if you're eating a hamburger 13:58:46
13 at a restaurant and you're thinking about how good 13:58:49
14 that hamburger is, the fact that you're laughing 13:58:53
15 and joking with your friend while you're eating 13:58:55
16 that hamburger could cause an incidental positive 13:58:57
17 mood, and that positive mood can make you say, oh, 13:58:57
18 that's a good hamburger if someone at that moment 13:59:00
19 says, hey, how much do you like that hamburger. So 13:59:05
20 that would be an incidental mood effect on an 13:59:05
21 evaluation. 13:59:08
22 Q. Did you undertake any steps to control 13:59:11

1 whether or not people's moods in their approach to 13:59:16
2 taxes had any impact on the responses to your 13:59:20
3 survey questions? 13:59:25
4 A. I don't know what effects I would be 13:59:28
5 controlling for. So I didn't do anything to 13:59:30
6 control for these effects. 13:59:33
7 Q. Do you think somebody's bad mood when it 13:59:35
8 comes to filing taxes would have an impact on their 13:59:39
9 perspective of the experience with filing their 13:59:45
10 taxes on TurboTax? 13:59:50
11 A. It could. I don't know what effect it 13:59:53
12 would have. I'd have to think more carefully about 13:59:55
13 what possible effects we're even talking about. 13:59:59
14 Q. But you didn't test for that in any way, 14:00:01
15 correct? 14:00:03
16 A. I did not do any tests involving mood, no. 14:00:04
17 Q. Let's turn back now to Appendix E in 14:00:07
18 your report, GX-303, and I want to talk about 14:00:11
19 question TAT-255 and TAT-265. 14:00:26
20 Can you -- well, I hate to do this to the 14:00:54
21 court reporter, but can you read the question and 14:00:56
22 the responses to TAT-255. 14:00:58

1 A. Sure. "You have stated that you think you 14:01:03
2 can file your 2021 income taxes for free using 14:01:06
3 TurboTax on-line software. Which of the following 14:01:10
4 sources played a role in your forming that 14:01:14
5 impression? Select all that apply." 14:01:17
6 Response 1, "TurboTax advertisements." 14:01:22
7 Response 2, "TurboTax Website." 14:01:27
8 Response 3, "Word of mouth (such as 14:01:30
9 information from friends, family, et cetera)." 14:01:33
10 Response 4, "Advice from a financial 14:01:37
11 professional (such as an accountant or tax 14:01:40
12 preparer)." 14:01:44
13 Response 5, "Information on-line not from 14:01:46
14 TurboTax (such as articles, on Websites, blogs, 14:01:51
15 et cetera)." 14:01:56
16 Response 6, "Other." 14:01:59
17 Response 7, "Don't know, not sure." 14:02:02
18 Q. And to make this simple I'm going to focus 14:02:07
19 my questions on TAT-255, but to kind of set a 14:02:11
20 predicate for that to save us time, can you just 14:02:19
21 describe what the differences are between TAT-255 14:02:21
22 and TAT-265? 14:02:24

1 A. Sure. So 265 and 255 are very similar. 14:02:28
2 They're just for different groups of people. 14:02:32
3 They're either funneled from those who said I can 14:02:35
4 file for free with TurboTax to 255 or they're filed 14:02:38
5 to -- those who said I cannot file for free with 14:02:43
6 TurboTax are filed to -- funneled to 265. 14:02:47
7 Otherwise they seem to be identical other than that 14:02:49
8 one phrase. 14:02:52
9 Q. Okay. So I'm going to -- let's focus on 14:02:54
10 TAT-255, but I think you agree that the questions 14:02:58
11 that I'm going to ask are going to have 14:03:02
12 applicability to TAT-265, and if I ask a question 14:03:06
13 where there's some difference between them in the 14:03:10
14 next series, just flag it and let me know. 14:03:14
15 A. Okay. I'll try to remember that. 14:03:18
16 Q. Okay. Well, one's sort of contra to the 14:03:19
17 other, they're the same responses. I'm just trying 14:03:23
18 to simplify it. 14:03:26
19 Let me first ask you, did you conduct 14:03:31
20 qualitative interviews with consumers in deciding 14:03:34
21 which multiple choice answers to include here as 14:03:37
22 closed-ended responses for TAT-255? 14:03:41

1 interview to ask them what sources they may have 14:04:48
2 relied on for the purpose of trying to develop a 14:04:53
3 comprehensive list of closed-ended responses to 14:04:57
4 present in the survey? 14:05:01
5 A. I don't recall doing that. 14:05:05
6 Q. Isn't it best practice to do qualitative 14:05:09
7 interviews in designing a survey to determine which 14:05:11
8 multiple choice closed-ended responses to present 14:05:15
9 as part of the survey? 14:05:18
10 A. It depends on the situation. I wouldn't 14:05:19
11 say there's one answer to that across contexts. 14:05:21
12 Q. And you didn't do that here, though, 14:05:24
13 right? 14:05:27
14 A. My memory is I didn't do that here. 14:05:28
15 Q. How did you select the closed-ended 14:05:30
16 responses that appear in TAT-255? 14:05:35
17 A. I would say I looked at plausible sources 14:05:47
18 for a substantial number of consumers to have found 14:05:51
19 out about their ability to file for free with 14:05:56
20 TurboTax and tried to list the sources that I knew 14:06:00
21 of that were plausible sources for that particular 14:06:02
22 information. 14:06:05

1 Q. Let's turn to your rebuttal report, which 14:06:09
2 is RX-1345, and paragraph 91. Oh, yeah. Sorry. 14:06:14
3 Paragraph 91 is on page 43. Sorry. I want to 14:06:38
4 focus in specifically on the sentence in this 14:06:49
5 paragraph "In fact, psychologists regularly ask 14:06:52
6 respondents to record the source of their beliefs 14:06:55
7 or impressions, and respondents are able to 14:06:57
8 indicate when they do not remember the source of 14:07:00
9 their impressions in these studies"; do you see 14:07:02
10 that? 14:07:04
11 A. I see that. 14:07:05
12 Q. Okay. Do you want to take a second just 14:07:06
13 to read the surrounding context to be able to 14:07:10
14 answer questions? 14:07:13
15 A. Sure. I'd be happy to do that. 14:07:14
16 Okay. 14:07:48
17 Q. In the instances that you're talking about 14:07:55
18 in that sentence, are the psychologists asking 14:07:59
19 respondents to create their own answers about the 14:08:05
20 source akin to an open-ended response, or are they 14:08:07
21 providing respondents with closed-ended answer 14:08:12
22 choices like what you did in your survey? 14:08:15

1 A. I'm sure both kinds of studies exist. 14:08:18

2 Q. And what's your basis for saying that? 14:08:25

3 A. My understanding of the academic research 14:08:28

4 in this area. 14:08:30

5 Q. Did you consider explicitly asking 14:08:31

6 respondents about the sources that they may have 14:08:35

7 considered using open-ended questions as part of 14:08:37

8 your survey? 14:08:40

9 A. I did ask a question like that. So the 14:08:45

10 question that would have preceded the one that we 14:08:47

11 just read I believe -- let me read it from the -- 14:08:51

12 it's in the other appendix. I think I can find it 14:08:57

13 quickly enough. 14:09:01

14 Q. So it's GX-303, which is your report, 14:09:04

15 Appendix E, page 8. 14:09:08

16 A. I'm looking for -- so they would have 14:09:17

17 answered -- just checking the flow. Here it is. 14:09:23

18 So TAT-250 would have been the one that comes 14:09:35

19 before TAT-255 and it reads "You may have already 14:09:39

20 said this above, but please tell us again why you 14:09:42

21 think you can file your 2021 income taxes for free 14:09:45

22 using TurboTax software." 14:09:50

1 So that certainly would have been an 14:09:52
2 open-ended question where they may have and many 14:09:54
3 people did reply with the source of their belief. 14:09:57
4 Q. But you didn't explicitly ask respondents 14:10:01
5 about what sources they may have considered in 14:10:05
6 forming their belief, did you? 14:10:09
7 A. So I asked the question "Why do you think 14:10:14
8 you can file for free?" And so that's not exactly 14:10:16
9 the same phrase you used, but it seems like a very 14:10:20
10 related question. 14:10:23
11 Q. Well, you could have asked TAT-255, right? 14:10:25
12 The last sentence you say "Which of the following 14:10:31
13 sources played a role in your forming that 14:10:33
14 impression," right? 14:10:35
15 A. I do say that, yes. 14:10:38
16 Q. You could have asked explicitly which 14:10:39
17 sources played a role in you forming that 14:10:42
18 impression as an open-ended question, right? 14:10:45
19 A. I could have, yes. 14:10:48
20 Q. And you didn't do that? 14:10:49
21 A. I did not ask that specifically worded 14:10:50
22 question that you just described, no. 14:10:53

1 Q. Do you agree that the response options 14:10:55
2 that are provided for TAT-255 are weighted more in 14:10:58
3 one direction than another? 14:11:05

4 A. Sorry. I don't follow the question. 14:11:13

5 Q. Let me ask it this way. Do you agree that 14:11:14
6 when response options are provided with a question 14:11:17
7 and they're weighted more in one direction than 14:11:19
8 another, that the question is a leading question? 14:11:22

9 A. I'm not sure what you mean by "weighted." 14:11:26

10 Q. Well, here the response options represent 14:11:29
11 what complaint counsel contend to be the case but 14:11:32
12 fails to provide an equal number of options 14:11:36
13 representing what Intuit contends to be the case; 14:11:38
14 isn't that right? 14:11:42

15 MS. PLETT: Objection, argumentative. 14:11:42

16 A. I don't know what everybody contends to be 14:11:46
17 the case. I would just observe that the number of 14:11:49
18 TurboTax options is fewer than the number of 14:11:52
19 non-TurboTax options, if that's what you're 14:11:54
20 referring to by "weighted." 14:11:56

21 Q. No, that's not, but it is complaint 14:11:58
22 counsel's allegations in this case that the 14:12:05

1 TurboTax advertisements are the cause of deception, 14:12:09
2 correct? 14:12:13
3 A. I understand that to be part of the 14:12:14
4 complaint, yes. 14:12:15
5 Q. And that is your response No. 1, right? 14:12:16
6 A. Yes. Keep in mind, of course, these 14:12:19
7 responses are randomized, so it's not always the 14:12:21
8 first one anybody sees. It's the first one listed 14:12:23
9 in this particular version. 14:12:27
10 Q. But you listed that as one of the 14:12:28
11 closed-ended response options, right? 14:12:32
12 A. I did. 14:12:34
13 Q. And it's complaint counsel's contention in 14:12:34
14 this case that the TurboTax Website is the cause of 14:12:37
15 deception; isn't that right? 14:12:39
16 A. That's my understanding. 14:12:40
17 Q. And you listed the TurboTax Website as one 14:12:41
18 of the options in your closed-ended responses, 14:12:43
19 correct? 14:12:45
20 A. Correct. 14:12:45
21 Q. Do you think the phrasing of the question 14:12:57
22 on TAT-255 as "which of the following" makes it 14:13:02

1 more likely that a respondent will pick from the 14:13:07
2 list that you provided rather than "Other" or 14:13:09
3 "Don't know"? 14:13:16
4 A. As compared to what? You asked a 14:13:19
5 comparative question and I don't know what the 14:13:21
6 comparator is. 14:13:22
7 Q. Well, does providing the question "which 14:13:25
8 of the following sources" make it more likely that 14:13:27
9 someone would pick response, as it's listed in 14:13:30
10 Appendix E, 1, 2, 3, 4, or 5 rather than response 14:13:35
11 6, "Other", or response 7, "Don't know, not sure"? 14:13:41
12 A. I'm not sure if I understand your 14:13:50
13 comparison correctly. You say more likely to pick. 14:13:52
14 More likely to pick 1 through 5 than to pick 6 and 14:13:56
15 7, or do you mean compared to some other wording of 14:13:59
16 the question? 14:14:03
17 Q. Well, doesn't the phrasing of the question 14:14:03
18 "which of the following" make it more likely a 14:14:06
19 respondent will pick from the closed-ended 14:14:09
20 responses that you provided rather than "Other" or 14:14:14
21 "Don't know." 14:14:19
22 A. I don't think the phrase "which of the 14:14:21

1 following sources played a role" points them 14:14:23
2 particularly to 1 through 5 more than 6 or 7. 6 or 14:14:26
3 7 are also some of the following responses. So 14:14:29
4 when you ask for "which of the following sources," 14:14:33
5 you're pointing them, in my mind, equally to the 14:14:37
6 seven options that are, you know, randomly rotated 14:14:39
7 right below the question. 14:14:43
8 Q. Do you agree that in allocating 14:14:45
9 probabilities to events, respondents tend to assign 14:14:48
10 more weight to possibilities that are explicitly 14:14:51
11 mentioned than to those implicitly lumped together 14:14:54
12 in the other causes category? 14:14:58
13 A. Sorry. It's a complicated question. I'm 14:15:13
14 trying to think it through. 14:15:18
15 I do believe that things that are 14:15:35
16 explicitly mentioned are more likely to be chosen 14:15:36
17 than things that are not explicitly mentioned, 14:15:42
18 yes. 14:15:44
19 Q. In your list of closed-ended responses, 14:15:49
20 you did not list other TurboTax competitors' ads, 14:15:51
21 did you? 14:15:58
22 A. I did not. 14:16:05

1 Q. And why didn't you include advertisements 14:16:06
2 or Websites of other tax preparation services as 14:16:10
3 answer options in TAT-255? 14:16:14

4 A. So my understanding of the advertising for 14:16:19
5 this category is that TurboTax has a dominant share 14:16:24
6 of that voice. And so I thought that the 14:16:27
7 72 percent of free ads in this industry coming from 14:16:31
8 TurboTax with the word "TurboTax" would be much 14:16:37
9 more likely to influence people than the 28 percent 14:16:40
10 of ads coming from non-TurboTax entities like 14:16:42
11 H&R Block to influence people about their beliefs 14:16:45
12 about TurboTax. 14:16:49

13 So it didn't seem like a big source of 14:16:50
14 beliefs about TurboTax for those reasons. So I 14:16:53
15 guess it didn't make the cut trying to keep the 14:16:58
16 number of response options manageable. 14:16:59

17 Q. And are you a football fan? 14:17:03

18 A. Not a huge one. 14:17:07

19 Q. No? Have you watched any of the playoffs? 14:17:08

20 A. A little bit. 14:17:13

21 Q. Have you seen any advertisements for 14:17:13
22 H&R Block tax filing services? 14:17:15

1 A. I have not noticed H&R Block tax filing. 14:17:17

2 Q. Have you seen television ads for H&R Block 14:17:20

3 just in your normal ordinary course of watching 14:17:23

4 television? 14:17:26

5 A. I truly don't watch very much live 14:17:27

6 television these days. I mostly stream. 14:17:29

7 Q. And have you seen any ads for TaxSlayer? 14:17:31

8 A. No. 14:17:35

9 Q. Has complaint counsel provided you with 14:17:37

10 any ads that were run by any of TurboTax's 14:17:40

11 competitors as part of your work on this case? 14:17:47

12 A. I have -- I don't know where they came 14:17:49

13 from, whether from complaint counsel or other 14:17:51

14 documents, but I certainly have seen TurboTax's 14:17:53

15 competitors' ads as part of my work on this case. 14:17:56

16 Q. Is it possible that one of these -- 14:17:59

17 well, strike that. 14:18:01

18 Is it possible that some of the 14:18:03

19 607 respondents to your survey would have been 14:18:07

20 exposed to advertisements from TurboTax 14:18:11

21 competitors? 14:18:15

22 A. It is possible. 14:18:16

1 Q. Is it possible that advertisements from 14:18:17
2 TurboTax's competitors might have been -- might 14:18:20
3 have played a role in their forming an impression 14:18:27
4 about their ability to file for free? 14:18:30
5 A. It might have. 14:18:33
6 Q. I'm going to show you just a couple ads 14:18:37
7 because I think it would be worth looking at them 14:18:40
8 and getting your reaction. So let's play -- this 14:18:43
9 is RX-1337, which is an H&R Block ad called "May 14:18:56
10 Never Know" that ran on December 29, 2019. 14:19:01
11 (Whereupon a video was played.) 14:19:07
12 BY MR. PAIKIN: 14:19:26
13 Q. Do you know whether or not any of the 14:19:26
14 607 respondents to your survey saw that ad? 14:19:27
15 A. I do not know. 14:19:32
16 Q. You didn't ask them that as part of the 14:19:33
17 closed-ended responses to TAT-255, did you? 14:19:37
18 A. I didn't list it explicitly. They 14:19:40
19 certainly could have selected it under option 6. 14:19:42
20 Q. Let's look at RX-1338, which is a 14:19:46
21 TaxSlayer ad called "Cash Cow," which I guess on 14:19:52
22 the Web page looks like it ran January 4th, 2022. 14:20:01

1 (Whereupon a video is played.) 14:20:23

2 BY MR. PAIKIN: 14:20:36

3 Q. Now, this ad ran, at least as of this 14:20:36

4 January 4th, 2022, and you took your survey in 14:20:40

5 March of 2022, right? 14:20:44

6 A. I administered my survey in March of 2022, 14:20:47

7 yes. 14:20:51

8 Q. So RX-1338 was running on television 14:20:51

9 around the time that you undertook this survey, 14:20:56

10 correct? 14:20:59

11 MS. PLETT: Objection, lack of foundation. 14:20:59

12 A. I see here that you're indicating it ran 14:21:01

13 in January about two months before my survey 14:21:02

14 opened. 14:21:07

15 Q. Let's look at another ad that was running 14:21:07

16 in that time period, this one from H&R Block 14:21:10

17 entitled "Help is Here." It's Exhibit No. -- 14:21:14

18 sorry -- Exhibit No. 1339, RX-1339. 14:21:22

19 (Whereupon a video is played.) 14:21:48

20 BY MR. PAIKIN: 14:22:20

21 Q. And let's run RX-1340, which is a 14:22:20

22 TaxSlayer ad called "Anthem Simply Free" that was 14:22:25

1 running in the same time period as your survey. 14:22:28

2 (Whereupon a video is played.) 14:22:35

3 BY MR. PAIKIN: 14:23:09

4 Q. Have you ever seen RX-1340 before today? 14:23:09

5 A. I don't recall seeing that particular ad, 14:23:14

6 no. 14:23:16

7 Q. And have you ever seen the H&R Block "Help 14:23:16

8 is Here," RX-1339, before today? 14:23:19

9 A. I don't recall seeing that one. 14:23:24

10 Q. And did you undertake any test to 14:23:25

11 determine whether or not the 607 respondents to 14:23:31

12 your survey had seen those ads? 14:23:34

13 A. I did not. 14:23:37

14 Q. And just because this is the ad that 14:23:44

15 H&R -- well, let me ask you, have you seen the ad 14:23:49

16 that H&R Block is currently running this year? 14:23:53

17 A. Not that I recall. 14:23:56

18 Q. Okay. I saw -- I'm a Giants fan and I saw 14:23:57

19 it in a Giants' game. So let's run RX-1341, which 14:24:00

20 is this year's H&R Block football season ad. 14:24:05

21 (Whereupon a video is played.) 14:24:13

22 BY MR. PAIKIN: 14:24:29

1 Q. Have you ever seen RX-1341? 14:24:29

2 A. I have not seen that ad, no. 14:24:32

3 Q. Maybe it will run during the Super Bowl 14:24:33

4 unless Mr. Anguizola files a motion for preliminary 14:24:37

5 injunction to enjoin it. I guess we'll wait and 14:24:43

6 see. 14:24:45

7 In listing the closed-ended responses to 14:24:47

8 TAT-255, you didn't include as an option your own 14:24:51

9 experience, did you? 14:24:57

10 A. I did not explicitly call out one's own 14:24:58

11 experience, no. 14:25:01

12 Q. And a respondent may have filed on a 14:25:03

13 competitor's Website with different criteria and 14:25:06

14 that could have formed the source of their belief 14:25:09

15 as to the eligibility requirements on TurboTax; 14:25:12

16 isn't that possible? 14:25:16

17 A. Anything's possible. I'm not sure how 14:25:19

18 likely it is, because if I file for free, let's 14:25:21

19 say, with H&R Block, that's likely to have a big 14:25:24

20 influence on my beliefs about H&R Block, it's 14:25:26

21 likely to have less of an influence on my beliefs 14:25:29

22 about TurboTax. 14:25:32

1 Q. So group A did not file their taxes on 14:25:33
2 TurboTax in the prior three years, right? 14:25:35

3 A. Correct. 14:25:38

4 Q. But group A could have filed their taxes 14:25:38
5 on H&R Block, right? 14:25:42

6 A. They could have, yes. 14:25:44

7 Q. Or they could have filed their taxes on 14:25:45
8 TaxSlayer, couldn't they? 14:25:48

9 A. They could have. 14:25:49

10 Q. Or they could have filed it on any one of 14:25:50
11 TurboTax's competitors for free filing, right? 14:25:52

12 A. Potentially, but a limitation on that 14:25:59
13 would be, as we talked about earlier, the criteria 14:26:01
14 are largely overlapping between what's free on the 14:26:05
15 different sites. And so to the extent we've 14:26:08
16 sampled a whole bunch of people who are not free, 14:26:11
17 not eligible to file for free on TurboTax, they're 14:26:14
18 unlikely to be eligible to file for free on the 14:26:17
19 other sites. It's possible that a few of them are 14:26:21
20 eligible, but it's unlikely that many of them were 14:26:23
21 eligible to file for free. 14:26:26

22 Q. Well, earlier we discussed the eligibility 14:26:28

1 requirements for simple returns. Do you recall 14:26:31
2 when we had that conversation earlier today? 14:26:37
3 A. I recall that. 14:26:39
4 Q. And different tax sites have different 14:26:40
5 eligibility requirements for what constitutes a 14:26:41
6 simple return, right? 14:26:46
7 A. I believe they are different but largely 14:26:47
8 overlapping eligibility requirements. 14:26:50
9 Q. But different, right? 14:26:52
10 A. Not identical. 14:26:53
11 Q. And you haven't actually examined the 14:26:54
12 eligibility requirements on any of TurboTax 14:26:57
13 competitors, right? 14:27:00
14 A. I know a little bit about them, they've 14:27:05
15 come up in some discussions. I haven't examined 14:27:07
16 them nearly as closely and don't remember them 14:27:09
17 nearly as well as TurboTax, but there was some 14:27:11
18 discussion of them, and my memory of that 14:27:13
19 discussion is that they were largely similar but 14:27:15
20 not identical. 14:27:17
21 Q. Your eligibility requirements for the 14:27:21
22 survey track to the eligibility requirements to 14:27:22

1 file for free with TurboTax Free Edition in tax 14:27:26

2 year 2021, correct? 14:27:29

3 A. Correct. 14:27:30

4 Q. They're not tracking eligibility to file 14:27:31

5 for free on H&R Block for tax year 2021, correct? 14:27:35

6 A. They might well track with H&R Block's 14:27:39

7 requirements. I'd have to look at H&R Block's 14:27:41

8 requirements to answer that question. 14:27:43

9 Q. And they're not trying to track with 14:27:45

10 TaxSlayer's eligibility requirements to file in tax 14:27:50

11 year 2021, correct? 14:27:54

12 A. I did not check if they track with 14:27:55

13 TaxSlayer, but as with H&R Block, I would suspect 14:27:57

14 TaxSlayer has similar requirements. I didn't go 14:27:59

15 through all of TurboTax's requirements. I just 14:28:02

16 picked I believe three, and those three may overlap 14:28:04

17 with TaxSlayer or H&R Block. 14:28:07

18 Q. Which -- in tax year 2021, which of 14:28:13

19 Intuit's competitors allowed you to file for free 14:28:19

20 and report unemployment income? 14:28:21

21 A. I don't recall that off the top of my 14:28:24

22 head. 14:28:25

1 Q. In tax year 2021 which of TurboTax's 14:28:26
2 competitors allowed you to report student interest 14:28:29
3 payments on free filing tax services? 14:28:34

4 A. I'm not sure. Those are two criteria that 14:28:41
5 I know have moved around over time. So I'm not 14:28:44
6 sure where they were for a particular provider in a 14:28:46
7 particular year. 14:28:48

8 Q. And in the closed-ended responses to 14:28:49
9 TAT-255 you did not list as a source playing a role 14:28:54
10 in a consumer's impression about their ability to 14:29:02
11 file for free on TurboTax any competitors' Website 14:29:05
12 or advertisements, correct? 14:29:09

13 A. I did not explicitly call those out as 14:29:13
14 their own response options, that's correct. 14:29:15

15 Q. Do you agree that throughout your survey 14:29:18
16 there was a focus on TurboTax? 14:29:20

17 A. I'm not sure whose focus you mean. As the 14:29:25
18 person designing the survey, I was certainly 14:29:28
19 focused on TurboTax. So I would say yes to that. 14:29:30

20 Q. So is it fair to say that many of the 14:29:33
21 questions that are set forth on Appendix E are 14:29:34
22 TurboTax specific? 14:29:37

1 Q. And what is a demand artifact? 14:30:44

2 A. A demand artifact is survey respondents 14:30:48

3 answering in a particular way that they think the 14:30:52

4 person running the survey wants them to answer. 14:30:55

5 Q. And don't all of the prior questions 14:30:58

6 leading up to TAT-255 make clear that the survey is 14:31:01

7 about TurboTax? 14:31:07

8 A. I think we established that most of the 14:31:12

9 questions are about TurboTax, yes, if that's what 14:31:15

10 you're asking. 14:31:18

11 Q. So TAT-220, for instance, says "What is 14:31:19

12 your understanding about whether or not there is a 14:31:24

13 cost to filing your own income taxes using TurboTax 14:31:26

14 on-line software," right? 14:31:29

15 A. Yes. 14:31:31

16 Q. And TAT-230 says "You may have already 14:31:32

17 said this above, but please tell us again in your 14:31:39

18 understanding who, if anyone, can file their taxes 14:31:42

19 for free using TurboTax on-line software"; do you 14:31:44

20 see that? 14:31:47

21 A. I see that. 14:31:48

22 Q. And TAT-240 says "You may have already 14:31:49

1 said this above, but please tell us again which of 14:31:54
2 the following best describes your understanding of 14:31:56
3 filing your 2021 income taxes for free using 14:31:58
4 TurboTax on-line software," right? 14:32:03
5 A. That is -- that question, yes. 14:32:05
6 Q. And TAT-250, "You may have already said 14:32:08
7 this above, but please tell us again why you think 14:32:13
8 you can file your 2021 income taxes for free using 14:32:15
9 TurboTax on-line software," right? 14:32:18
10 A. That is question 250. 14:32:21
11 Q. And so when they get to TAT-255, do you 14:32:22
12 think that they would have guessed that the survey 14:32:27
13 was seeking information about TurboTax and that 14:32:32
14 would have made them more likely to provide 14:32:36
15 closed-ended response 1, which is the -- or 2, 14:32:40
16 which are the only two closed-ended responses that 14:32:44
17 mention TurboTax by name? 14:32:46
18 A. It's a compound question and I'll take the 14:32:49
19 two parts separately. 14:32:52
20 Part of your question was do I think they 14:32:54
21 think it's about TurboTax. They may well think the 14:32:58
22 survey is about TurboTax. Does that make them more 14:33:01

1 likely to select option 1 or 2 in TAT-255? It's 14:33:03
2 not clear to me why that would be an obvious 14:33:06
3 conclusion from that premise. 14:33:10
4 Q. Now, there were some unprompted responses 14:33:15
5 to open questions that would indicate that there 14:33:18
6 were some demand artifacts in the survey, weren't 14:33:21
7 there? 14:33:25
8 A. You'd have to tell me more what you're 14:33:27
9 referring to. 14:33:30
10 Q. Well, in your -- do you recall that in 14:33:31
11 your rebuttal report, you discussed one of 14:33:33
12 Dr. Hauser's critiques that there were responses to 14:33:38
13 open questions that indicated that there were 14:33:42
14 demand artifacts in your survey? 14:33:45
15 A. Dr. Hauser did talk about demand artifacts 14:33:48
16 and I did respond to that, yes. 14:33:51
17 Q. Okay. 14:33:52
18 Now, in response to TT-250 asking why a 14:33:53
19 respondent believes he can file for free, 14:34:00
20 Respondent ID No. 10394 said "Because this survey 14:34:02
21 is suggesting that I can file it for free," right? 14:34:08
22 Is that what Respondent ID No. 10394 said 14:34:15

1 unprompted in response to an open question? 14:34:20

2 A. You'd have to put the data or Hauser's 14:34:22

3 report in front of me. I don't know off the top of 14:34:24

4 my head what that particular respondent said, of 14:34:26

5 course. 14:34:28

6 Q. Okay. Respondent ID No. 5708 said "It's 14:34:28

7 been said a few times now during survey that you 14:34:35

8 can file for free using TurboTax." Do you remember 14:34:39

9 that? 14:34:43

10 A. That sounds familiar. 14:34:44

11 Q. And Respondent ID 5783 said unprompted 14:34:46

12 "Because you keep yelling me I can." I think 14:34:51

13 that's probably a typo. I think it should be 14:34:57

14 "Because you keep telling me I can," but he wrote 14:34:59

15 "yelling." Do you recall that being one of the 14:35:02

16 unprompted responses? 14:35:06

17 A. That sounds familiar. I don't remember 14:35:08

18 specific wording. 14:35:10

19 Q. And in response to TT-270, Respondent ID 14:35:11

20 No. 1836 said "Just to be told I can, I'm assuming 14:35:17

21 since this has been asked four times, that it must 14:35:22

22 be free." Do you recall Respondent ID No. 1836 14:35:25

1 giving that unsolicited response? 14:35:32

2 A. That sounds like something from 14:35:39

3 Dr. Hauser's report, but I don't recall the 14:35:41

4 specific wording that you're reading out now. 14:35:42

5 Q. Don't unsolicited responses like those 14:35:44

6 give rise to a concern that there is a demand 14:35:47

7 artifact issue in your survey? 14:35:51

8 A. So I would make two observations about 14:35:53

9 those responses and whether they give rise to a 14:35:55

10 concern. Observation No. 1 is this is less than 14:35:58

11 1 percent of our respondents. So it may be the 14:36:03

12 case that, you know, less than 1 percent of our 14:36:06

13 respondents were concerned. 14:36:08

14 I would also recall that these were 14:36:10

15 responses to the question "Why do you think that" 14:36:13

16 directly. So these were not unsolicited, 14:36:18

17 open-ended, you know, tell us something about the 14:36:24

18 survey. That's often done in a debriefing at the 14:36:24

19 end of a survey to check for demand artifacts. 14:36:24

20 These were done in response to a 14:36:29

21 particular probe about why they have that belief. 14:36:30

22 The fact that we got less than 1 percent of people 14:36:33

1 in that probe for why do you have this belief, to 14:36:36
2 say it's the survey makes me not concerned about 14:36:38
3 whether there's a more widespread demand artifact 14:36:42
4 in my data. 14:36:45
5 Q. Now, you said at the beginning it was less 14:36:49
6 than 1 percent of respondents, right? 14:36:51
7 A. Right. 14:36:53
8 Q. There were 607 respondents, and these were 14:36:54
9 six people, but what percentage was it of the 14:36:56
10 people who claimed to be under a misimpression? 14:36:59
11 A. I don't recall that. I didn't map those 14:37:06
12 back and do that calculation. 14:37:07
13 Q. And what percentage was it of the people 14:37:09
14 that identified TurboTax advertisements or TurboTax 14:37:10
15 Website as the source of their misimpression? 14:37:14
16 A. I don't recall, but just some simple math 14:37:18
17 off the top of my head suggests it would be a tiny 14:37:21
18 fraction of either of those because those are both 14:37:23
19 very large fractions of the 607. 14:37:25
20 Q. I think it was 190 people who you said had 14:37:32
21 pointed to TurboTax advertisements or TurboTax 14:37:38
22 Website as a source of misimpression, right? 14:37:40

1 A. I'd have to look at the report. I don't 14:37:44
2 remember that number off the top of my head. 14:37:46

3 Q. So that would be 3 percent of the 190. 14:37:48

4 A. Okay. 14:37:52

5 Q. Does that rise to a level where it gives 14:37:54
6 some concern that 3 percent of those respondents 14:37:57
7 are saying unsolicited, unprompted, that they 14:38:00
8 understand what the purpose of the survey is, to 14:38:04
9 try to get at TurboTax? 14:38:07

10 A. I wouldn't say unsolicited or unprompted, 14:38:08
11 and I would also say 3 percent is not terribly 14:38:12
12 alarming. 14:38:16

13 Q. Now, your survey also used the word "free" 14:38:19
14 13 times in the survey, didn't it? 14:38:22

15 A. I didn't count them, but Professor Hauser 14:38:25
16 seemed to think there were 13. 14:38:27

17 Q. Okay. And in your rebuttal report -- 14:38:29
18 you can take a look at it. I think it was 14:38:32
19 paragraph 78, which is RX-1345. Do you see it says 14:38:34
20 there that your tax perception survey uses the word 14:39:26
21 "free" 13 times? 14:39:30

22 A. To read that sentence, that's part of 14:39:32

1 Professor Hauser's argument, Professor Hauser's 14:39:35
2 argument that respondents may have been influenced 14:39:39
3 by my -- I'm just giving some words, which says the 14:39:42
4 word "free" 13 times. So that's coming from 14:39:46
5 Professor Hauser. 14:39:49
6 Q. Do you dispute that? 14:39:50
7 A. I didn't count that. It's a realistic 14:39:53
8 number, I don't know. I obviously haven't counted 14:39:55
9 them. 14:39:55
10 Q. Is it -- would it be fair to say that the 14:39:55
11 impact of repeating the word "free" 13 times in 14:39:56
12 your survey on respondents would have a short-term 14:40:00
13 effect on respondents that are responding to your 14:40:02
14 survey questions? 14:40:06
15 A. I'd have to think about what effect you 14:40:12
16 mean when you say it has an effect. 14:40:14
17 Q. Would you believe that using the word 14:40:16
18 "free" 13 times in your survey would create a 14:40:17
19 demand artifact? 14:40:20
20 A. It's not clear to me because some of those 14:40:20
21 times when the word "free" appeared, it appeared 14:40:22
22 right after the word "not." So sometimes when it's 14:40:25

1 free, what you're really seeing is "not free." 14:40:28

2 Q. Would you agree that you use the word 14:40:31

3 "free" in your survey more times than profess- -- 14:40:33

4 than the phishing ad that was used in Professor 14:40:40

5 Hauser's disclosure efficacy survey? 14:40:43

6 A. I don't recall exactly how many times 14:40:50

7 "free" was used in that ad. I have seen that ad, 14:40:52

8 but I don't remember if the number happens to be 14:40:54

9 greater or less than 13. 14:40:56

10 MR. PAIKIN: Okay. I think this is a good 14:40:58

11 time for a break. 14:41:01

12 THE VIDEOGRAPHER: The time is 2:41 p.m. 14:41:02

13 Eastern. We are now off the record. 14:41:05

14 (A break was had.) 15:01:47

15 THE VIDEOGRAPHER: This is the beginning 15:03:29

16 of media unit No. 5 in the video-recorded 15:03:30

17 deposition of Mr. Nathan Novemsky. The time is 15:03:34

18 3:03 p.m. Eastern. We are now back on the record. 15:03:37

19 Counsel, you may proceed. 15:03:41

20 BY MR. PAIKIN: 15:03:45

21 Q. Okay. Professor Novemsky, let's turn to 15:03:45

22 page 31, figure 2 in your report, which is GX-303, 15:03:48

1 and I want to do some math here. And you know 15:04:16

2 what, to help you, to the extent it's useful, I'm 15:04:20

3 going to hand you a calculator if that helps. 15:04:23

4 Okay. So looking at figure 2, in group A 15:04:30

5 I think we know from elsewhere in your report there 15:04:37

6 were a total of 404 group A respondents, correct? 15:04:39

7 A. That sounds right. 15:04:44

8 Q. If you need to confirm that in your 15:04:46

9 report, feel free to look at anything. 15:04:48

10 (Witness reviewing document.) 15:05:08

11 A. Yeah. Figure 1 shows 404 respondents for 15:05:08

12 group A. 15:05:11

13 Q. Okay. And for group B there were 203 15:05:12

14 respondents that ultimately participated in the 15:05:15

15 survey, correct? 15:05:17

16 A. Yes. 15:05:20

17 Q. And the total number of respondents to the 15:05:20

18 survey that completed and did not opt out was 607 15:05:22

19 participants, right? 15:05:28

20 A. Correct. 15:05:28

21 Q. And if you include the opt-outs that we 15:05:29

22 discussed earlier, that would be another 164 15:05:32

1 respondents who opted out for a total of 771 15:05:36

2 respondents, right? 15:05:42

3 A. That sounds correct. 15:05:43

4 Q. Okay. So I'm interested in the way that 15:05:50

5 you presented your data here in figure 2. So if we 15:05:56

6 look at row 2 in figure 2, which are the number of 15:06:01

7 respondents who identified TurboTax advertisements 15:06:08

8 as the source of their misimpression in response to 15:06:15

9 TAT-255, right? 15:06:22

10 A. Yes, that seems like what that is. 15:06:26

11 Q. Okay. And so 98 people out of 404 group A 15:06:29

12 respondents say they thought they qualified for 15:06:34

13 TurboTax Free Edition based on a TurboTax 15:06:37

14 advertisement, correct? 15:06:41

15 A. Yes. 15:06:47

16 Q. And 23 people out of 203 group B 15:06:47

17 respondents said they thought they qualified for 15:06:51

18 TurboTax Free Edition based on a TurboTax 15:06:54

19 advertisement, correct? 15:06:57

20 A. Correct. 15:07:00

21 Q. So 98 plus 23 would be 121 total 15:07:01

22 respondents out of the 607 total survey 15:07:05

1 participants said that they thought they qualified 15:07:11
2 for TurboTax Free Edition from a TurboTax 15:07:15
3 advertisement, right? 15:07:17
4 A. That sounds correct. 15:07:19
5 Q. And that's 19.9 percent of survey 15:07:20
6 respondents, right? 15:07:24
7 A. I haven't verified it. I can if you want 15:07:26
8 me to. 15:07:30
9 Q. If you don't trust my math, feel free to 15:07:30
10 use the calculator, but I will tell you that I have 15:07:34
11 done the math and I think I've gotten it right. 15:07:35
12 A. Okay. 15:07:39
13 Q. But that sounds right to you? 15:07:40
14 A. That's in the ballpark, yeah. 15:07:41
15 Q. Okay. And if you count the opt-outs, it's 15:07:43
16 121 people out of 771 survey respondents, right? 15:07:46
17 A. That is the math, yes. 15:07:51
18 Q. And that's 15.6 of survey respondents and 15:07:53
19 opt-outs, right, 15.6 percent? 15:07:57
20 A. Yeah. It's unusual to have people in the 15:08:01
21 denominator who do not have a chance to be in the 15:08:04
22 numerator. So I don't know what that percentage 15:08:07

1 means, but the math sounds correct. 15:08:08

2 Q. Okay. Well, do you know with respect to 15:08:11

3 these 121 people which specific TurboTax ad gave 15:08:15

4 them this impression? 15:08:22

5 A. I do not. 15:08:24

6 Q. So do you know whether or not it was the 15:08:25

7 ads that TurboTax ran in 2015? 15:08:27

8 A. I don't know. 15:08:30

9 Q. Do you know whether it was the ads they 15:08:31

10 ran in 2016? 15:08:32

11 A. I don't know. 15:08:34

12 Q. How about the ads in 2017? 15:08:35

13 A. It's unlikely that it was ads that old, 15:08:41

14 but I don't know for sure. I would certainly 15:08:44

15 hypothesize that it was ads closer to the time of 15:08:45

16 the survey compared to further from the time of the 15:08:48

17 survey, but I don't know for sure which year it 15:08:50

18 was. 15:08:52

19 Q. Why is that? 15:08:52

20 A. Because my understanding is, A, there were 15:08:53

21 more ads -- more free-themed ads closer to the time 15:08:57

22 of the survey than in 2015. The other piece is, of 15:09:01

1 course, ads decay -- the effect of ads decay. And 15:09:05
2 so it's more likely to be recent than older that 15:09:09
3 would lead to that. 15:09:13
4 Q. And just to round it out, you don't know 15:09:16
5 any specific ad from any time period that would 15:09:19
6 have caused that misimpression for a particular 15:09:22
7 survey respondent, right? 15:09:26
8 A. That's correct. 15:09:29
9 Q. And turning to the response in figure 2, 15:09:32
10 3, the TurboTax Website, if we run the math again, 15:09:37
11 it's 100 people out of 404 group A respondents say 15:09:42
12 they thought that they qualified for TurboTax Free 15:09:47
13 Edition from a TurboTax Website, right? 15:09:50
14 A. That's correct. 15:09:53
15 Q. And it's 30 people out of 203 group B 15:09:53
16 respondents say that they thought they qualified 15:09:57
17 for TurboTax Free Edition based on information in 15:09:59
18 the TurboTax Website, right? 15:10:03
19 A. That's correct. 15:10:06
20 Q. And 100 plus 30, then that would be 130 15:10:06
21 people out of the 607 respondents said that they 15:10:10
22 thought they qualified for TurboTax Free Edition 15:10:14

1 from a TurboTax advertisement, right? I'm sorry. 15:10:17

2 From a TurboTax -- let me ask that again. 15:10:22

3 So it would be 130 people out of 607 15:10:24

4 respondents said that they thought they qualified 15:10:27

5 for TurboTax Free Edition based on information on 15:10:30

6 TurboTax Website, right? 15:10:32

7 A. That's correct. 15:10:34

8 Q. And that would be 21.4 percent of the 15:10:34

9 survey respondents, right? 15:10:39

10 A. I'll trust your math. 15:10:40

11 Q. Okay. And if you count the opt-outs it's 15:10:41

12 130 people out of 771 survey respondents, right? 15:10:44

13 A. That would be the math, yes. 15:10:49

14 Q. And that's 16 percent of survey 15:10:50

15 respondents and opt-outs then, correct? 15:10:54

16 A. That sounds correct. 15:10:55

17 Q. And can you identify what year it was that 15:10:57

18 the Website involved would have given any 15:11:03

19 particular Respondent this misimpression? 15:11:07

20 A. I cannot. 15:11:10

21 Q. So you don't know whether it was 2015, 15:11:11

22 2016, 2017, any year up through 2022, right? 15:11:15

1 A. I do not know which year would have caused 15:11:19
2 the misimpression. 15:11:21

3 Q. And would you hypothesize that it's more 15:11:23
4 unlikely for it to have been Website iterations 15:11:27
5 earlier in time or later prior to the survey? 15:11:30

6 A. Sorry. That -- 15:11:36

7 Q. Let me ask it again. We had discussed the 15:11:38
8 earlier-in-time advertisements were unlikely to 15:11:40
9 have been the source, and my question is do you 15:11:43
10 believe that earlier versions of the Website are 15:11:48
11 less likely to have been the source of impression 15:11:56
12 by these respondents than the iterations of the 15:12:00
13 Website that existed closer in time to the survey? 15:12:07

14 MS. PLETT: Objection, mischaracterizes 15:12:10
15 the prior testimony. 15:12:12

16 MR. PAIKIN: Okay. Well, strike what I 15:12:13
17 said about the prior testimony and just answer the 15:12:14
18 question. 15:12:16

19 A. So I'm glad you gave me a chance to think 15:12:16
20 about it again. So my first thought was that old 15:12:18
21 ads or Website might have less of an impression 15:12:21
22 because of memory decay, but there's another force 15:12:24

1 going the other direction. So I can't speak to the 15:12:27
2 temporal pattern. 15:12:30

3 The other force would be if it's the first 15:12:31
4 time they learned about it, in, let's say, 2015 15:12:33
5 they saw an ad that said it's free, they may have 15:12:37
6 continued to believe it's free. We know first 15:12:38
7 impressions matter more. And so the fact they saw 15:12:41
8 something later may be less material than the first 15:12:42
9 thing they see. 15:12:44

10 So to the extent they're either first 15:12:47
11 seeing the Website or seeing the ads earlier in 15:12:48
12 time, those could be more impactful, but there's 15:12:51
13 also memory decay that goes the other direction. 15:12:55
14 So I can't make a strong statement about the 15:12:58
15 temporal course of what's going to be more 15:13:01
16 influential either on the Website or in the 15:13:03
17 advertisements. 15:13:04

18 Q. Would it also depend what the state of the 15:13:05
19 tax laws were in the relevant time period? 15:13:08

20 A. So obviously their eligibility in the 15:13:14
21 relevant time period could play a role. It may not 15:13:19
22 play a role. People today seeing a TurboTax Free, 15:13:21

1 free, free ad, it doesn't seem like the tax laws 15:13:24
2 are relevant to -- necessarily relevant to them 15:13:27
3 taking away I can file for free. So the tax laws 15:13:31
4 may or may not have played a role in their 15:13:33
5 impression. 15:13:35
6 Q. Well, prior to 2018 a simple tax return 15:13:36
7 was a 1040-EZ or a 1040-A; were you aware of 15:13:40
8 that? 15:13:45
9 MS. PLETT: Objection, assumes facts not 15:13:46
10 in evidence. 15:13:47
11 MR. PAIKIN: Really? 15:13:48
12 MS. PLETT: TurboTax's definition of a 15:13:51
13 simple return? 15:13:52
14 MR. PAIKIN: Okay. Just answer the 15:13:55
15 question. 15:13:57
16 A. I'm sorry. Could you repeat the 15:13:58
17 question. 15:13:59
18 MR. PAIKIN: Could you read it back. 15:14:00
19 (Record read as requested.) 15:14:11
20 BY THE WITNESS: 15:14:13
21 A. I was aware that it was a 1040-EZ in the 15:14:13
22 past. I couldn't have told you exactly which year. 15:14:17

1 Q. So if somebody used TurboTax Free version 15:14:19
2 to file their taxes for free in 2015, it would have 15:14:22
3 been in a period where they could do so with a 15:14:26
4 1040-EZ or a 1040-A, right? 15:14:29

5 A. If you say that I'll believe it, but I 15:14:33
6 don't remember specifically which year, which forms 15:14:36
7 again, but that sounds like it could be right. 15:14:38

8 Q. And are you aware that the tax laws 15:14:40
9 changed in 2018 for tax year 2019? 15:14:42

10 A. Which tax laws are we talking about? 15:14:48

11 Q. Are you aware that the 1040-EZ was 15:14:50
12 eliminated as a tax form for tax year 2019? 15:14:52

13 A. No, I wasn't. 15:14:56

14 Q. Do you understand that today you can file 15:14:58
15 your taxes using a form 1040-EZ? 15:14:59

16 A. I know I cannot file my taxes today using 15:15:02
17 1040-EZ. I haven't been able to for a while. I 15:15:05
18 didn't know whether the form existed or not for 15:15:08
19 anybody. 15:15:10

20 Q. So do you know whether or not any taxpayer 15:15:11
21 in the United States filing their taxes in tax year 15:15:16
22 2022 can use a form 1040-EZ? 15:15:20

1 much interaction they would have had with the 15:18:29
2 Website. It might be the case that especially 15:18:31
3 having the belief that they can file for free that 15:18:33
4 they would have gone and tried the Website. 15:18:37
5 Q. Okay. 15:18:44
6 Now, looking at line 1, in line 1 you 15:18:44
7 aggregated the respondents who responded that they 15:18:49
8 had formed their misimpression based on either the 15:18:54
9 TurboTax advertisements or the TurboTax Website, 15:18:59
10 correct? 15:19:02
11 A. Yes. 15:19:04
12 Q. Okay. And 154 people out of the 404 group 15:19:04
13 A respondents say they thought they qualified for 15:19:10
14 TurboTax Free Edition from a TurboTax advertisement 15:19:12
15 or TurboTax Website, right? 15:19:15
16 A. That's correct. 15:19:18
17 Q. And 36 people out of 203 group B 15:19:19
18 respondents say they thought they qualified for 15:19:23
19 TurboTax Free Edition from a TurboTax advertisement 15:19:25
20 or TurboTax Website, correct? 15:19:28
21 A. Correct. 15:19:30
22 Q. And 154 plus 36 is 190, right? 15:19:31

1 reference to the 190 respondents that we just 15:22:23
2 discussed, that would be the 190 respondents out of 15:22:28
3 the 607 respondents who thought that -- had the 15:22:31
4 impression that they qualified to file for free on 15:22:36
5 TurboTax Free Edition from either a TurboTax 15:22:39
6 advertisement or a TurboTax Website, correct? 15:22:41
7 A. Correct. 15:22:44
8 Q. And you say in paragraph 66 that in your 15:22:44
9 view if you give credence to Professor Hauser's 15:22:50
10 coding exercise there would still be 132 15:22:56
11 respondents out of that 190 remaining, correct? 15:22:59
12 A. Give me a moment. 15:23:06
13 I believe that 132 is out of the 190, yes. 15:23:19
14 Q. Okay. So that would mean that 132 people 15:23:22
15 out of 607 respondents said that they thought they 15:23:29
16 qualified for TurboTax Free Edition from a TurboTax 15:23:33
17 advertisement or Website, correct? 15:23:37
18 A. Correct. 15:23:41
19 Q. And that would be 21 percent of the 15:23:41
20 overall survey respondents, right? 15:23:46
21 A. That math sounds right. 15:23:47
22 Q. And if you count the opt-outs, it would be 15:23:49

1 132 out of 771 survey respondents, which would be 15:23:51
2 16 percent of survey respondents, correct? 15:23:56
3 A. That sounds about right. 15:24:01
4 Q. How did you go about determining whether 15:24:03
5 closed-ended and open-ended responses were 15:24:06
6 consistent? 15:24:10
7 A. So Professor Hauser did some coding of the 15:24:15
8 responses, and we -- I guess I'll step back a 15:24:19
9 minute. 15:24:26
10 When I looked at Professor Hauser's coding 15:24:28
11 of the open-ended responses I thought he was 15:24:29
12 flagging responses that were not inconsistent as 15:24:32
13 inconsistent. And so to determine which ones were 15:24:36
14 consistent or inconsistent what I did was rather 15:24:40
15 than look at individual responses as he instructed 15:24:44
16 his coders to do I looked across the responses for 15:24:46
17 a particular person. 15:24:50
18 And so, for example, they might have said 15:24:51
19 it's free for simple returns in the first case. 15:24:53
20 And so I would have -- and he would have coded that 15:25:00
21 as, okay, it's not clear, there would be an "I'm 15:25:02
22 not sure" in his coding. And then they might say 15:25:05

1 later to why do you think you can file, I have a 15:25:08
2 simple return, and to me that would be very 15:25:11
3 consistent. And then they would later check "Yes, 15:25:14
4 I think I can file for free" in the closed-ended, 15:25:16
5 and their simple return question would also 15:25:17
6 indicate they think they have a simple return. 15:25:20
7 And so looking across a respondent's 15:25:22
8 answer to multiple questions, it was often clear to 15:25:25
9 me that they were not being inconsistent, although 15:25:27
10 Professor Hauser's coding of consistency marked 15:25:30
11 them as inconsistent. And so then I went through 15:25:32
12 all of them to say how often are these codes when 15:25:37
13 looking across different questions simultaneously 15:25:40
14 actually inconsistent, and that's where we modified 15:25:43
15 the numbers that Professor Hauser had given us. 15:25:46
16 Q. And so I'm just trying to understand what 15:25:50
17 you did. You examined the responses that the 15:25:54
18 respondent gave to multiple questions, and if one 15:26:00
19 answer appeared to be inconsistent but other 15:26:03
20 answers appeared to be consistent, you formed the 15:26:07
21 view that it was consistent? I'm just trying -- 15:26:11
22 I'm really just trying to understand what you did. 15:26:14

1 A. Right. Okay. So that's not what we did. 15:26:16
2 What we did was we looked across the answers, could 15:26:19
3 we make sense of all of the answers. If they said 15:26:21
4 something inconsistent in a question, we would 15:26:24
5 leave them as inconsistent for the purposes of this 15:26:26
6 subsection. It's if we looked across and we said 15:26:28
7 actually all of their answers line up with a 15:26:32
8 simple, consistent story that makes sense to us in 15:26:34
9 the context of all of their open- and closed-ended 15:26:37
10 answers, then we would mark them as consistent. 15:26:40
11 So we took many people that Professor 15:26:43
12 Hauser marked as inconsistent, moved them to 15:26:44
13 consistent, because when you look not in isolation 15:26:47
14 but across, you see that it's fairly 15:26:49
15 straightforward. For example, you know, I think 15:26:53
16 it's free for simple returns is -- although he 15:26:56
17 marked it as unsure, it's not unsure when in the 15:26:58
18 context of I have a simple return in response to a 15:27:01
19 later question. 15:27:03
20 And so that's a very coherent story across 15:27:05
21 all of their answers to all of the questions we 15:27:07
22 examined. So it's not that they had a little bit 15:27:09

1 of inconsistency and we marked them as 15:27:12
2 inconsistent. It was that when you look in context 15:27:16
3 you see there isn't any inconsistency for many of 15:27:19
4 the respondents that they marked as inconsistent. 15:27:21
5 Q. And who undertook this exercise that 15:27:24
6 you're describing? 15:27:29
7 A. So I instructed some people at Cornerstone 15:27:30
8 to go through all the data and do this. 15:27:34
9 Q. Did you employ blind coders? 15:27:38
10 A. I don't know all the details of exactly 15:27:42
11 who they staffed on that task. They have a lot of 15:27:44
12 tools at their disposal. So I don't have an answer 15:27:48
13 off the top of my head to that question. 15:27:52
14 Q. So you don't know whether the coders that 15:27:53
15 you used were blind to complaint counsel's 15:27:56
16 hypotheses in this case, then, do you? 15:28:01
17 A. I don't know if the people who recoded 15:28:03
18 those were. I do know that they showed me the 15:28:05
19 codings and I was able to verify that, yes, 15:28:08
20 looking -- I didn't look at all of them, there were 15:28:12
21 hundreds, but looking at many of them that it made 15:28:15
22 a lot of sense to me that the ones they were 15:28:17

1 marking as consistent were indeed consistent. 15:28:19

2 Q. But you, yourself are aware of complaint 15:28:22

3 counsel's hypotheses in this case, right? 15:28:25

4 A. I am. 15:28:27

5 Q. So you wouldn't consider yourself to be a 15:28:28

6 blind coder, then, would you? 15:28:30

7 A. I wasn't trying to confirm complaint 15:28:34

8 counsel's hypotheses in this exercise or any other. 15:28:36

9 I was just trying to get at what consumers 15:28:39

10 understand about their ability to file for free. 15:28:43

11 Q. And did the reviewers look at the 15:28:45

12 closed-ended and open-ended questions in tandem, at 15:28:48

13 the same time? 15:28:54

14 A. Yes. So for an individual they would look 15:28:55

15 across the different answers to the multiple 15:28:57

16 closed- and open-ended questions together and say 15:28:59

17 is there inconsistency when I look at the sum total 15:29:02

18 of a particular individual's responses. 15:29:05

19 Q. And how did you ensure that the coding was 15:29:08

20 not biased? 15:29:11

21 A. One of the things I did, as I said a 15:29:16

22 second ago, was I looked at many of the examples, 15:29:18

1 not all of them, but many of the examples to say do 15:29:21
2 these look consistent or inconsistent, and there 15:29:24
3 were some that may have come back as on the margin 15:29:26
4 or maybe somebody wasn't sure how to code it. And 15:29:30
5 so I examined many of those also. And so I tried 15:29:33
6 to be fairly conservative and say if there's 15:29:35
7 something on the margin you're showing me that 15:29:37
8 looks like it may be inconsistent, let's count it 15:29:40
9 as inconsistent for these purposes. So that's how 15:29:42
10 we resolved some of the coding issues. 15:29:45
11 (Exhibit RX-1358 was marked 15:29:56
12 for identification.) 15:29:56
13 BY MR. PAIKIN: 15:30:01
14 Q. Okay. I'm going to hand you what's been 15:30:01
15 marked as RX-1358, and let me just tell you RX-1358 15:30:03
16 was prepared by the Analysis Group after your 15:30:22
17 rebuttal report to examine some of the records that 15:30:30
18 you, upon further review of Dr. Hauser's coding, 15:30:36
19 determined to be consistent, and I'd like to take a 15:30:39
20 look at some of those examples to try to understand 15:30:43
21 your thinking as to why you believe that the 15:30:48
22 responses are -- to the open-ended and closed-ended 15:30:53

1 questions are all consistent. 15:30:57

2 So let's take -- let's start with the 15:30:59

3 third one, which is record 1657 on Exhibit RX-1358. 15:31:01

4 That is an entry that you coded as consistent and 15:31:10

5 the blind coders that Dr. Hauser was employing 15:31:16

6 coded as "I do not have enough information." And 15:31:20

7 do you see that the response to TAT-220, which 15:31:25

8 asked "Based on your current information and 15:31:32

9 understanding, what can you tell us about whether 15:31:34

10 there is a cost to filing your taxes with 15:31:35

11 TurboTax," that respondent, record 1657, said "Not 15:31:38

12 familiar with TurboTax as well"; do you see that 15:31:45

13 response. 15:31:52

14 A. I see that, yep. 15:31:52

15 Q. And Dr. Hauser's independent coders looked 15:31:53

16 at that response "Not familiar with TurboTax as 15:31:56

17 well" and they in a blind coding determined that to 15:31:59

18 mean that that respondent did not have enough 15:32:05

19 information having responded not familiar with 15:32:07

20 TurboTax, but you in reviewing it determined that 15:32:12

21 that was consistent with the responses. Can you 15:32:16

22 explain that? 15:32:22

1 A. I don't recall whether I reviewed this 15:32:23
2 particular respondent. As I said, I didn't look at 15:32:24
3 all 262 that he would have coded. So I don't have 15:32:28
4 a memory of this particular respondent. 15:32:32

5 Q. Do you think sitting here today that those 15:32:37
6 responses are consistent or do you think they 15:32:40
7 should be coded as "I do not have enough 15:32:41
8 information" ? 15:32:44

9 A. It's a marginal case. I'm looking at 15:32:50
10 question 230 which says "Anyone can use TurboTax, I 15:32:54
11 haven't," the next one is "I have all my forms." 15:32:59
12 So the only thing that calls it into question of 15:33:06
13 whether they are consistent with the closed-ended 15:33:11
14 question 240 is their answer to question 220 that 15:33:16
15 you flagged, "Not familiar with TurboTax as well." 15:33:21

16 I'm trying to think if there's a reading 15:33:26
17 of that that would have people think that it could 15:33:28
18 be consistent. I'd certainly consider this a 15:33:34
19 marginal case and I could see this being flagged as 15:33:36
20 inconsistent. Maybe I could see it being flagged 15:33:39
21 as consistent also. The "not familiar with 15:33:44
22 TurboTax as well" is a little bit nonresponsive to 15:33:47

1 that question and doesn't tell me that they can't 15:33:50
2 file for free or they have some understanding they 15:33:52
3 can't file for free with TurboTax. 15:33:55
4 You know, the phrasing of open-ended 15:33:59
5 questions leaves a bit of ambiguity. So the "as 15:34:01
6 well" seems like that's a misstatement of some 15:34:05
7 kind. And so they could be saying I'm not very 15:34:08
8 familiar with TurboTax, I'm not well -- you know, 15:34:10
9 to use improper English, but I'm not well familiar 15:34:14
10 with TurboTax could have been kind of what they 15:34:17
11 meant when they say "as well" because it doesn't 15:34:19
12 strike me as obvious what the comparator could be 15:34:22
13 there for the "as well." 15:34:24
14 And so, you know, it's possible that 15:34:26
15 they're just saying I don't know a lot about 15:34:27
16 TurboTax in answer to question 220. If you 15:34:29
17 interpret that open-ended response as that, then I 15:34:31
18 don't see a great deal of inconsistency. "I'm not 15:34:34
19 very familiar," "I think anyone can file," "I have 15:34:37
20 all my forms," which is a bit nonresponsive but 15:34:41
21 maybe meaning it's okay, you know, I can do it, and 15:34:43
22 then there's nothing, for example, here saying, oh, 15:34:46

1 I don't know if I can file or I don't think I can 15:34:50
2 file or people like me can't file or I don't have a 15:34:53
3 simple tax return. 15:34:59
4 So we also included the simple questions 15:35:00
5 in our analysis, not just the questions shown here. 15:35:02
6 And so I don't know what this person's response to 15:35:04
7 those both open -- I think there was another 15:35:06
8 open-ended question also. There were four 15:35:10
9 open-ended questions in total and I see three here. 15:35:13
10 So I don't know what else is in the dataset, but 15:35:15
11 that would be my guess as to why this was, you 15:35:17
12 know, a marginal case. 15:35:20
13 Q. And you didn't use blind coders right? 15:35:22
14 A. I don't recall how Cornerstone did it. 15:35:25
15 Q. Okay. I only have seven hours. So if we 15:35:26
16 give these long responses to every one of these, 15:35:32
17 we're going to run the clock. So maybe try to keep 15:35:35
18 your answers short, but let me just give you two 15:35:37
19 more quick examples. 15:35:41
20 MS. PLETT: Counsel, I object to that. 15:35:43
21 Because Professor Novemsky should take the time he 15:35:44
22 needs to answer the questions you ask accurately 15:35:48

1 and completely. I think that's the goal of the 15:35:50
2 deposition. I'd also like to object to this 15:35:51
3 exhibit because it's not putting in front of him 15:35:53
4 the entirety of the open-ended question responses. 15:35:55
5 So he doesn't actually have the dataset he'd need 15:35:58
6 to do the analysis. 15:36:02
7 MR. PAIKIN: Let's look at record 4311 and 15:36:03
8 that's one that you tagged as consistent and 15:36:07
9 Dr. Hauser's independent coders tagged as "I do not 15:36:10
10 have enough information." And do you see that the 15:36:14
11 response there to TAT-250 and TAT-260 by respondent 15:36:16
12 4311 was "I am not sure I am using TurboTax since I 15:36:22
13 use another service"; do you see that? 15:36:26
14 A. I do. 15:36:28
15 MS. PLETT: I have the same objection to 15:36:30
16 the completeness of this exhibit, and I'll have a 15:36:31
17 standing objection to questions about this 15:36:33
18 exhibit. 15:36:35
19 Q. Do you believe sitting here today that 15:36:36
20 those answers for 4311 should be coded as 15:36:37
21 consistent or should they be coded as "I do not 15:36:41
22 have enough information"? 15:36:45

1 A. So just reviewing them quickly for myself, 15:36:46
2 they say "I've never used TurboTax," that seems 15:36:49
3 irrelevant to me for this. "Anyone can use 15:36:53
4 TurboTax," that seems to strongly suggest they 15:36:57
5 would be in the group that can use it for free. 15:36:59
6 And "I'm not using TurboTax because I use something 15:37:02
7 else" seems also kind of nonresponsive. 15:37:08
8 Q. Well, that's not what they -- 15:37:11
9 THE REPORTER: Guys. 15:37:11
10 Q. But that's not what they said, though. It 15:37:11
11 says "I am not sure I am using TurboTax since I use 15:37:13
12 another service," right? That's the language that 15:37:18
13 appears in that column? 15:37:21
14 A. That is the language and that to me 15:37:22
15 suggests that -- you know, you always have to 15:37:23
16 interpret these open-ended questions to what you 15:37:27
17 think is the closest actual meaning. That sentence 15:37:28
18 as it sits is hard to parse, but the way I would 15:37:32
19 parse it is when they say "I am not sure I am using 15:37:35
20 TurboTax since I use another service" means I may 15:37:40
21 not consider TurboTax because maybe they're using 15:37:45
22 H&R Block. It's not terribly responsive to the 15:37:47

1 question asked, but sometimes open-endeds aren't, 15:37:50

2 but it also doesn't stand in contradiction to what 15:37:55

3 is to me a clear belief in 230, which is anyone can 15:37:57

4 use it, and then when asked closed-ended can you 15:38:00

5 use it for free they say yes. So that one I would 15:38:04

6 see as not inconsistent. 15:38:07

7 Q. Okay. One more example because otherwise 15:38:10

8 we're going to close out the deposition on this 15:38:12

9 exercise. Let's take record 9284. That's one that 15:38:14

10 you tagged as consistent and Dr. Hauser's blind 15:38:19

11 coders said "Respondent contradicts themselves." 15:38:25

12 In response to TAT-220 asking whether there is a 15:38:29

13 cost to filing your taxes with TurboTax this 15:38:33

14 respondent answered, "Yes, my own income taxes 15:38:37

15 using TurboTax on-line software." So he answered 15:38:41

16 affirmatively yes. To the question 230, TAT-230, 15:38:44

17 "Based on your current information and 15:38:48

18 understanding, who, if anyone, is eligible to file 15:38:52

19 taxes for" -- sorry -- "who, if anyone, is eligible 15:38:56

20 to file taxes for free with TurboTax," they said 15:38:58

21 yes, they can file their taxes for free using 15:39:00

22 TurboTax on-line software. Isn't that a direct 15:39:03

1 contradiction? 15:39:07

2 A. So it relies on the reading of 220, which 15:39:12

3 is "Yes, my own income taxes using TurboTax on-line 15:39:15

4 software." I would say that's a marginal case. It 15:39:20

5 asks who can tell us about whether there's a cost, 15:39:27

6 yes, my own TurboTax is using -- it's a very 15:39:33

7 ambiguous question -- ambiguous response. You 15:39:37

8 know, I could see it as inconsistent. I would call 15:39:41

9 it very marginal. 15:39:47

10 Q. I thought you said at the beginning that 15:39:50

11 you took the most conservative approach when you 15:39:52

12 reviewed Dr. Hauser's coding exercise in putting 15:39:55

13 together your rebuttal response, and we've just 15:40:01

14 identified two -- two situations that you've 15:40:04

15 decided were marginal. Is that consistent with 15:40:07

16 taking the most conservative approach? 15:40:11

17 A. So as I said earlier, I did not look at 15:40:13

18 all 262 of the ones Hauser flagged. I don't recall 15:40:17

19 whether I looked at these particular ones. They 15:40:20

20 don't look familiar to me sitting here today. So I 15:40:23

21 don't know if I was asked to make a judgment about 15:40:26

22 them or not. 15:40:27

1 Q. Let's turn in your report, which is 15:40:32
2 GX-303, to page 7, paragraph 11, and this I 15:40:34
3 think -- 15:40:57
4 A. I have a version with highlighting at 15:40:59
5 paragraph 11. 15:41:01
6 Q. I think that might reflect confidential 15:41:02
7 information in the highlighting is why there's 15:41:08
8 highlighting in it. 15:41:11
9 A. Oh, okay. 15:41:14
10 Q. Okay. So paragraph 11 reads "The results 15:41:15
11 of the TurboTax perception survey [REDACTED] 15:41:19
12 [REDACTED] 15:41:23
13 [REDACTED] provides strong evidence that 15:41:26
14 Intuit's marketing is the most likely source of 15:41:28
15 these consumer misperceptions." And I just want to 15:41:31
16 try to break that down and understand what you mean 15:41:36
17 there. 15:41:40
18 So let's take it in pieces. "These 15:41:41
19 consumer misperceptions," what are you referring 15:41:44
20 to? 15:41:46
21 A. Referring to the consumers identified in 15:41:48
22 my survey as not being eligible to use Free Edition 15:41:51

1 but thinking that they are eligible to file for 15:41:55
2 free with TurboTax. 15:41:58
3 Q. Okay. And when you say "strong evidence," 15:41:59
4 what does that mean? 15:42:02
5 A. That means there's a fair amount of 15:42:05
6 scientific certainty that the statement that it has 15:42:09
7 evidence for is indeed true. 15:42:14
8 Q. Now, you've testified as an expert a 15:42:18
9 number of times, right? 15:42:22
10 A. I have. 15:42:23
11 Q. In your response you said "there's a fair 15:42:24
12 amount of scientific certainty." I think the usual 15:42:26
13 standard that experts put is to a reasonable degree 15:42:31
14 of scientific certainty. Is that -- are you saying 15:42:34
15 the same thing or are you drawing some distinction 15:42:37
16 there with your -- with your phrasing? 15:42:40
17 A. I was not drawing a distinction. I meant 15:42:42
18 to a reasonable degree of scientific certainty. 15:42:44
19 Q. Okay. And when you refer to Intuit's 15:42:46
20 marketing, what marketing are you referring to? 15:42:49
21 A. So it's the sum total of all their 15:42:58
22 marketing, including advertisements, things that 15:43:00

1 might be said on their Website, direct e-mails, 15:43:03
2 search engine optimization, banner ads, and, you 15:43:05
3 know, a number of other things that they used in 15:43:08
4 their marketing campaign to get out the message 15:43:10
5 that TurboTax is free to file with. 15:43:12

6 Q. Okay. And in what years of their 15:43:17
7 marketing are you making this opinion? 15:43:20

8 A. I am not isolating their marketing 15:43:24
9 campaign from one year to the other. I'm saying 15:43:27
10 their marketing campaign up to the point of the 15:43:31
11 survey, March 11th, 2022, has given consumers this 15:43:33
12 misimpression. 15:43:37

13 Q. And that's based on the responses that we 15:43:40
14 discussed from the 607 survey participants? 15:43:43

15 A. I don't know what you mean by "the 15:43:50
16 responses we discussed." 15:43:51

17 Q. Well, it's based on your perception 15:43:53
18 survey? 15:43:55

19 A. It is, yes. 15:43:56

20 Q. Okay. And what does "most likely source" 15:43:57
21 mean in paragraph 11? 15:44:01

22 A. It means that there's a reasonable degree 15:44:06

1 of scientific certainty that the source is Intuit's 15:44:08
2 marketing. 15:44:13
3 Q. Well, when you say "most likely," is that 15:44:15
4 51 percent? I mean, what does "most likely" mean? 15:44:18
5 A. It means the scientific evidence points to 15:44:25
6 that as the source with a reasonable degree of 15:44:28
7 certainty. Nothing is a hundred percent certain in 15:44:32
8 this kind -- in consumer studies, but there's a 15:44:33
9 reasonable degree of scientific certainty that that 15:44:35
10 is indeed the source is what I meant to imply. 15:44:38
11 Q. And the scientific certainty is derived 15:44:40
12 from the TurboTax perception survey? 15:44:42
13 A. In addition to other pieces of evidence. 15:44:43
14 [REDACTED] 15:44:47
15 [REDACTED] 15:44:50
16 Q. [REDACTED] [REDACTED] 15:44:53
17 [REDACTED] is there any other evidence that 15:44:58
18 you're referring to? 15:45:02
19 A. Other pieces of evidence would include, 15:45:05
20 you know, trying to identify alternative sources, 15:45:08
21 and to the extent there are a lack of plausible 15:45:10
22 alternative sources, that would have caused a 15:45:14

1 substantial number of consumers to have this same 15:45:16
2 misimpression, that's part of the scientific 15:45:19
3 analysis that says this is a likely source. 15:45:21
4 Q. Okay. Did you look at how many 15:45:30
5 respondents to the survey said that TurboTax 15:45:32
6 advertisements or the Website was the only source 15:45:36
7 of their impression that they could file for free? 15:45:39
8 A. I don't recall if I looked at those 15:45:43
9 numbers. They didn't seem terribly relevant to my 15:45:45
10 analysis. 15:45:47
11 Q. Okay. So of the 190 respondents I believe 15:45:48
12 Dr. Hauser says 91 also flagged other sources of 15:45:54
13 information that played a role in their 15:45:58
14 understanding. Do you recall seeing that? 15:46:00
15 A. I don't recall the specific number, but I 15:46:03
16 remember him talking about that. 15:46:05
17 Q. For the respondents that selected other 15:46:07
18 sources, did you take any steps to disentangle the 15:46:10
19 influence of those other sources on their 15:46:14
20 impressions? 15:46:16
21 MS. PLETT: Objection, argumentative. 15:46:17
22 A. I did not. My goal was to identify 15:46:21

1 whether TurboTax marketing was a source of the 15:46:26
2 misimpression. I was not trying to identify 15:46:30
3 whether it was the only or exclusive source of that 15:46:33
4 misimpression. And so I did not do much analysis 15:46:35
5 with people who checked TurboTax marketing plus 15:46:38
6 other things. 15:46:42

7 Q. So how could you be confident of the 15:46:43
8 relative role that those other sources played 15:46:46
9 versus the TurboTax ads and Website? 15:46:49

10 A. It wasn't my assignment and I didn't try 15:46:53
11 to assess the relative role of TurboTax ads or 15:46:54
12 Website. I just tried to assess that there was a 15:46:58
13 role. 15:47:00

14 Q. And you said earlier that making that 15:47:03
15 determination wasn't relevant. What do you mean by 15:47:07
16 that? 15:47:12

17 A. It wasn't relevant to my assignment. My 15:47:13
18 assignment was to determine whether a substantial 15:47:15
19 number of consumers were indeed influenced by 15:47:18
20 TurboTax marketing and Website to believe they can 15:47:24
21 file for free when they can't. My assignment 15:47:28
22 wasn't to determine how much influence other 15:47:30

1 sources may have had. 15:47:31

2 Q. And you're not offering a legal opinion as 15:47:32

3 to whether or not that's relevant or not, right? 15:47:34

4 A. I am not a lawyer. 15:47:37

5 MR. PAIKIN: Okay. Should we take a break 15:47:55

6 now? Does that make sense? 15:47:56

7 MS. PLETT: Does that make sense? 15:47:58

8 THE WITNESS: It's fine with me. 15:47:59

9 THE VIDEOGRAPHER: The time is 3:48 p.m. 15:48:02

10 Eastern. We are now off the record. 15:48:05

11 (A break was had.) 16:03:58

12 THE VIDEOGRAPHER: This is the beginning 16:04:09

13 of media unit No. 6 in the video-recorded 16:04:10

14 deposition of Mr. Nathan Novemsky. The time is 16:04:15

15 4:04 p.m. Eastern. We are now back on the record. 16:04:18

16 Counsel, you may proceed. 16:04:23

17 BY MR. PAIKIN: 16:04:25

18 Q. So Professor Novemsky, at some point 16:04:25

19 before the last break, we were talking about 16:04:28

20 differences in eligibility requirements to file for 16:04:31

21 free on some of Intuit's competitors; do you recall 16:04:35

22 that? 16:04:38

1 A. I do. 16:04:39

2 Q. And I think -- I'm not trying to 16:04:40

3 characterize your testimony. So I stipulate that 16:04:43

4 what I'm saying is not what he exactly said, but as 16:04:45

5 a general matter, I had understood you to say that 16:04:49

6 you understood that there were some small 16:04:53

7 differences but they were similar. Is that fair to 16:04:55

8 say and put it in your own words? 16:05:00

9 A. I would agree with that, that my 16:05:02

10 understanding is there are some overlap -- mostly 16:05:03

11 overlapping and maybe some nonoverlapping criteria 16:05:05

12 between the competitors of TurboTax and what 16:05:11

13 qualifies for free. 16:05:12

14 Q. We looked at two H&R Block ads earlier in 16:05:13

15 this deposition, television ads; do you recall 16:05:16

16 that? 16:05:21

17 A. I do. 16:05:22

18 Q. Isn't it fair to say that they've spent 16:05:22

19 millions of dollars in their advertising budget 16:05:25

20 trying to convince consumers that more people can 16:05:27

21 file for free on H&R Block than on TurboTax? 16:05:31

22 A. I don't remember the number. We have some 16:05:35

1 data on H&R Block advertising. I don't know if 16:05:38
2 it's millions of dollars, but clearly those ads had 16:05:40
3 the theme of it's harder to file with free -- for 16:05:44
4 free with TurboTax than it is with H&R Block. 16:05:48
5 Q. Wouldn't those ads send the message that 16:05:50
6 the eligibility requirements to file for free on 16:05:53
7 H&R Block are more expansive than the eligibility 16:05:56
8 requirements to file for free on TurboTax? 16:06:01
9 A. That was what I took away from them. So I 16:06:04
10 imagine most consumers might also. 16:06:06
11 Q. And did you undertake any test to 16:06:09
12 determine whether or not the 607 respondents to 16:06:11
13 your survey formed a misimpression about the 16:06:15
14 eligibility requirements for filing for free on 16:06:19
15 TurboTax by confusing Intuit's product with 16:06:23
16 H&R Block? 16:06:27
17 A. I didn't, but that ad doesn't concern me 16:06:29
18 at all in that score. In fact, it reassures me, 16:06:32
19 because that ad is explicitly about TurboTax and is 16:06:34
20 explicitly about the idea that TurboTax is hard to 16:06:38
21 file for free with. 16:06:41
22 And so to the extent that's going to 16:06:42

1 influence consumers for the key question I was 16:06:45
2 focused on, it's going to push them to say I cannot 16:06:47
3 file for free with TurboTax because that seemed to 16:06:50
4 be one of the main messages, certainly the 16:06:52
5 TurboTax-related main message of that ad. So it 16:06:55
6 didn't concern me. 16:06:58

7 Q. You would agree at least that that ad 16:07:01
8 conveys that there are, from H&R Block's 16:07:03
9 perspective, material differences between the 16:07:07
10 eligibility requirements to file for free on 16:07:11
11 H&R Block versus the eligibility requirements to 16:07:15
12 file for free on TurboTax, though, wouldn't you? 16:07:17

13 A. I wouldn't necessarily conclude that. As 16:07:22
14 a marketer if we allow a million people to file for 16:07:26
15 free and TurboTax allows 999,999 to file for free, 16:07:29
16 I might well run that ad to say you have an easier 16:07:33
17 time filing for free with us than with them to try 16:07:37
18 to poach many of their consumers who could probably 16:07:41
19 file for free with both, but if they know it's 16:07:42
20 easier to file with us, no matter how marginal that 16:07:45
21 easier is, I still want those consumers. 16:07:48

22 It doesn't mean they thought there was a 16:07:50

1 big difference between the two or what you call a 16:07:52
2 material difference. They presumably have to have 16:07:55
3 a difference to be truthful in their ad, but they 16:07:57
4 don't have to have a big difference to be truthful 16:07:59
5 in that particular ad, as I understood it at 16:08:02
6 least. 16:08:05

7 Q. Let's just quickly, because we don't have 16:08:05
8 a lot of time, I just want to play RX-1337, which 16:08:07
9 was the H&R Block "May Never Know" ad, and then 16:08:13
10 right after that let's play RX-1339, which is the 16:08:17
11 H&R Block "Help is Here" ad. 16:08:21

12 (Whereupon a video was played.) 16:09:10

13 BY MR. PAIKIN: 16:09:11

14 Q. Having reviewed the ads, does that change 16:09:11
15 your responses to the prior questions that I 16:09:14
16 asked? 16:09:15

17 A. No. It reinforces them. Again, what this 16:09:16
18 suggests is H&R Block is saying more people can 16:09:19
19 file with us than with TurboTax for free. There's 16:09:21
20 no claim about how many more people. And so it 16:09:24
21 could be a very thin margin, it could be a very 16:09:27
22 wide margin. 16:09:29

1 Either way, they might want to tout that 16:09:31
2 margin again to try to encourage people to come 16:09:33
3 over from TurboTax to them whether or not they 16:09:35
4 could actually file for free with TurboTax. 16:09:37
5 Q. And is it still your contention that the 16:09:39
6 eligibility requirements to file for free on 16:09:42
7 H&R Block and TurboTax are substantially the same 16:09:43
8 despite these two ads that you just watched? 16:09:48
9 MS. PLETT: Objection, mischaracterizes 16:09:50
10 prior testimony. 16:09:51
11 A. So these ads don't inform that opinion. 16:09:54
12 Q. Let's turn to your report, which is 16:09:59
13 GX-330, Appendix E, and let's talk about question 16:10:03
14 TAT-290. 16:10:08
15 MS. PLETT: Counsel, you meant 303, right, 16:10:10
16 not -- 16:10:12
17 MR. PAIKIN: 303, yeah. Sorry. Thank 16:10:13
18 you. 16:10:15
19 Just so the record is clear, could you 16:10:34
20 read what the question and closed responses are to 16:10:37
21 TAT-290. 16:10:42
22 A. Sure. 16:10:44

1 "In some of its advertisements TurboTax 16:10:47

2 mentions 'simple U.S. returns.' Do you think that 16:10:49

3 your 2021 income tax return meets TurboTax's 16:10:56

4 definition of a 'simple U.S. return'?" 16:11:00

5 Response option 1, "Yes, I think my 2021 16:11:05

6 income tax return meets TurboTax's definition of a 16:11:13

7 simple U.S. return." 16:11:15

8 Response 2, "No, I don't think my 2021 16:11:18

9 income tax return meets TurboTax's definition of a 16:11:21

10 simple U.S. return." 16:11:26

11 Response option 3, "Don't know, not sure." 16:11:28

12 Q. And do you think the -- well, do you have 16:11:32

13 an opinion as to whether or not the framing of this 16:11:39

14 question using the word "think" invites guessing? 16:11:41

15 A. Similar to my answer before, I think that 16:11:52

16 the word "think" is used here because to me it's 16:11:54

17 the appropriate standard of I wanted to measure 16:11:57

18 consumers' misperceptions to the extent they're 16:12:00

19 likely to drive consumer behavior, and when a 16:12:04

20 consumer thinks they have a simple return, in this 16:12:07

21 context, that might send them to the TurboTax 16:12:10

22 Website to try to file for free. And so I don't 16:12:12

1 think it's about guessing. I think it's about 16:12:15
2 setting the right standard to correspond to 16:12:16
3 behavior. 16:12:19

4 Q. Why didn't you present it as a two-sided 16:12:20
5 question, then, do you think or do you not think 16:12:24
6 that your 2021 income tax returns meet TurboTax 16:12:29
7 definition of a simple U.S. return? 16:12:34

8 A. I think that would be a fine phrasing 16:12:38
9 also. I have no objection to that phrasing. 16:12:41

10 Q. Isn't it leading to present it as a 16:12:43
11 one-sided question? 16:12:45

12 A. I don't think in this case it's terribly 16:12:46
13 leading because the responses, which, remember, 16:12:48
14 rotate in their order, so some people say no first, 16:12:53
15 some people say yes first. The responses clearly 16:12:56
16 say it could be yes, it could be no. 16:12:59

17 And so I think consumers, before they 16:13:01
18 actually select a response, which is the key moment 16:13:02
19 here, have been exposed to the idea of yes, it's 16:13:05
20 simple and no, it's not. And so I think any bias 16:13:09
21 introduced by not having the "whether or not" 16:13:14
22 phrase in the question would be quite small. 16:13:16

1 Q. And at the time that the respondents were 16:13:22
2 providing answers to this question, they did not 16:13:25
3 have TurboTax's definition of simple tax return in 16:13:29
4 front of them, correct? 16:13:35

5 A. Correct. 16:13:36

6 Q. In your report, GX-303, on page 35, 16:13:37
7 paragraph 87. 16:13:45

8 (Witness reviewing document.) 16:14:33

9 BY MR. PAIKIN: 16:14:34

10 Q. And this section of the report you're 16:14:34
11 discussing responses to TAT-290, correct? 16:14:37

12 A. Correct. 16:14:45

13 Q. You say in the second-to-last line of 16:14:46
14 paragraph 87 "In fact, they" -- meaning the 16:14:48
15 respondents -- "are more likely to answer yes to 16:14:52
16 this question because motivated reasoning, wishful 16:14:55
17 thinking, and optimistic bias will drive many 16:14:59
18 consumers to give themselves the answer that is 16:15:04
19 advantageous for them, namely that their tax return 16:15:07
20 is indeed simple and therefore they can file for 16:15:10
21 free." You wrote that, right? 16:15:14

22 A. I did. 16:15:17

1 Q. Doesn't that statement suggest that the 16:15:18
2 results are likely inflated irrespective of what 16:15:19
3 Intuit's advertisements and Websites say? 16:15:25

4 A. No, it doesn't. Let me be clear why. 16:15:28
5 Motivated reasoning, et cetera, that I mention, 16:15:32
6 those psychological forces in that question that 16:15:35
7 can drive people to say yes, I have a simple 16:15:38
8 return, they will operate as much, if not more, in 16:15:40
9 the real world when behavior is being determined as 16:15:43
10 they'll operate in my survey. 16:15:45

11 So it's a bias that drives their thinking 16:15:47
12 both in responding to surveys and in deciding to go 16:15:49
13 to TurboTax and trying to file. So it's not 16:15:52
14 something that separates my survey responses from 16:15:54
15 real behavior at all. 16:15:56

16 Q. Okay. 16:15:59

17 In the closed-end responses to TAT-255, 16:16:07
18 you didn't list the IRS's definition of simple tax 16:16:10
19 return, did you? 16:16:18

20 A. I did not. 16:16:19

21 Q. And are you aware that the IRS has a 16:16:19
22 definition for simple tax return? 16:16:21

1 Q. Did you consider GX -- RX-78 in connection 16:19:00
2 with the preparation of your report? 16:19:07
3 A. I don't recall using this. 16:19:11
4 Q. In the note under figure 4, do you see it 16:19:16
5 says "IRS defines the categories by accompanying 16:19:19
6 schedules or additional forms associated with 16:19:23
7 specific tax credits"; do you see that? 16:19:25
8 A. I do. 16:19:28
9 Q. And it says -- can you -- well, let me 16:19:29
10 read it. Simple -- it says "Simple returns are 16:19:33
11 without any schedules"; do you see that? 16:19:36
12 A. I do. 16:19:38
13 Q. And "Intermediate returns are defined as 16:19:38
14 having Schedules A, B, D, and forms associated with 16:19:43
15 the additional child tax credit, educational 16:19:47
16 credit, childcare credit, credit for the elderly, 16:19:51
17 or earned income tax credit"; do you see that? 16:19:56
18 A. I do. 16:19:59
19 Q. And there's also a definition for complex 16:20:00
20 returns which are "all other returns including 16:20:01
21 returns with Schedule C, E, F, or other schedules"; 16:20:04
22 do you see that? 16:20:10

1 eligibility requirements in tax year 2021. 16:21:16

2 A. Okay. 16:21:25

3 Q. Okay. And on Intuit's definition of a 16:21:26

4 simple return, it includes earned income tax 16:21:31

5 credit, right? 16:21:34

6 THE REPORTER: Yes? 16:21:36

7 A. Yes, it does. 16:21:37

8 Q. And earned income tax credit is something 16:21:38

9 that under the IRS's definition would be part of an 16:21:42

10 intermediate return, correct? 16:21:46

11 MS. PLETT: Counsel, I'm just going to 16:21:48

12 object to the characterization of the exhibit 16:21:50

13 because I believe the exhibit says a simple tax 16:21:52

14 return is a Form 1040 only. 16:21:54

15 MR. PAIKIN: Can you just answer the 16:21:59

16 question? Do you see the note that we're talking 16:22:00

17 about that we just read? Under the note it 16:22:03

18 reads -- do you see where it says "Intermediate 16:22:09

19 returns are with Schedules A, B, D, and forms 16:22:12

20 associated with the additional child tax credit, 16:22:17

21 educational credit, childcare credit, credit for 16:22:20

22 the elderly, or earned income tax credit"; do you 16:22:24

1 see that? 16:22:27

2 A. I do see that. 16:22:27

3 Q. So in the definition of intermediate 16:22:28

4 returns that we read, it includes earned income tax 16:22:30

5 credit under intermediate returns; isn't that 16:22:32

6 right? 16:22:34

7 A. It does. 16:22:34

8 Q. And child tax credits is also listed as -- 16:22:35

9 under the definition of intermediate returns by the 16:22:44

10 IRS, correct? 16:22:46

11 A. That's correct. 16:22:47

12 Q. And under Intuit's eligibility 16:22:48

13 requirements to file for free, childcare credits 16:22:52

14 are included in Intuit's definition of simple tax 16:22:57

15 return, right? 16:23:00

16 A. It is a little ambiguous because at the 16:23:02

17 top of the simple definition it says "A simple 16:23:04

18 definition is for Form 1040 only" and then it goes 16:23:07

19 on to characterize earned income tax credit and 16:23:11

20 child tax credits as situations covered by TurboTax 16:23:15

21 Free Edition. So it's not a hundred percent clear 16:23:18

22 to me whether those are in or out. I'm confused by 16:23:20

1 the contra- -- what seems like a contradiction. 16:23:24

2 Q. And do you know whether or not student 16:23:29

3 loan interest deduction is something that can be 16:23:31

4 included when you file for free on TurboTax in tax 16:23:39

5 year 2021? 16:23:42

6 A. It seems ambiguous to me unless it is 16:23:42

7 included on the 1040 itself, which I don't remember 16:23:44

8 it to be. Then, again, there seems like a 16:23:49

9 contradiction between a simple tax return is 1040 16:23:53

10 only and then later it lists student loan interest 16:23:56

11 as included in this Free Edition or covered by the 16:23:59

12 Free Edition is the word they used. So I find that 16:24:02

13 confusing. 16:24:05

14 Q. So you find the IRS's definition 16:24:06

15 confusing? 16:24:08

16 A. In the IRS's definition, it seems clear to 16:24:10

17 me that -- the additional tax credit -- so the 16:24:13

18 IRS's definition says without any schedules, but it 16:24:23

19 doesn't say without any forms, and it seems here 16:24:27

20 that those are all called out as forms. Whereas -- 16:24:30

21 so that does not seem as confusing. 16:24:36

22 Q. Do you think this confusion arises from 16:24:40

1 the change in the tax law? 16:24:43

2 A. The confusion for me arises from the fact 16:24:45

3 that it says in the TurboTax materials 1040 only 16:24:47

4 and then later says child tax credit and earned 16:24:51

5 income credit. That's where the confusion 16:24:58

6 arises. 16:25:00

7 Q. What about with respect to student loan 16:25:01

8 interest? Let me ask it this way. Prior to tax 16:25:03

9 year 2018, could you report student loan interest 16:25:06

10 on a 1040-EZ? 16:25:09

11 A. I don't know. 16:25:11

12 Q. And prior to tax year 2019, could you 16:25:12

13 report unemployment compensation on a 1040-EZ? 16:25:21

14 A. I don't know. 16:25:24

15 Q. Have you done any testing to determine 16:25:26

16 whether or not respondents to your survey's 16:25:29

17 confusion arises from the change to the tax code 16:25:34

18 that took place in 2018 with respect to tax year 16:25:37

19 2019? 16:25:43

20 A. I did not. 16:25:44

21 Q. Are you familiar with what a 1040-EZ is or 16:26:02

22 was? 16:26:06

1 A. Vaguely familiar. I think I used it 16:26:07
2 myself many years ago. 16:26:09

3 Q. And what is a 1040-EZ? 16:26:10

4 A. My understanding is it's a very simplified 16:26:12
5 version of the 1040 tax form that excludes a lot of 16:26:14
6 line items that are on the 1040 for people who have 16:26:18
7 a situation where they don't need those particular 16:26:22
8 lines. It's about one page long or maybe two pages 16:26:24
9 if I remember. 16:26:29

10 Q. And what is your understanding of what a 16:26:30
11 1040-A was? 16:26:32

12 A. 1040-A, my memory is something 16:26:35
13 intermediate. It had a number of things on the 16:26:37
14 1040 but not all of them. 16:26:39

15 Q. And where would you go to try to determine 16:26:41
16 what the requirements were for a 1040-EZ back in 16:26:44
17 2018? 16:26:50

18 A. Are you asking me as an individual where I 16:26:54
19 would go, or are you asking where a consumer... 16:26:56

20 Q. Where would you go? 16:27:00

21 A. I personally would go to the IRS Website 16:27:01
22 where they have the different forms and some 16:27:03

1 guidance about which form you should use. I 16:27:07
2 haven't been to that site in many years, but that's 16:27:09
3 my memory of what I did years ago. 16:27:11

4 Q. Do you agree -- I think we talked about 16:27:30
5 this earlier -- that a variant of the simple 16:27:31
6 return's disclosure language was present in the 16:27:34
7 allegedly deceptive Intuit television ads from tax 16:27:37
8 year 2021? 16:27:43

9 A. I believe the simple return's language was 16:27:44
10 used in most, if not all, of the TurboTax free adds 16:27:45
11 in 2021. 16:27:49

12 Q. And do you agree that the "see if you 16:27:50
13 qualify" disclosure language was present in 16:27:55
14 TurboTax TV ads from tax years 2020 and 2021? 16:27:57

15 A. I don't recall if that was in all of the 16:28:03
16 ads. 16:28:04

17 Q. In your -- let's turn to your rebuttal 16:28:08
18 report, page 96, paragraph 222, which is RX-1345, 16:28:11
19 and I want to focus in on the end of paragraph 222 16:28:47
20 where you say "Therefore even if some consumers 16:28:53
21 notice the disclaimer that TurboTax Free Edition is 16:28:56
22 for simple U.S. returns or otherwise develop the 16:28:59

1 notion that TurboTax Free Edition is for simple or 16:29:03
2 uncomplicated returns, the consumers may still be 16:29:06
3 misled by Intuit's ads because they do not 16:29:10
4 necessarily associate the phrase "simple returns" 16:29:12
5 with the specific criteria used by Intuit, 16:29:15
6 particularly as those criteria have changed over 16:29:19
7 time"; do you see that? 16:29:22
8 A. I do. 16:29:23
9 Q. So is it correct that your perception 16:29:23
10 study is only asking whether a consumer perceives 16:29:31
11 simple U.S. returns to match the eligibility 16:29:34
12 requirements for Free Edition? 16:29:38
13 A. My question asked do you think you have a 16:29:39
14 simple tax return as defined by TurboTax. That was 16:29:41
15 the only way I used the word "simple." 16:29:46
16 Q. So you did not study whether consumers 16:29:50
17 understand that Free Edition is for uncomplicated 16:29:52
18 returns, then, right? 16:29:54
19 A. I'm not sure I follow your question. 16:29:55
20 Q. Well, in your report you say that "Even if 16:29:58
21 consumers develop the notion that TurboTax Free 16:30:02
22 Edition is for simple or uncomplicated returns"; do 16:30:05

1 A. Some consumers may certainly have come 16:31:21
2 away from the TV ads as understanding their 16:31:23
3 eligibility as being about the level of simplicity 16:31:27
4 or complexity of their return. 16:31:29

5 Q. And after a consumer watches the 16:31:36
6 television ad, they may not know precisely whether 16:31:41
7 their tax situation fits within the precise 16:31:44
8 eligibility requirements, right? 16:31:48

9 A. Right. In fact, my survey is evidence 16:31:49
10 that many don't know. 16:31:51

11 Q. And the television ads for tax years 2020 16:31:53
12 and 2021 included a disclaimer -- or a disclosure 16:31:58
13 that said "see if you qualify," right? 16:32:02

14 A. Again, I don't recall "see if you qualify" 16:32:05
15 being as ubiquitous as simple returns only. 16:32:08

16 Q. And the television ads in 2021 had a 16:32:11
17 voice-over that directed people to go to 16:32:14
18 TurboTax.com, right? 16:32:16

19 A. I don't recall when the voice-over 16:32:20
20 started. 16:32:22

21 Q. And, in fact, you need to go to 16:32:23
22 TurboTax.com to use the tax filing service, right? 16:32:25

1 A. That is true. 16:32:29

2 Q. And the precise eligibility requirements 16:32:30

3 are set forth on the Website, right? 16:32:32

4 A. I would say they're contained within the 16:32:35

5 Website most of the time through a hyperlink. 16:32:37

6 Q. Did any of your survey questions ask 16:32:43

7 respondents whether there were eligibility criteria 16:32:46

8 for filing for free on TurboTax Free Edition? 16:32:49

9 A. There is a question where some respondents 16:32:59

10 answered with eligibility criteria. I'd have to go 16:33:01

11 back and look at the exact wording of my questions 16:33:05

12 to see if they match what you're asking me. 16:33:08

13 Q. Do you recall whether or not you asked an 16:33:10

14 explicit question whether or not respondents 16:33:14

15 believed that their eligibility criteria to file 16:33:16

16 for free on TurboTax? 16:33:19

17 A. I didn't use the term "eligibility 16:33:21

18 criteria." I did ask, for example, who was 16:33:23

19 eligible, which does have some implication that 16:33:24

20 there are eligibility criteria potentially. 16:33:27

21 Q. Did you ask an open source question to 16:33:30

22 consumers to state their understanding of the 16:33:33

1 eligibility criteria to file for free on TurboTax? 16:33:36

2 A. Again, it's the same answer. I think you 16:33:43

3 meant open-ended, not open source, but I didn't 16:33:46

4 ask -- I didn't use the word "eligibility criteria" 16:33:50

5 in the wording of any of my questions, but some 16:33:53

6 reasonable answers to my questions could have 16:33:56

7 included that. 16:33:58

8 For example, the one that said who can 16:33:59

9 file for free invites them to tell me people with 16:34:01

10 low income, which is an eligibility criteria, 16:34:04

11 people with uncomplicated returns, or something 16:34:05

12 else. So in that sense I did get asked and 16:34:08

13 answered responsively answers about the complexity 16:34:11

14 of returns -- or sorry, the qualification criteria 16:34:14

15 associated with returns. 16:34:18

16 Q. So you didn't ask an open source question, 16:34:19

17 for example, state the eligibility criteria as you 16:34:25

18 understand them to file for free on TurboTax Free 16:34:27

19 Edition, correct? 16:34:31

20 A. I did not answer [sic] a question as you 16:34:32

21 worded it with the words "qualification criteria" 16:34:34

22 in the question. I did not ask that question. 16:34:38

1 Q. And if you had, we would have some 16:34:40
2 information to study as to the nature of the 16:34:41
3 discrepancy between a consumer's individual 16:34:43
4 understanding of their ability to file for free and 16:34:46
5 the specific eligibility criteria to file for free 16:34:50
6 on TurboTax Free Edition, wouldn't we? 16:34:53

7 A. You might be able to ask that question and 16:34:57
8 use those answers for the purpose you just 16:34:59
9 mentioned. 16:35:01

10 Q. And why didn't you gather that 16:35:04
11 information? 16:35:05

12 A. Wasn't a focus of my assignment. 16:35:07

13 Q. Can you turn to figure 6 in your rebuttal 16:35:12
14 report, which is RX-1345. It's on page 31. I 16:35:14
15 think here you identify five respondents that you 16:35:39
16 believe were miscoded by Professor Hauser's blind 16:35:42
17 coders, right? Please take a moment to review the 16:35:46
18 quotes. 16:35:49

19 (Witness reviewing document.) 16:35:50

20 A. Okay. 16:36:54

21 Q. Is it fair to say that the respondents 16:36:55
22 that are set forth in figure 6 knew their 16:36:58

1 eligibility requirements for free filing with 16:37:04
2 TurboTax? 16:37:06

3 A. You want me to answer those one by one? 16:37:08

4 Q. Or let's take it, is it fair to say that 16:37:11
5 the first, fourth, and fifth respondents that you 16:37:15
6 identify correctly stated that only people with 16:37:17
7 simple returns can file for free? So the first 16:37:20
8 one -- let's take them one by one. The first one 16:37:26
9 in the first column says "There is no cost for 16:37:29
10 TurboTax if you use the basic program." That 16:37:31
11 respondent -- what do you think that respondent 16:37:34
12 understood based on that response? 16:37:36

13 A. They could have understood a number of 16:37:40
14 things. I do not see simplicity of a tax return 16:37:43
15 there, but they could have understood that there 16:37:46
16 are programs with different features, of whatever 16:37:49
17 kind I can only imagine, and that you could use a 16:37:52
18 simple -- a basic program or you could use a more 16:37:56
19 enhanced or feature-rich program is what I 16:37:59
20 understood from the first row. 16:38:01

21 Q. And the second respondent says in the 16:38:02
22 second column "I believe everyone can as long as 16:38:04

1 their income is under a certain threshold"; do you 16:38:07
2 see that? 16:38:09
3 A. I do. 16:38:10
4 Q. And what do you think that respondent 16:38:10
5 understood? 16:38:14
6 A. I think they understand that people with a 16:38:15
7 lower income can file for free with TurboTax and 16:38:17
8 with a higher income you cannot. 16:38:19
9 Q. The next one in the first column says 16:38:21
10 "Under a certain income level, there is no cost to 16:38:23
11 file"; do you see that? 16:38:25
12 A. I do. 16:38:26
13 Q. And what do you think that respondent 16:38:27
14 understood? 16:38:29
15 A. I think they understood that the 16:38:30
16 qualification criteria involved an income cutoff. 16:38:32
17 Q. And the next one on the list in column A 16:38:34
18 says "Depends on the complexity of the return"; do 16:38:39
19 you see that? 16:38:41
20 A. Yes. 16:38:42
21 Q. And what do you think that respondent 16:38:42
22 understood? 16:38:44

1 A. They understood there was something about 16:38:45
2 the complexity of the return that allowed people to 16:38:48
3 file for free. 16:38:50

4 Q. And the last one in figure 6, column B 16:38:51
5 says "Basic file, no special forms." What do you 16:38:54
6 think that respondent understood? 16:38:58

7 A. That, again, if you filed without certain 16:39:00
8 forms, you could file for free. If you use those 16:39:02
9 forms, you couldn't. 16:39:04

10 Q. Is it fair to say that the disclosures in 16:39:10
11 the television ads put people on notice that only 16:39:13
12 simple returns can be filed on TurboTax Free 16:39:16
13 Edition for free and invited people to visit the 16:39:18
14 Website to see if they qualify? 16:39:21

15 A. When you say "put people on notice," I 16:39:25
16 would need to understand that a little better. My 16:39:27
17 understanding of what the television ad disclaimer 16:39:30
18 does is it gets some people, those who notice it -- 16:39:35
19 and that's an empirical question, who notices it 16:39:41
20 and internalizes it -- and it gets some people to 16:39:41
21 think that it's about the complexity or simplicity 16:39:42
22 of the return that allows you to file for free. 16:39:45

1 Q. And do the ads also invite people to visit 16:39:49
2 the Website to see if they qualify? 16:39:51

3 A. I think a number of the ads had something 16:39:56
4 about come to the Website. 16:39:59

5 Q. And let me just ask you, what is deceptive 16:40:00
6 about that? Can you just explain that to me? 16:40:05

7 A. Sure. 16:40:09

8 Q. Let me ask it differently. Let me strike 16:40:09
9 that question. 16:40:12

10 In addition to your litigation consulting, 16:40:13
11 you also advise a number of companies in the 16:40:16
12 private space, right? 16:40:18

13 A. I do. 16:40:20

14 Q. And have you worked on television 16:40:20
15 campaigns? 16:40:24

16 A. I've worked on marketing communication 16:40:24
17 writ large. We don't -- at my level don't do 16:40:26
18 specifically how are you going to use it. They 16:40:28
19 might use it in television, what I talk to them 16:40:30
20 about. 16:40:34

21 Q. Can you describe some of the marketing 16:40:35
22 campaigns that you've worked on that involve 16:40:35

1 television advertising? 16:40:37

2 A. I don't work on the campaigns. As they 16:40:38

3 are, they can build the campaigns after. I work 16:40:41

4 with the company to understand the consumer better, 16:40:43

5 and then they take the understanding I've given 16:40:45

6 them, and they might build a marketing campaign. 16:40:48

7 I'm not involved in the campaign level. 16:40:51

8 Q. In your experience how do the level of 16:40:53

9 disclosures that appear in a television ad compare 16:40:56

10 to the terms and conditions that are available on a 16:41:00

11 Website? 16:41:03

12 A. I'm not sure I understand the question. 16:41:08

13 I'm sorry. 16:41:10

14 Q. Well, what level of detail would you 16:41:11

15 expect in a television ad with respect to things 16:41:13

16 like eligibility criteria and things like that? 16:41:17

17 A. I would hope that certainly whenever I 16:41:25

18 advise my companies that I work with, I certainly 16:41:27

19 advise them only to say things that will give 16:41:31

20 consumers, you know, the correct impression about 16:41:33

21 what they're trying to get across. And so if 16:41:35

22 they're going to use television, they have to think 16:41:39

1 about what's a way they can get across the message 16:41:44

2 they want to get across and not get across a 16:41:46

3 different message. 16:41:49

4 Q. And have you been involved in any 16:41:49

5 television marketing where the purpose of the 16:41:51

6 television ads was to drive traffic to the Website? 16:41:55

7 A. Certainly some companies are trying to 16:42:00

8 drive traffic to their Website through their other 16:42:02

9 marketing communications, television or otherwise. 16:42:05

10 Q. Can you think of any companies that you've 16:42:07

11 worked on where that was the case? 16:42:09

12 A. There are a number of companies I've 16:42:12

13 worked with where they might want people to go to 16:42:14

14 the Website. 16:42:16

15 Q. Give me an example. 16:42:18

16 A. So I worked with E-Trade and they want to 16:42:22

17 drive people to their Website. 16:42:26

18 Q. And does E-Trade's television commercials 16:42:27

19 provide all of the terms and conditions with 16:42:31

20 respect to the use of the site in the television 16:42:34

21 ad? 16:42:36

22 A. No. 16:42:38

1 Q. You would go to the Website in order to 16:42:39
2 learn that information? 16:42:42

3 A. It's not -- I'm not sure what information 16:42:47
4 that "that information" refers to, but here the at 16:42:53
5 issue at marketing they're making claims whose 16:42:57
6 modifications are required to understand those 16:43:03
7 claims correctly. E-Trade was not making claims 16:43:05
8 that would leave a consumer with a false impression 16:43:09
9 absent whatever information might be on their 16:43:16
10 Website. So it's a different situation. I'm not 16:43:17
11 sure what you're asking me to compare. 16:43:19

12 Q. Okay. Let's change topics. I'm going to 16:43:21
13 hand you what's been previously identified as 16:43:36
14 Government Exhibit 460, and what is Government 16:43:39
15 Exhibit 460? 16:43:59

16 A. [REDACTED] 16:44:00
17 [REDACTED] 16:44:02

18 Q. And is this -- did you rely on this in 16:44:05
19 connection with your report? 16:44:08

20 A. I did. 16:44:09

21 Q. In what way? 16:44:09

22 A. [REDACTED] 16:44:11

1 [REDACTED] 16:44:16
2 [REDACTED] 16:44:20
3 [REDACTED] 16:44:22
4 Q. [REDACTED] 16:44:25
5 [REDACTED] 16:44:30
6 [REDACTED] 16:44:41
7 [REDACTED] 16:44:44
8 [REDACTED] 16:44:48
9 [REDACTED] 16:44:54
10 A. [REDACTED] 16:44:55
11 Q. In your rebuttal report, which is RX-1345, 16:45:05
12 on page 12, paragraph 20, you talk about "The first 16:45:12
13 prong of this structure was designed to assess 16:45:34
14 taxpayer's existing opinions and beliefs in the 16:45:37
15 marketplace"; do you see that? 16:45:39
16 A. I do. 16:45:40
17 Q. Can you elaborate on what you meant there? 16:45:41
18 A. Okay. I was trying to -- so this is 16:45:48
19 talking about my survey, what my survey is trying 16:45:50
20 to assess, and one of the first things my survey 16:45:52
21 was trying to assess was taxpayers' existing 16:45:54
22 beliefs and opinions about whether or not they can 16:45:58

1 file their taxes for free with TurboTax. 16:46:00

2 Q. [REDACTED] [REDACTED] 16:46:05

3 [REDACTED] 16:46:07

4 [REDACTED] 16:46:08

5 A. [REDACTED] 16:46:12

6 Q. [REDACTED] 16:46:13

7 [REDACTED] why don't you just take a 16:46:16

8 second and review page 11 so you get the context of 16:46:20

9 what we're talking about here. 16:46:24

10 (Witness reviewing document.) 16:47:22

11 A. Okay. 16:47:23

12 Q. Okay. And the lead to this section in 16:47:23

13 your rebuttal report is "The TurboTax perception 16:47:25

14 survey has the appropriate structure to address the 16:47:30

15 issues of interest in this case," right? 16:47:33

16 A. Correct. 16:47:35

17 Q. [REDACTED] 16:47:35

18 [REDACTED] 16:47:39

19 A. [REDACTED] [REDACTED] 16:47:42

20 [REDACTED] 16:47:44

21 Q. [REDACTED] [REDACTED] [REDACTED] 16:47:45

22 [REDACTED] 16:47:53

1	[REDACTED]	16:47:55
2	[REDACTED]	16:47:59
3	A. [REDACTED]	16:48:01
4	Q. [REDACTED]	16:48:02
5	[REDACTED]	16:48:08
6	A. [REDACTED]	16:48:13
7	[REDACTED]	16:48:50
8	Q. [REDACTED]	16:48:51
9	A. [REDACTED]	16:48:52
10	[REDACTED]	16:48:56
11	[REDACTED]	16:48:58
12	Q. [REDACTED]	16:49:03
13	[REDACTED]	16:49:05
14	[REDACTED]	16:49:09
15	A. [REDACTED]	16:49:09
16	Q. [REDACTED]	16:49:10
17	[REDACTED]	16:49:12
18	[REDACTED]	16:49:15
19	[REDACTED]	16:49:19
20	A. [REDACTED]	16:49:21
21	Q. [REDACTED]	16:49:22
22	[REDACTED]	16:49:28

1 [REDACTED] 16:49:33

2 [REDACTED] 16:49:36

3 A. [REDACTED] [REDACTED] 16:49:41

4 Q. [REDACTED] 16:49:43

5 [REDACTED] 16:49:45

6 [REDACTED] 16:49:51

7 [REDACTED] 16:49:56

8 A. [REDACTED] 16:49:58

9 [REDACTED] [REDACTED] [REDACTED] 16:50:01

10 [REDACTED] 16:50:04

11 Q. [REDACTED] 16:50:06

12 [REDACTED] In your own perception study, you 16:50:07

13 were trying to determine consumers' impressions 16:50:09

14 about their ability to file for free on TurboTax 16:50:11

15 Free Edition, correct? 16:50:15

16 A. Correct. 16:50:15

17 Q. And you did that without showing them any 16:50:16

18 ads, right? 16:50:18

19 A. Correct. 16:50:19

20 Q. And without showing them any Websites, 16:50:19

21 correct? 16:50:23

22 A. Correct. 16:50:24

1 Q. And so it was based solely on the TurboTax 16:50:24
2 brand name with no advertising, right? 16:50:27
3 A. That's right. I did not show them any 16:50:31
4 advertising. 16:50:33
5 Q. [REDACTED] 16:50:33
6 [REDACTED] 16:50:35
7 [REDACTED] 16:50:40
8 [REDACTED] 16:50:43
9 A. [REDACTED] [REDACTED] 16:50:46
10 [REDACTED] 16:50:47
11 Q. [REDACTED] 16:50:51
12 [REDACTED] 16:50:56
13 [REDACTED] 16:51:00
14 A. [REDACTED] [REDACTED] 16:51:07
15 [REDACTED] [REDACTED] 16:51:09
16 [REDACTED] 16:51:12
17 [REDACTED] 16:51:16
18 Q. [REDACTED] 16:51:19
19 [REDACTED] 16:51:23
20 A. [REDACTED] 16:51:27
21 Q. [REDACTED] 16:51:29
22 A. [REDACTED] [REDACTED] 16:51:33

1 [REDACTED] [REDACTED] 16:51:36

2 [REDACTED] 16:51:39

3 [REDACTED] [REDACTED] 16:51:42

4 [REDACTED] 16:51:45

5 Q. You rely on Government Exhibit 460 for 16:51:47

6 your own opinion, right? 16:51:50

7 A. I do. 16:51:52

8 Q. Is it fair to say that you consider 16:51:53

9 Government 460 to be a reliable source of 16:51:55

10 information? 16:51:58

11 A. It is. 16:51:59

12 Q. [REDACTED] 16:52:03

13 [REDACTED] 16:52:05

14 A. [REDACTED] 16:52:10

15 Q. [REDACTED] 16:53:26

16 [REDACTED] 16:53:30

17 [REDACTED] 16:53:32

18 A. [REDACTED] 16:53:39

19 [REDACTED] [REDACTED] 16:53:41

20 Q. [REDACTED] 16:55:57

21 A. [REDACTED] [REDACTED] 16:55:58

22 Q. [REDACTED] 16:55:59

1	A.	[REDACTED]	[REDACTED]	16:56:01
2	Q.	[REDACTED]	[REDACTED]	16:56:02
3		[REDACTED]	[REDACTED]	16:56:10
4	A.	[REDACTED]	[REDACTED]	16:56:31
5	Q.	[REDACTED]	[REDACTED]	16:56:34
6	A.	[REDACTED]	[REDACTED]	16:56:34
7	Q.	[REDACTED]	[REDACTED]	16:56:35
8		[REDACTED]	[REDACTED]	16:56:44
9		[REDACTED]	[REDACTED]	16:56:48
10	A.	[REDACTED]	[REDACTED]	16:56:48
11	Q.	[REDACTED]	[REDACTED]	16:56:49
12		[REDACTED]	[REDACTED]	16:56:51
13		[REDACTED]	[REDACTED]	16:56:53
14	A.	[REDACTED]	[REDACTED]	16:56:56
15	Q.	[REDACTED]	[REDACTED]	16:56:56
16		[REDACTED]	[REDACTED]	16:57:00
17		[REDACTED]	[REDACTED]	16:57:03
18	A.	[REDACTED]	[REDACTED]	16:57:07
19		[REDACTED]	[REDACTED]	16:57:09
20	Q.	[REDACTED]	[REDACTED]	16:57:22
21		[REDACTED]	[REDACTED]	16:57:24
22		[REDACTED]	[REDACTED]	16:57:29

1	[REDACTED]	16:57:39
2	[REDACTED]	16:57:42
3	[REDACTED]	16:57:45
4	A. [REDACTED]	16:57:47
5	Q. [REDACTED]	16:57:47
6	[REDACTED]	16:57:51
7	A. [REDACTED]	16:57:52
8	Q. [REDACTED]	16:57:53
9	[REDACTED]	16:57:56
10	A. [REDACTED]	16:57:59
11	[REDACTED]	16:58:00
12	Q. [REDACTED]	16:58:02
13	[REDACTED]	16:58:04
14	[REDACTED]	16:58:09
15	[REDACTED]	16:58:13
16	[REDACTED]	16:58:16
17	A. [REDACTED]	16:58:17
18	[REDACTED]	16:58:19
19	Q. [REDACTED]	16:58:20
20	[REDACTED]	16:58:23
21	[REDACTED]	16:58:25
22	A. [REDACTED]	16:58:26

1	Q. [REDACTED]	16:58:26
2	[REDACTED]	16:58:30
3	[REDACTED]	16:58:37
4	[REDACTED]	16:58:42
5	[REDACTED]	16:58:47
6	A. [REDACTED]	16:58:50
7	Q. [REDACTED]	16:58:50
8	[REDACTED]	16:58:52
9	A. [REDACTED]	16:58:56
10	Q. [REDACTED]	16:58:58
11	[REDACTED]	16:59:02
12	A. [REDACTED] [REDACTED]	16:59:05
13	[REDACTED]	16:59:07
14	Q. [REDACTED]	16:59:07
15	[REDACTED]	16:59:11
16	A. [REDACTED]	16:59:18
17	Q. [REDACTED]	16:59:18
18	[REDACTED]	16:59:23
19	THE REPORTER: I'm sorry. I couldn't hear	16:59:30
20	you. Watch your mic, please.	16:59:31
21	MR. PAIKIN: [REDACTED]	16:59:34
22	[REDACTED]	16:59:36

1	A.	[REDACTED]	16:59:38
2	Q.	[REDACTED]	16:59:38
3		[REDACTED]	16:59:42
4		[REDACTED]	16:59:46
5	A.	[REDACTED]	16:59:49
6	Q.	[REDACTED]	16:59:49
7		[REDACTED]	16:59:53
8		[REDACTED]	16:59:57
9		[REDACTED]	17:00:00
10	A.	[REDACTED]	17:00:02
11		[REDACTED]	17:00:04
12	Q.	[REDACTED]	17:00:09
13		[REDACTED]	17:00:33
14		[REDACTED]	17:00:36
15	A.	[REDACTED]	17:00:41
16	Q.	[REDACTED]	17:00:41
17		[REDACTED]	17:00:45
18		[REDACTED]	17:00:54
19		[REDACTED]	17:00:57
20		[REDACTED]	17:01:01
21		[REDACTED]	17:01:04
22	A.	[REDACTED]	17:01:12

1	[REDACTED]	17:01:15
2	[REDACTED]	17:01:18
3	[REDACTED]	17:01:19
4	Q. [REDACTED]	17:01:25
5	[REDACTED]	17:01:26
6	[REDACTED]	17:01:29
7	[REDACTED]	17:01:31
8	A. [REDACTED]	17:01:34
9	Q. [REDACTED]	17:01:36
10	A. [REDACTED]	17:01:37
11	[REDACTED] [REDACTED]	17:01:41
12	[REDACTED] [REDACTED]	17:01:44
13	[REDACTED]	17:01:48
14	[REDACTED]	17:01:51
15	[REDACTED]	17:01:55
16	[REDACTED] [REDACTED]	17:01:59
17	Q. [REDACTED]	17:02:04
18	[REDACTED]	17:02:08
19	A. [REDACTED]	17:02:13
20	Q. [REDACTED]	17:02:14
21	[REDACTED]	17:02:17
22	A. [REDACTED]	17:02:19

1 Q. [REDACTED] 17:02:20
2 [REDACTED] 17:02:24
3 [REDACTED] 17:02:28
4 [REDACTED] 17:02:31
5 A. [REDACTED] 17:02:34
6 [REDACTED] 17:02:36
7 [REDACTED] [REDACTED] 17:02:40
8 [REDACTED] 17:02:44
9 MR. PAIKIN: Okay. I think it's a good 17:02:52
10 time to take a break. 17:02:54
11 THE VIDEOGRAPHER: The time is 5:02 p.m. 17:02:55
12 Eastern. We are now off the record. 17:02:57
13 (A break was had.) 17:16:53
14 THE VIDEOGRAPHER: This is the beginning 17:17:23
15 of media unit No. 7 in the video-recorded 17:17:24
16 deposition of Mr. Nathan Novemsky. The time is 17:17:28
17 5:17 p.m. Eastern. We are now back on the record. 17:17:32
18 Counsel, you may proceed. 17:17:37
19 BY MR. PAIKIN: 17:17:40
20 Q. Professor Novemsky, I want to give you a 17:17:40
21 hypothetical of a respondent to your survey who 17:17:41
22 visited and filed their taxes for free on Intuit's 17:17:47

1 Website in tax year 2018. Okay? And let's imagine 17:17:51
2 that this respondent was a college student at the 17:17:59
3 time who had only one source of income and under 17:18:02
4 the tax law in 2018 they were able to file a Form 17:18:04
5 1040-EZ, which was a simple tax return under 17:18:11
6 Intuit's definition at the time in 2018. 17:18:16

7 Let's take that same respondent, has not 17:18:23
8 visited Intuit's Website for three years and comes 17:18:26
9 in tax year 2021 and is a respondent to your 17:18:38
10 survey, and that respondent was unemployed at the 17:18:42
11 time because of the pandemic and so had 17:18:50
12 unemployment income. And that respondent in 2021 17:18:56
13 was not able to file for free on a simple tax 17:18:58
14 return under the eligibility requirements that 17:19:06
15 TurboTax had in place for Free Edition that year. 17:19:09

16 The respondent -- would you say that the 17:19:15
17 respondent's impression that was formed for tax 17:19:17
18 year 2018 as to whether or not they could file for 17:19:23
19 free was true and accurate with respect to tax year 17:19:26
20 2018? 17:19:31

21 MS. PLETT: Objection, complex, compound 17:19:33
22 question. 17:19:35

1 A. If I understand your question -- and I'll 17:19:37
2 put it in my own words to make sure I do. So what 17:19:40
3 I would say is someone who is -- who can -- who 17:19:46
4 does file with Free Edition in 2018 and thinks they 17:19:48
5 can file for free in 2018 is not under a 17:19:51
6 misimpression about their ability to file for free 17:19:54
7 in 2018. 17:19:57

8 Q. And would you say that the source of their 17:19:58
9 misimpression with respect to 2021, in my 17:20:07
10 hypothetical they have not seen any Intuit ad and 17:20:11
11 they have not seen Intuit's Website -- 17:20:15

12 MS. PLETT: Objection -- 17:20:21

13 Q. -- would you agree that the source of 17:20:23
14 their confusion would be the change in tax law 17:20:26
15 eliminating the 1040-EZ and the IRS's decision that 17:20:28
16 unemployment income could no longer be reported on 17:20:38
17 a simple tax return as the IRS itself defined it? 17:20:43

18 MS. PLETT: Objection, compound, 17:20:47
19 confusing. 17:20:49

20 A. If the -- if the person is going to file 17:20:54
21 their taxes with TurboTax, they have to go to the 17:20:57
22 Website. So they would necessarily be exposed to 17:20:58

1 the TurboTax Website in 2021 or tax year 2021 when 17:21:02
2 they do that filing. So they can't do that and not 17:21:04
3 see anything from TurboTax. 17:21:08
4 Q. But you're measuring in your survey their 17:21:10
5 perception before they go to the tax -- to the Web 17:21:13
6 page, correct? 17:21:17
7 A. They may not have gone to the Web page at 17:21:18
8 the moment of my survey, that's possible. 17:21:20
9 Q. Their misperception may be as a result of 17:21:22
10 a change in the tax law. Can you eliminate that 17:21:27
11 possibility? 17:21:29
12 A. I'm not -- I'm not opining or connecting 17:21:30
13 any of my research to the tax law. I'm connecting 17:21:33
14 only to TurboTax's eligibility criteria, and to me 17:21:36
15 if we take this hypothetical they were actually 17:21:41
16 free in 2018, they are no longer eligible for free 17:21:44
17 in 2021, they've miraculously dodged all of 17:21:49
18 TurboTax's marketing in the intervening period 17:21:53
19 about free taxes, and they haven't yet gone to the 17:21:55
20 Website to file for tax year 2022, then they could 17:21:57
21 have an impression based on the fact that they 17:22:02
22 filed for free in 2018. 17:22:05

1 Q. Can you -- let's turn to your trial 17:22:11
2 transcript from the Living Essentials case, which 17:22:15
3 was RX-1349, and on page 1875 there's a question 17:22:18
4 that was asked at the bottom of the page on 1875. 17:22:42
5 "Were you asked to consider what the -- what 17:22:51
6 that" -- strike that. 17:22:55
7 "Were you asked to consider what that -- 17:22:57
8 what would have been appropriate in terms of a 17:23:00
9 control ad?" Do you see that question? 17:23:02
10 A. I do. 17:23:06
11 Q. And can you just review the response 17:23:06
12 there. You don't need to read it out loud. 17:23:08
13 (Witness reviewing document.) 17:23:32
14 A. Yep. 17:23:57
15 Q. And can you describe in your own words, 17:23:58
16 you know, today what it is that you're discussing 17:24:04
17 in your response to that question? 17:24:06
18 A. So my memory is that they're asking me 17:24:11
19 about a false claim in an ad about a five-hour 17:24:14
20 energy drink, and so we were discussing how we 17:24:22
21 would have a control ad to try to measure the 17:24:24
22 deception of the at-issue ad. So I was describing 17:24:30

1 the process of thinking about a control ad. 17:24:33

2 Q. And in your response you say that you 17:24:37

3 would have to take out whatever you considered to 17:24:42

4 be the offending statement, the part of the 17:24:44

5 advertisement that you think is false either by 17:24:48

6 omission or commission, so it could be done to add 17:24:50

7 in some clarification; do you see that? 17:24:52

8 A. I do. 17:24:55

9 Q. And can you explain what you meant by 17:24:55

10 that? 17:24:57

11 A. So one way to examine whether a particular 17:24:57

12 ad or part of an ad is deceptive is to compare that 17:25:00

13 ad to a modified ad that either takes out or adds 17:25:05

14 in something that you know cures the deception and 17:25:09

15 compare the two consumers' impressions from seeing 17:25:13

16 one ad compared to consumers' impressions from 17:25:16

17 seeing the other ad. 17:25:19

18 Q. How does that compare to the disclosure 17:25:21

19 efficacy survey that Professor Hauser ran? 17:25:27

20 A. Professor Hauser did compare two ads, but 17:25:33

21 I think that's where the similarities end because 17:25:35

22 he did not do something in his test ad, I call it, 17:25:38

1 which is the other one from the control, in his 17:25:43
2 test ad or his revised ad may be the word he uses, 17:25:45
3 he did not revise it in a way that cured or took 17:25:49
4 out the potentially deceptive pieces of the ad. He 17:25:52
5 did modify it, but not in a way that cured the ad. 17:25:55
6 In fact, his data are very clear that he modified 17:25:59
7 it in a way that didn't cure the ad of deception. 17:26:03
8 Q. And do you know -- have you reviewed 17:26:08
9 the -- I think I asked you this. Have you reviewed 17:26:08
10 the settlement that Intuit entered into with the 50 17:26:13
11 state attorney generals? 17:26:17
12 A. I don't recall reviewing that settlement. 17:26:17
13 Q. Is it your understanding that the test ad 17:26:19
14 that Professor Hauser was putting together was 17:26:21
15 modeled on the requirements that were set forth in 17:26:26
16 the settlement with the state attorney generals? 17:26:31
17 A. Yeah. He said as much. 17:26:32
18 Q. And the comparison that was being done was 17:26:36
19 from taking the dance ad disguised that TurboTax 17:26:39
20 had run and comparing it to his modified ad 17:26:46
21 consistent with the state attorney general 17:26:50
22 requirements; is that fair to say? 17:26:54

1 A. That's my understanding of his study. 17:26:56

2 Q. And in your rebuttal report on page 49, 17:26:58

3 which is RX-1345, in paragraph 112 you say 17:27:07

4 "Professor Hauser fails to establish that consumers 17:27:34

5 in either the test or control group were not 17:27:37

6 deceived"; do you see that? 17:27:42

7 A. I do. 17:27:42

8 Q. And let me ask you, do you believe there's 17:27:43

9 no difference between an ad that says free 50 times 17:27:47

10 versus an ad that says free two times? 17:27:50

11 A. There is a difference. One says free a 17:27:54

12 lot more. 17:27:56

13 Q. What causal evidence exists that consumers 17:27:59

14 were deceived by TurboTax's dance class ad? 17:28:02

15 A. [REDACTED] 17:28:12

16 [REDACTED] 17:28:14

17 [REDACTED] 17:28:18

18 [REDACTED] 17:28:20

19 [REDACTED] 17:28:25

20 Q. And if you were going to undertake a test 17:28:27

21 and control study to determine whether or not the 17:28:29

22 dance class ad was deceptive, how would you go 17:28:31

1 about that? 17:28:35

2 A. It's not obvious. There are several 17:28:42

3 problems with that that are related to the same 17:28:46

4 problems of why I didn't use a test and control in 17:28:51

5 my perception survey. 17:28:54

6 Q. And if you were going to go about creating 17:28:56

7 a test and control ad to test whether or not the 17:28:58

8 TurboTax phishing ad was deceptive, what would you 17:29:00

9 need to do? 17:29:04

10 A. The phishing ad could be modified to take 17:29:06

11 out the free claims to see if it's leaving the 17:29:11

12 impression of free. So you could take the phishing 17:29:17

13 ad as it is in the -- as it is today and you could 17:29:22

14 compare it with another group of consumers who see 17:29:25

15 the phishing ad where the mentions of free are I 17:29:28

16 guess changed in some way so they're not saying 17:29:33

17 free. 17:29:36

18 Q. Did you undertake any test and control 17:29:36

19 study to determine whether or not TurboTax's dance 17:29:40

20 class ad deceived consumers? 17:29:45

21 A. I didn't undertake a study about that 17:29:48

22 specific ad. I only undertook a broader study 17:29:49

1 about the entire marketing campaign. 17:29:51

2 Q. Did you undertake a test and control study 17:29:54

3 to determine whether or not TurboTax's phishing ad 17:29:56

4 caused deception in consumers? 17:30:01

5 A. I did not. 17:30:03

6 Q. Have you undertaken any test and control 17:30:04

7 study to determine whether or not consumers are 17:30:07

8 deceived by advertising that contains the 17:30:11

9 additional disclosures that are required by 17:30:13

10 Intuit's settlement with the attorney generals? 17:30:16

11 A. I have not. 17:30:19

12 Q. You say in your rebuttal report in 17:30:23

13 paragraph 112 "Professor Hauser cannot rule out the 17:30:26

14 possibility that his original and revised stimuli 17:30:30

15 are equally deceptive"; do you see that? 17:30:33

16 A. I do. 17:30:37

17 Q. Do you understand complaint counsel's 17:30:40

18 position in this lawsuit to be that ads that comply 17:30:41

19 with the disclosure requirement set forth in the 17:30:44

20 settlement with the state attorney generals are 17:30:48

21 equally deceptive as the ads that ran without those 17:30:50

22 disclosures? 17:30:53

1 was more than just the ads being shown. There was 17:32:12
2 a Website, maybe several pieces of the Website. I 17:32:14
3 don't recall the details. There was a banner ad. 17:32:17
4 And so especially for the Website there was a 17:32:20
5 question about what did they do on the Website, and 17:32:22
6 I don't think I was ever told what exactly they did 17:32:26
7 once they got to the Website, what they clicked on, 17:32:29
8 did they click on the disclosure of simple, for 17:32:32
9 example, or not. 17:32:34
10 Q. So how is it relevant to determining 17:32:35
11 whether an ad is deceptive to know whether and to 17:32:38
12 what extent the respondents interacted with the 17:32:41
13 stimuli? 17:32:44
14 A. So to be clear, that's not about the ad 17:32:45
15 part. So the Hauser disclosure survey is not an ad 17:32:47
16 test per se. It includes an ad, but it includes a 17:32:51
17 number of other pieces. It includes, for example, 17:32:56
18 the Website. So the interaction part is about the 17:32:58
19 Website, which is part of what he tested together. 17:33:00
20 He did not test an ad in isolation. When we talk 17:33:03
21 about ad testing, typically we're talking about -- 17:33:06
22 and certainly what we just read we were talking 17:33:07

1 about ad testing in isolation. This is not an 17:33:09
 2 isolated ad test. This is ad plus Website, maybe 17:33:12
 3 plus some other stuff tested together, and it's the 17:33:15
 4 other stuff that has the interaction. 17:33:18

5 Q. Let's look at paragraph 119 in your 17:33:21
 6 rebuttal report, which is RX-1345, on page 51. You 17:33:25
 7 say "To begin with, whether or not a specific 17:33:39
 8 stimuli (in this case Professor Hauser's revised ad 17:33:42
 9 and Web page) is deceptive is an empirical question 17:33:45
 10 about how actual consumers perceive the stimuli. 17:33:54
 11 Scientifically this can only be answered by 17:33:58
 12 providing evidence about whether and to what extent 17:34:00
 13 consumers are deceived by Professor Hauser's 17:34:02
 14 revised stimuli. Whether or not the stimuli is 17:34:05
 15 consistent with, say, a legal document is not the 17:34:08
 16 subject of empirical inquiry of how actual 17:34:10
 17 consumers perceive the stimuli." 17:34:14

18 What do you mean by "scientifically this 17:34:18
 19 can only be answered by providing evidence about 17:34:20
 20 whether and to what extent consumers are deceived 17:34:23
 21 by Professor Hauser's revised stimuli"? 17:34:25

22 A. Sure. It's not well worded, I would agree 17:34:27

1 with you, but what I'm trying to say there is the 17:34:31
2 question of whether consumers are deceived by a 17:34:34
3 particular stimuli has a scientific nature to it. 17:34:37
4 You can answer that scientifically with consumer 17:34:41
5 study. To answer that scientifically with consumer 17:34:43
6 study you need to do something like find out what 17:34:46
7 consumers' perception is, for example, do they 17:34:49
8 think they can file for free. Absent some probing 17:34:52
9 of consumers' understanding, you can't answer the 17:34:55
10 question were they deceived by a particular 17:34:57
11 stimulus. He has no such probe in his efficacy 17:35:00
12 survey. So his survey is not set up to answer the 17:35:06
13 question were consumers deceived by either the 17:35:09
14 revised stimulus or the original stimulus. 17:35:12
15 Q. Would you need to show as part of that 17:35:13
16 survey the specific stimuli at issue to the 17:35:17
17 respondents in the survey? 17:35:19
18 A. Need to for what purpose? I'm sorry. 17:35:24
19 Q. For the scientific purpose of answering 17:35:26
20 the question as to whether and to what extent 17:35:29
21 consumers are deceived by Professor Hauser's 17:35:32
22 revised stimuli? 17:35:34

1 Q. And the concern that you're expressing 17:38:49
2 with the demand artifact is that the respondents 17:38:52
3 are aware that the purpose of the study is to 17:38:53
4 determine marketing with respect to Vertax, right? 17:38:57
5 A. Yes. 17:39:02
6 Q. And we talked earlier, your own survey we 17:39:03
7 agreed communicates that the purpose of the survey 17:39:09
8 is TurboTax, right? 17:39:11
9 A. Right. 17:39:12
10 Q. So doesn't your survey likely give the 17:39:12
11 respondents the impression that the sponsor of this 17:39:15
12 survey is interested in TurboTax? 17:39:17
13 A. It does give that impression. 17:39:20
14 Q. And so help me understand, why are you 17:39:22
15 criticizing Professor Hauser for a demand artifact 17:39:25
16 about Vertax, but you don't think that that's a 17:39:31
17 problem with respect to the demand artifact that 17:39:34
18 you have in your own study with respect to 17:39:36
19 TurboTax? 17:39:38
20 A. So there are two -- at least two 17:39:39
21 differences that come to mind immediately. One 17:39:41
22 difference that comes to mind is I'm asking my key 17:39:43

1 questions about do you think you can file for free 17:39:46
2 or not file for free. The fact that TurboTax as a 17:39:47
3 sponsor doesn't obviously make people in my mind 17:39:51
4 want to say free or maybe not free. It's just not 17:39:54
5 clear. Whereas his usage intent question is more 17:39:56
6 clear that that's the kind of question where people 17:39:59
7 who were from Vertax are doing it on behalf of 17:40:02
8 Vertax would want a yes. And so that's part of it. 17:40:04
9 The second piece of it is Vertax obviously 17:40:08
10 they know nothing about, that's a blank slate to 17:40:13
11 them prior to this study because that's a new name. 17:40:13
12 And so the fact that it's a new piece of software 17:40:15
13 with no existing knowledge about it also could 17:40:16
14 increase the effect of a demand artifact because 17:40:20
15 there isn't much real knowledge to go off of there. 17:40:23
16 And so that makes the malleability of the response 17:40:27
17 higher. 17:40:31
18 Q. Anything else? 17:40:31
19 A. Those are what come to mind initially. 17:40:33
20 There might be others if I think about it for a 17:40:36
21 while. 17:40:39
22 Q. Switching gears, do you have any evidence 17:40:39

1 of what purchasers look at when considering what 17:40:41
2 tax filing product to use? 17:40:44

3 A. I'm sorry. Could you restate that? 17:40:48

4 Q. We're talking -- I'm switching gears to 17:40:51
5 the purchase driver survey. 17:40:53

6 A. Okay. 17:40:55

7 Q. The question I have is do you have any 17:40:55
8 evidence of what purchasers look at when 17:40:57
9 considering what tax filing product to use from 17:41:00
10 your own work on this case? 17:41:06

11 A. The closest I have to that is people's 17:41:08
12 sources of the impression that they can file for 17:41:12
13 free. So the answers to that question 255 and 265 17:41:14
14 and maybe the open-ended that goes along with that 17:41:19
15 would be my only evidence about what sources people 17:41:22
16 use. 17:41:25

17 Q. And what is your evidence that tax 17:41:26
18 preparation is a product that consumers do not 17:41:28
19 research? 17:41:32

20 A. There's -- the biggest piece of evidence 17:41:40
21 that consumers do not research tax preparation is 17:41:45
22 they don't like to research much at all, period. 17:41:47

1 They are cognitive misers to use the word you 17:41:51
2 referred to earlier. And so tax prep makes them -- 17:41:53
3 you know, they're a cognitive miser there and in 17:41:59
4 addition, as we spoke about before, taxes is not 17:42:02
5 something people enjoy thinking about. And so that 17:42:05
6 might put up an additional barrier to people 17:42:08
7 wanting to research, think about, or engage with 17:42:12
8 any information relative to tax filing. 17:42:13

9 Q. So I saw your opinion that consumers are 17:42:15
10 cognitive misers. Let's turn to your rebuttal 17:42:18
11 report, page 45, paragraph 100, which is where I 17:42:24
12 think you say this. You say "Consumers are 17:42:26
13 cognitive misers who are unlikely to conduct 17:42:39
14 additional research, especially in complex or 17:42:43
15 costly situations like tax filing," right? 17:42:45

16 A. Sorry. I'm still looking for that in 17:42:52
17 paragraph 100? 17:42:54

18 Q. It's right -- one, two, three, about four 17:42:56
19 lines up, three lines up, middle of the sentence. 17:43:03

20 A. Oh, okay. I see it. 17:43:08

21 Q. Did you do any research into whether or 17:43:13
22 not consumers are cognitive misers who are unlikely 17:43:21

1 to conduct additional research in connection with 17:43:24
2 their tax preparation for TurboTax? 17:43:28
3 A. I did not do research about this context. 17:43:32
4 I'm drawing on a broad finding in my field that 17:43:33
5 consumers are cognitive misers writ large. 17:43:37
6 Q. So it's not something that you tested with 17:43:39
7 respect to any of the TurboTax consumers here? 17:43:42
8 A. Correct. 17:43:48
9 Q. So is it your opinion that consumers are 17:43:51
10 not motivated to save money, especially, as I think 17:43:56
11 you put it elsewhere in your report, that price is 17:44:00
12 an important factor? 17:44:02
13 A. Consumers are motivated to save money 17:44:03
14 generally. 17:44:05
15 Q. And wouldn't that motivation encourage 17:44:09
16 them to do some research in order to save money on 17:44:12
17 their tax filing? 17:44:16
18 A. The determinants of consumer behavior are 17:44:20
19 complicated. Goals or motivation as you talk about 17:44:23
20 is a part of it and a goal to save money can 17:44:26
21 motivate some actions, but there's also barriers. 17:44:29
22 Cognitive effort is costly to people and they don't 17:44:33

1 want to spend it and they don't spend it easily. 17:44:35

2 If they have a high expectation of immediate or 17:44:38

3 high returns they may spend some of that cognitive 17:44:40

4 effort. I don't know if they would have it in this 17:44:42

5 situation. When they do have that expectation it 17:44:44

6 can motivate more thinking or research than 17:44:46

7 otherwise. 17:44:49

8 Q. So is it your opinion that for someone 17:44:50

9 where \$50 is a meaningful sum of money they 17:44:53

10 wouldn't be motivated to find alternatives for tax 17:44:56

11 filing? 17:45:02

12 A. I'm not sure I understand the question. 17:45:03

13 Q. All right. I'll move on. 17:45:14

14 Do you agree that TurboTax customers have 17:45:18

15 options and do not have to file with TurboTax? 17:45:19

16 A. I agree that TurboTax customers do not 17:45:23

17 have to file with TurboTax, yes. 17:45:27

18 Q. And do you agree that customers may 17:45:29

19 abandon their returns for reasons unrelated to 17:45:31

20 deception arising out of TurboTax's television ads? 17:45:36

21 A. I do believe that's possible, yeah. 17:45:39

22 Q. Is it possible that the millions of 17:45:41

1 TurboTax Website visitors who do not start a return 17:45:43
2 with TurboTax are individuals who are researching 17:45:45
3 different tax preparation providers? 17:45:48
4 A. I'm sorry. I misunder- -- I didn't 17:45:52
5 understand that. 17:45:55
6 Q. Is it possible that the millions of 17:45:56
7 TurboTax Website visitors who do not start a return 17:45:57
8 with TurboTax are individuals who are researching 17:46:01
9 different tax preparation providers? 17:46:04
10 A. It's possible. I don't think it's likely 17:46:10
11 that most of them are, but it's possible. 17:46:13
12 Q. Have you done any analysis to quantify the 17:46:19
13 so-called sunk costs that customers encounter when 17:46:23
14 they begin the process of filing their taxes on 17:46:26
15 TurboTax? 17:46:28
16 A. I have not investigated sunk costs in the 17:46:29
17 tax filing context specifically, no. 17:46:33
18 Q. What steps in the filing process do you 17:46:36
19 consider to be sunk costs? 17:46:38
20 A. So potential steps in the filing process 17:46:41
21 that could operate as sunk costs could be things 17:46:43
22 like going to the TurboTax Website, establishing a 17:46:46

1 TurboTax ID and password, entering information into 17:46:49
2 the TurboTax Website, tax information, personal 17:46:54
3 information, answering the TurboTax questions, just 17:46:57
4 going through the process of all the things they 17:47:02
5 ask you to do on the path to filing a return. 17:47:05
6 Q. Doesn't the fact that -- anything else 17:47:11
7 other than what you've listed? 17:47:13
8 A. What I would call sunk costs? Nothing 17:47:23
9 else is coming to mind. 17:47:26
10 Q. Doesn't the fact that customers regularly 17:47:28
11 abandon their returns indicate that any sunk costs 17:47:31
12 are insignificant? 17:47:34
13 A. No. 17:47:35
14 Q. Why not? 17:47:36
15 A. The fact that some percentage of people 17:47:38
16 abandon returns could indicate -- first of all, 17:47:41
17 there's all the other people who don't abandon 17:47:47
18 returns. It indicates nothing about them and their 17:47:49
19 sunk costs. For the people who do abandon their 17:47:51
20 returns, they could have high sunk costs but 17:47:54
21 abandon their returns for an even higher benefit 17:47:55
22 they get from something else. Maybe their cousin 17:47:58

1 came in and said, hey, I'll do your taxes for you 17:48:00

2 and they abandon their return even though they see 17:48:04

3 a lot of sunk costs. 17:48:04

4 Q. Earlier in the deposition we looked at one 17:48:07

5 of the H&R Block ads for this season, the football 17:48:10

6 season, which was RX-1341. Do you remember seeing 17:48:14

7 that ad? 17:48:18

8 A. I do. 17:48:19

9 Q. And we can watch it again, but at the end 17:48:21

10 of the commercial it says "Upload last year's 17:48:24

11 TurboTax return and switch to H&R Block." Do you 17:48:29

12 recall that? 17:48:31

13 A. I do recall that. 17:48:31

14 Q. And do you know what would be involved in 17:48:32

15 switching from TurboTax to H&R Block? 17:48:34

16 A. I do not. 17:48:38

17 Q. And do you have any understanding of how 17:48:41

18 easy or difficult it would be to upload last year's 17:48:44

19 TurboTax return and switch to H&R Block? 17:48:47

20 A. I have some understanding. It would take 17:48:50

21 at the very least finding the appropriate form if 17:48:52

22 you have it. I think they take a PDF. Finding 17:48:55

1 that PDF that you have and going through some 17:48:58
2 process on the H&R Block site. I don't know what 17:49:02
3 it is, I haven't done it where you have to I 17:49:03
4 imagine take a couple steps and get this into a 17:49:06
5 form where H&R Block recognizes it and can read it 17:49:09
6 and maybe you have to also sign in to H&R Block, 17:49:11
7 maybe you have to create an H&R Block 17:49:14
8 identification and password. So those are the 17:49:16
9 kinds of steps I would imagine it takes. 17:49:18
10 Q. Have you done any investigation as to the 17:49:21
11 costs that would be involved in switching from 17:49:23
12 TurboTax to H&R Block on your own? 17:49:25
13 A. I have not done an investigation. 17:49:28
14 Q. And if people are unhappy with TurboTax, 17:49:32
15 what is it that would prevent them from switching 17:49:34
16 to H&R Block? 17:49:37
17 A. There are a number of factors that could 17:49:40
18 prevent them from switching to H&R Block. One is 17:49:42
19 they have the belief that if I stay with TurboTax I 17:49:45
20 don't have to enter as much information because I 17:49:49
21 have my history. Another one could be they have 17:49:51
22 to -- you know, switching to H&R Block means 17:49:53

1 they've already decided H&R Block is the right one, 17:49:56
2 but there could be a search process prior to that 17:49:59
3 where they have to decide where do I switch, okay, 17:50:02
4 H&R Block is the right one for me. Again, the ID 17:50:04
5 and password, all that kind of thing that could be 17:50:07
6 involved in an H&R Block filing. So those are the 17:50:10
7 kinds of things I can think of. There may be a few 17:50:13
8 others. 17:50:16

9 Q. Do you agree that high customer retention 17:50:19
10 rates could be the result of customers' preference 17:50:21
11 for a product or service? 17:50:24

12 A. They can be. 17:50:26

13 Q. And I had shown you earlier the report 17:50:34
14 that you did -- expert report that you did in the 17:50:37
15 integrated case, which was RX-1347. 17:50:41

16 MS. PLETT: Counsel, is that Integrity 17:50:47
17 Advance? 17:50:49

18 MR. PAIKIN: Integrity Advance, that's 17:50:50
19 what it was. Thank you. 17:50:51

20 A. I have 1348 for Integrity Advance. You 17:51:04
21 said 1347. I just want to make sure I'm on the 17:51:10
22 right thing. 17:51:13

1 MS. PLETT: One is the report and one is 17:51:13
2 the transcript. I think we're looking at the 17:51:14
3 report. That's the transcript. 17:51:17
4 Q. Oh, yeah. I think the report was RX-1347. 17:51:18
5 A. Okay. All right. It will take me a 17:51:21
6 moment. There are a lot of exhibits accumulated. 17:51:23
7 MS. PLETT: I think it's under the middle 17:51:25
8 stack maybe. No. 17:51:27
9 THE WITNESS: Oh. I'm sorry. 17:51:33
10 Q. Can you turn to page 9, paragraph 30. 17:51:34
11 A. Okay. 17:51:42
12 Q. You say there "The fact that more than 17:51:43
13 85 percent of consumers choose to renew their loans 17:51:45
14 despite receiving these e-mail messages reminding 17:51:49
15 them when their loan is due and how to execute each 17:51:52
16 of the possible payment options is further support 17:51:54
17 for the idea that consumers prefer renewal to 17:51:57
18 paying off the loan even after receiving these 17:52:00
19 additional disclosures"; do you see that? 17:52:02
20 A. I do see that. 17:52:04
21 Q. And do you believe that the fact that 17:52:05
22 there's a high customer retention by TurboTax 17:52:12

1 supports the idea that people do not believe they 17:52:18
2 were deceived? 17:52:23
3 A. So that's a multi-layered question. There 17:52:30
4 are a number of -- there are a number of ways to 17:52:36
5 think about it. The first thing I would say is a 17:52:38
6 high retention rate means they're losing some 17:52:40
7 people. So I don't know how those people feel, but 17:52:42
8 there are many steps between being deceived and 17:52:46
9 leaving TurboTax. And so they could -- lose is the 17:52:49
10 wrong word, but the people could drop out of the 17:52:55
11 exit process at any of those steps. And so, you 17:52:58
12 know, I can go through -- there's about five or six 17:53:01
13 steps between being deceived on the one hand and 17:53:05
14 leaving TurboTax on the other hand. And so it's 17:53:08
15 not strong evidence necessarily one way or the 17:53:12
16 other in that situation. 17:53:17
17 Q. Do you claim that high customer 17:53:19
18 satisfaction is expressed in PRS scores or customer 17:53:21
19 reviews is consistent with deception? 17:53:25
20 A. The NPS scores for TurboTax are not 17:53:30
21 inconsistent with a substantial number of consumers 17:53:35
22 being deceived. 17:53:39

1 Q. And do you agree that high customer 17:53:40
2 satisfaction could be the result of customer 17:53:43
3 expectations being met? 17:53:46
4 A. It could be. 17:53:47
5 Q. And what analysis did you do to 17:53:48
6 distinguish between those two scenarios? 17:53:49
7 A. I'm sorry. Which two scenarios? 17:53:52
8 Q. The scenario where the high customer 17:53:54
9 retention is consistent with deception and the 17:53:57
10 scenario where the high customer retention and NPS 17:54:02
11 scores are the result of customer expectations 17:54:07
12 being met. 17:54:09
13 A. It could be both. They're not mutually 17:54:10
14 exclusive. 17:54:13
15 Q. And have you undertaken any analysis to 17:54:13
16 determine which is the case? 17:54:15
17 A. Again, I don't think one is exclusive of 17:54:18
18 the other. I didn't do any analysis of what might 17:54:20
19 have caused satisfaction and what TurboTax might 17:54:24
20 have done to cause satisfaction. I focused purely 17:54:26
21 on the deception part. 17:54:28
22 Q. Do you agree that customers abandoning 17:54:30

1 partial or fully completed returns could be 17:54:33
2 evidence of comparison shopping or 17:54:35
3 try-before-you-buy model? 17:54:38
4 A. It's not inconsistent with that. It could 17:54:43
5 be evidence of a number of things. 17:54:46
6 Q. What analysis did you conduct to 17:54:47
7 distinguish whether TurboTax's abandoned returns 17:54:50
8 were the result of alleged deception or simply 17:54:54
9 evidence of consumers comparison shopping or trying 17:55:00
10 out the products? 17:55:03
11 A. There's some analysis one could do 17:55:10
12 where -- complicated. To understand whether their 17:55:14
13 abandonments -- what the cause of the abandonments 17:55:20
14 are, I haven't studied that specifically, but one 17:55:22
15 can try to draw inferences from the existing data 17:55:24
16 in the various reports and I think one could maybe 17:55:27
17 distinguish, you know, that many of them are from a 17:55:30
18 particular cause. But I'd have to think through 17:55:35
19 exactly how to do that with what data we have 17:55:38
20 available, but it may be possible. 17:55:40
21 Q. Is that an analysis that you've undertaken 17:55:42
22 in this case? 17:55:46

1 relevant to assessing whether or not there was 17:57:07
2 deception? 17:57:09
3 A. I think TurboTax's NPS scores are in a 17:57:10
4 region where they're not inconsistent with 17:57:13
5 deception. Let me restate a more complete answer. 17:57:15
6 There's not a lot of information about 17:57:21
7 whether or not there was deception in NPS scores. 17:57:22
8 Q. Okay. Do you think that customer reviews 17:57:30
9 are relevant to evaluating whether or not there was 17:57:34
10 consumer deception? 17:57:38
11 A. They can more easily show the existence of 17:57:43
12 it than the absence of it. 17:57:45
13 Q. In what way? 17:57:49
14 A. If consumers' reviews say I was fooled, 17:57:50
15 then there's clear evidence of deception. If 17:57:55
16 consumers don't say I was fooled, that's not 17:57:59
17 evidence that they weren't fooled. It's not 17:58:00
18 particularly strong evidence that they weren't 17:58:04
19 fooled because they could have been fooled and then 17:58:05
20 still, you know, for example, give a 5-star rating 17:58:07
21 for any of, you know, five or six reasons that sit 17:58:11
22 between being deceived and ultimately, you know, 17:58:14

1 potentially writing a negative review. 17:58:18

2 Q. And consumer retention rates, do you think 17:58:20

3 consumer retention rates are a relevant factor to 17:58:24

4 consider when assessing whether there's consumer 17:58:27

5 deception? 17:58:31

6 A. Again, they're a very noisy signal on 17:58:32

7 their own because you could have high retention and 17:58:35

8 lots of deception. You could have high retention 17:58:38

9 and no deception. You could have low retention and 17:58:40

10 no deception. You could have low retention and 17:58:44

11 lots of deception. 17:58:45

12 Q. Is it a relevant factor to consider? 17:58:48

13 A. In and of itself it's a very noisy signal. 17:58:53

14 So I wouldn't take much from it without adding 17:58:56

15 additional observations. 17:58:58

16 Q. Are customer complaints a relevant 17:59:01

17 criteria when assessing whether or not there's been 17:59:05

18 consumer deception? 17:59:08

19 A. They are an even weaker signal because of 17:59:12

20 the barriers to complaining, which are even higher 17:59:14

21 than the barriers to leaving to a different -- to a 17:59:17

22 competitor. And so I think they're a very noisy at 17:59:19

1 best measure of deception. Again, they would 17:59:24
2 easily show the presence of it, but an absence of 17:59:28
3 complaints would not easily show the absence of 17:59:32
4 deception. 17:59:34

5 Q. Do you think that disclosures that appear 17:59:34
6 in the ads at issue are relevant to an analysis of 17:59:38
7 whether or not there was consumer deception? 17:59:43

8 A. I'm not sure what you mean when you ask 17:59:52
9 that. 17:59:53

10 Q. Well, in undertaking an analysis as to 17:59:54
11 whether or not consumers were deceived by an ad do 17:59:57
12 you think that the disclosures that appear in the 18:00:02
13 ad should be considered? 18:00:05

14 A. I think whether consumers are deceived by 18:00:08
15 an ad is ultimately an empirical question. You 18:00:11
16 could change your hypotheses about that empirical 18:00:14
17 observation based on disclosures in the ad, but it 18:00:17
18 wouldn't be an ultimate test. The ultimate test 18:00:20
19 would be empirical. 18:00:23

20 Q. How much time have you spent on this 18:00:29
21 matter through January 31st of this year? 18:00:31

22 A. Through yesterday? 18:00:39

1 Q. Yeah. 18:00:40

2 A. I don't recall off the top of my head. 18:00:44

3 Q. Do you keep records of that? 18:00:46

4 A. I do. I -- yes. 18:00:48

5 Q. And could you estimate how much time 18:00:51

6 you've spent on this case? 18:00:54

7 A. I don't have a good idea of how many hours 18:00:57

8 it's been. I had multiple invoices. So there's 18:00:59

9 not even a number I can bring to mind. 18:01:03

10 Q. And do you recall how much time you spent 18:01:05

11 drafting your opening expert report, Government 18:01:08

12 Exhibit 303? 18:01:11

13 A. I don't have a good estimate of that. 18:01:13

14 Q. Do you recall how much time you spent 18:01:16

15 drafting your rebuttal report, which is RX-1345? 18:01:18

16 A. I don't have an estimate of the number of 18:01:24

17 hours off the top of my head, no. 18:01:25

18 Q. And you maintain those records as itemized 18:01:28

19 records as to the amount of time that you've spent 18:01:33

20 on this case? 18:01:35

21 A. I have itemized records as to the amount 18:01:36

22 of time I've spent on this case. I may not have 18:01:38

1 itemized whether I was drafting my report versus 18:01:41
2 reading something, et cetera. 18:01:43
3 Q. And is that information that you've 18:01:44
4 provided to complaint counsel? 18:01:47
5 A. I provide it periodically. I have not 18:01:52
6 provided the most recent update. 18:01:53
7 Q. When was the last invoice that you 18:01:55
8 submitted to complaint counsel for your work on 18:01:57
9 this case? 18:01:59
10 A. Around the very beginning of January. 18:02:01
11 Q. Do you recall how much money you've been 18:02:05
12 paid for your work on this case to date? 18:02:07
13 A. No. That would be the same as how many 18:02:11
14 hours, and I don't remember the total offhand. 18:02:12
15 Q. Can you describe the drafting process that 18:02:19
16 you undertook with respect to your reports? 18:02:22
17 MS. PLETT: And I'm going to object to the 18:02:27
18 extent it calls for work product or other 18:02:29
19 information. 18:02:31
20 MR. PAIKIN: I'm just asking about the 18:02:32
21 process. 18:02:33
22 MS. PLETT: Okay. Yep. To the extent it 18:02:34

1 goes into work product, I'll instruct you not to 18:02:35
2 answer, but the process is fine. 18:02:38
3 A. Can you clarify what exactly you mean by 18:02:42
4 the process? 18:02:43
5 Q. Well, my understanding is that you worked 18:02:45
6 with Cornerstone in connection with your work on 18:02:48
7 this case; is that right? 18:02:50
8 A. That is right. 18:02:53
9 Q. Okay. And what did Cornerstone do on this 18:02:53
10 case? 18:02:56
11 A. They helped me do research. They helped 18:02:57
12 me do data analysis. They helped me interface with 18:02:59
13 GBK, which is the firm that executed my survey. 18:03:04
14 They helped me with, you know, whatever tasks arose 18:03:07
15 along the -- along the course of doing the 18:03:10
16 preparation for this case. 18:03:13
17 Q. And you also worked with GBK in connection 18:03:15
18 with your work on this case? 18:03:19
19 A. I did mostly through Cornerstone. I did 18:03:22
20 not interact with them too much directly. 18:03:23
21 Q. And what was the role that they played in 18:03:25
22 connection with your work on this case? 18:03:29

1 A. They were executing the perception survey. 18:03:30

2 Q. And with respect to the process of 18:03:36

3 physically drafting your report, just the process, 18:03:39

4 can you explain how that process came about to get 18:03:43

5 to the final report? 18:03:47

6 A. Okay. Again, I'm -- 18:03:52

7 Q. Well, did you personally write every word 18:03:54

8 to start? Did you interact with Cornerstone, did 18:03:56

9 you interact with complaint counsel? What was the 18:03:59

10 drafting process? 18:04:02

11 MS. PLETT: And, again, I'm going to 18:04:04

12 instruct the witness not to answer to the extent it 18:04:04

13 gets into work product or other information that is 18:04:09

14 not required to be disclosed by the scheduling 18:04:11

15 order. 18:04:14

16 A. I'm not sure where that leaves me as to 18:04:15

17 what I should say. 18:04:17

18 Q. Well, without disclosing communications 18:04:19

19 that you had with complaint counsel and without 18:04:24

20 disclosing the substance of your drafts, can you 18:04:28

21 generally describe the process that you went about 18:04:33

22 for drafting your report? 18:04:35

1 MS. PLETT: And I'm, again, going to 18:04:37
2 instruct the witness not to answer how the drafting 18:04:38
3 process came about, it's work product, and also not 18:04:41
4 required to be disclosed by a section I think it's 18:04:48
5 18-G of the scheduling order. 18:04:51

6 MR. PAIKIN: Well, that would be a new one 18:04:58
7 for me. 18:05:00

8 Who wrote the report? Did you write it? 18:05:02

9 A. I did. 18:05:04

10 Q. Did you write it with any help? 18:05:04

11 A. I did get help. 18:05:06

12 Q. Who helped you? 18:05:07

13 A. Cornerstone helped me. 18:05:09

14 Q. In what way? 18:05:10

15 A. They did research for me, a lot of data 18:05:11
16 analysis for sure, interfacing with GBK in getting 18:05:13
17 the survey run, as I mentioned, other analyses, 18:05:18
18 other things, looking up things, academic articles 18:05:22
19 that I wanted them to review or to find, that sort 18:05:25
20 of thing. So research as much as... 18:05:27

21 Q. And did GBK help you draft the report? 18:05:32

22 MS. PLETT: I'm going to object to this 18:05:35

1 line of questioning about the drafting of the 18:05:37
2 report as work product and also not required to be 18:05:39
3 disclosed by section 18-G of the scheduling order. 18:05:42
4 MR. PAIKIN: Okay. What did you do to 18:05:46
5 prepare for this deposition? 18:05:47
6 A. I met with Cornerstone; I did a lot of, of 18:05:50
7 course, reading of different reports and some 18:05:54
8 academic literature; and I met with complaint 18:05:56
9 counsel. 18:05:59
10 Q. And how long did you spend preparing for 18:06:01
11 this deposition? 18:06:05
12 A. It's hard to separate that out from the 18:06:06
13 general reporting, especially since I had a 18:06:08
14 rebuttal report due just a few days ago, as you 18:06:10
15 might know. And so it's hard to estimate given 18:06:14
16 that I was doing so much for this case recently for 18:06:17
17 several purposes. 18:06:20
18 MR. PAIKIN: Okay. Let's take a break. 18:06:28
19 MS. PLETT: Sure. 18:06:29
20 THE VIDEOGRAPHER: The time is 6:06 p.m. 18:06:31
21 Eastern. We are now off the record. 18:06:33
22 (A break was had.) 18:18:51

1 THE VIDEOGRAPHER: This is the beginning 18:19:18
2 of media unit No. 8 in the video-recorded 18:19:19
3 deposition of Mr. Nathan Novemsky. The time is 18:19:24
4 6:19 p.m. Eastern. We are now back on the record. 18:19:29
5 Counsel, you may proceed. 18:19:33
6 BY MR. PAIKIN: 18:19:36
7 Q. Professor Novemsky, is it your opinion 18:19:36
8 that consumers should have a complete understanding 18:19:38
9 of the eligibility requirements to file for free on 18:19:44
10 TurboTax from the television ads themselves? 18:19:49
11 A. I don't think I have an opinion about what 18:19:58
12 consumers should think. 18:20:01
13 Q. Well, is it your opinion that the 18:20:04
14 consumers were deceived by Intuit's television ads, 18:20:06
15 correct? 18:20:12
16 A. It is my opinion they were deceived by the 18:20:13
17 television ads as part of the larger marketing 18:20:15
18 program, yes. 18:20:17
19 Q. And the deception -- is it your opinion 18:20:18
20 that the deception was that those consumers didn't 18:20:25
21 understand what the eligibility requirements were 18:20:28
22 to file for free on Free Edition? 18:20:31

1 A. The way I think about it is slightly 18:20:34
2 different. The deception was they did not 18:20:38
3 understand that they could not file for free. 18:20:40
4 Whether or not they understood all the 18:20:43
5 qualification criteria was not what I was 18:20:45
6 assessing. 18:20:46

7 Q. Well, you were assessing whether or not 18:20:48
8 people understood that they could file for free 18:20:51
9 when, in fact, they didn't meet the eligibility 18:20:53
10 criteria, right? 18:20:57

11 A. That's right, but it's a different 18:20:59
12 statement to say they know all the eligibility 18:21:00
13 criteria versus they correctly ascertain whether 18:21:03
14 they, themselves can file for free or not. 18:21:06

15 Q. So is it your opinion that in order for a 18:21:08
16 consumer not to be deceived the television ads need 18:21:12
17 to provide consumers with a complete understanding 18:21:16
18 of the eligibility requirements to file for free on 18:21:20
19 TurboTax? 18:21:23

20 A. No, it is not. 18:21:25

21 Q. What do you believe the TurboTax ads 18:21:27
22 should contain? 18:21:31

1 A. I don't know how you're using "should" 18:21:34
2 there. 18:21:36

3 Q. Well, in order for -- in your opinion in 18:21:37
4 order for consumers to not be deceived by TurboTax 18:21:40
5 ads, what should they contain? 18:21:45

6 A. There are a variety of ways to not deceive 18:21:47
7 consumers. Actually, a limitless number. Some 18:21:49
8 examples would include don't make a claim that 18:21:53
9 they're going to misinterpret, you know, don't 18:21:56
10 say -- don't say this is free, free, free, free if 18:22:00
11 for most people it's indeed not free, free, free, 18:22:04
12 free. 18:22:06

13 Q. Do you believe the ads should contain the 18:22:07
14 eligibility requirements to file for free on 18:22:09
15 TurboTax? 18:22:10

16 A. That wouldn't be my first place to go to 18:22:15
17 avoid the deception that is at issue here. 18:22:19

18 Q. Why not? 18:22:23

19 A. I don't know that it can be effectively 18:22:24
20 communicated in a 30-second ad. 18:22:26

21 Q. Why not? 18:22:28

22 A. It's complicated. 18:22:30

1 Q. In what way? 18:22:32

2 A. There's a lot to it, and even when it's 18:22:34

3 communicated by text on the Website, I don't think 18:22:38

4 it's easy for consumers to parse out. 18:22:40

5 Q. Are you familiar with the concept of 18:22:48

6 information overload? 18:22:50

7 A. I am. 18:22:52

8 Q. Can you describe what that is? 18:22:53

9 A. Sure. If you try to give consumers too 18:22:54

10 much information in a context where they can't 18:22:57

11 process or won't process nearly that much 18:23:00

12 information, you have overloaded them and it's 18:23:02

13 typically associated with poor consumer 18:23:05

14 decision-making. 18:23:07

15 Q. How would you handle the tension between 18:23:09

16 sharing detailed information on the television ads 18:23:12

17 and having consumers be overwhelmed by that 18:23:17

18 information and ignoring it? 18:23:21

19 A. I wouldn't try to share lots of or 18:23:22

20 complicated information with consumers on a 18:23:25

21 30-second TV spot. It's not a place to do that. 18:23:27

22 Q. Why not? 18:23:31

1 A. They can't process that and won't process 18:23:32
2 that. It's not an effective medium of 18:23:34
3 communication for long or complicated information. 18:23:37
4 Q. What about with respect to a six-second 18:23:39
5 TikTok ad? 18:23:45
6 A. Even -- even less appropriate for 18:23:47
7 complicated information. 18:23:49
8 Q. Why? 18:23:50
9 A. Because, as you described it, it's a 18:23:51
10 six-second ad. Consumers, A, on the channel of 18:23:54
11 TikTok aren't looking to think hard about 18:23:58
12 something, and, B, six seconds isn't very long to 18:24:01
13 get something across in a way that consumers would 18:24:04
14 actually meaningfully absorb it. 18:24:06
15 Q. What level of information would you think 18:24:06
16 would be appropriate in a TikTok ad so as to avoid 18:24:08
17 deception? 18:24:11
18 A. There is not just a question -- when you 18:24:14
19 try to avoid deception, it's not just a question of 18:24:15
20 how much or the level of information. It's a 18:24:19
21 question of what information. And I think one 18:24:20
22 would want to provide different information than 18:24:23

1 things like free, free, free for six seconds. 18:24:25

2 Q. What type of information? 18:24:28

3 A. For example, if you wanted to communicate 18:24:32

4 that TurboTax is free for some people, instead of 18:24:34

5 saying it's free, free, free, free, free, you can 18:24:40

6 say this is free but only for a minority of people, 18:24:42

7 are you one of the lucky ones or something like 18:24:45

8 that to communicate clearly this isn't for most 18:24:47

9 people, this is for some people in a simple way 18:24:50

10 that can be processed by consumers without too much 18:24:53

11 thought. Giving the qualification criteria 18:24:54

12 certainly wouldn't do that. 18:24:58

13 Q. Would you include a link as part of the 18:25:00

14 six-second ad? 18:25:02

15 A. You could. 18:25:08

16 Q. Can you define for me who it is and in 18:25:18

17 what way you think consumers were harmed by the not 18:25:23

18 understanding the eligibility requirements to file 18:25:29

19 for free on TurboTax? 18:25:32

20 A. So I didn't -- it wasn't part of my 18:25:33

21 assignment and I didn't get into assessing the harm 18:25:36

22 that goes on with this situation and this 18:25:39

1 Q. And have you given a lot of thought how to 18:34:16

2 make such an ad nondeceptive? 18:34:18

3 A. No, I haven't. 18:34:22

4 Q. And is one way to make such an ad 18:34:23

5 nondeceptive to not make a deceptive claim in the 18:34:26

6 first place? 18:34:28

7 A. Yes, that would be one way. 18:34:29

8 MS. PLETT: That's all the question I 18:34:30

9 have. 18:34:33

10 MR. PAIKIN: I have no further questions. 18:34:33

11 Professor Novemsky, thank you very much for your 18:34:35

12 time and safe travels back to New Haven. 18:34:37

13 THE WITNESS: Thank you. 18:34:42

14 THE VIDEOGRAPHER: If there are no more 18:34:43

15 questions, then this is the conclusion of the 18:34:45

16 video-recorded deposition of Nathan Novemsky. We 18:34:49

17 are now going off the record at 6:34 p.m. Eastern. 18:34:51

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ACKNOWLEDGEMENT OF DEPONENT

I, NATHAN NOVEMSKY, being first duly sworn, on oath say that I am the deponent in the aforesaid deposition taken on the 1st day of February, 2023; that I have read the foregoing transcript of my deposition consisting of pages 1 through 324, inclusive, and affix my signature to same.

DATE

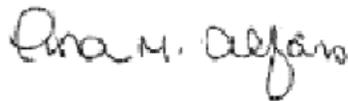
NATHAN NOVEMSKY

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C E R T I F I C A T E

I, TINA M. ALFARO, Registered Professional Reporter, Certified Realtime Reporter, and Registered Merit Reporter, the officer before whom the foregoing deposition was taken, do hereby certify that the foregoing transcript is a true and correct record of the testimony given; that said testimony was taken by me stenographically and thereafter reduced to typewriting under my direction; that reading and signing was requested; and that I am neither counsel for, related to, nor employed by any of the parties to this case and have no interest, financial or otherwise, in its outcome.

IN WITNESS WHEREOF, I have hereunto set my hand on this 2nd day of February, 2023.



Tina M. Alfaro, RPR, CRR, RMR

Exhibit B

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UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA
 SAN FRANCISCO DIVISION

FEDERAL TRADE COMMISSION,

 Plaintiff,

 v.

 LENDINGCLUB CORPORATION,

 d/b/a Lending Club,

 Defendant.

Case No. 3:18-cv-02454

**PLAINTIFF’S MOTION TO
 EXCLUDE EXPERT TESTIMONY**

Hearing:

Date: April 27, 2020
 Time: 9:00 a.m.
 Courtroom: F
 Judge: Hon. Jacqueline Scott Corley

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE THAT on April 27, 2020, at 9:00 a.m., or as soon thereafter as the matter may be heard before the Honorable Jacqueline Scott Corley, in Courtroom F, 15th Floor, of the United States District Court for the Northern District of California in the San Francisco Courthouse, 450 Golden Gate Avenue, San Francisco, California, 94102, Plaintiff Federal Trade Commission (“FTC”), will and does move this Court, pursuant to Rule 702 of the Federal Rules of Evidence, for an order excluding certain inadmissible purported expert testimony.

The FTC’s Motion is based on this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities, the concurrently filed Declaration of Leah Frazier with attached Exhibits, any other matters of which the Court may take judicial notice, other documents on file in this action, and any oral argument of counsel.

Dated: February 27, 2020

/s/ Katharine Roller
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Cases

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FTC v. Medlab, Inc., 615 F. Supp. 2d 1068 (N.D. Cal. 2009)..... 17

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Other Authorities

D. L. Paulhus, *Two-Component Models of Socially Desirable Responding*, 46 *J. Personality & Soc. Psychol.* 598–609 (1984) 9

Diamond, Sheri, *Reference Guide on Survey Research*, REFERENCE MANUAL ON SCIENTIFIC EVIDENCE (2011) 7, 8

R. A. Gordon; *Social Desirability Bias: A Demonstration and Technique for its Reduction*, *Teaching of Psychol.* 40–42 (1987) 9

S. Booth-Kewley, J. E. Edwards & P. Rosenfeld, *Impression Management, Social Desirability, and Computer Administration of Attitude Questionnaires: Does the Computer Make a Difference?*, 77 *J. Applied Psychol.* 562–66 (1992) 9

W. M. Becker, *Biasing Effect of Respondents’ Identification on Responses to a Social Desirability Scale: A Warning to Researchers*, 39 *Psychol. Rep.* 756–58 (1976) 9

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Plaintiff Federal Trade Commission (“FTC”) moves the Court for an order excluding testimony of Defendant LendingClub Corporation’s four purported expert witnesses: Yoram (Jerry) Wind, Charles Grice, Joseph Farrell, and Bruce Carlin. Their opinions suffer from deficiencies that render their testimony inadmissible under Federal Rule of Evidence 702. Wind used biased survey experiments that did not test what borrowers knew about the origination fee. Grice offers an irrelevant legal opinion about Defendant’s compliance with the Truth In Lending Act. Carlin offers an inexpert legal opinion that Defendant did not mislead consumers, which rests upon unreliable methodology and insufficient data. Farrell, who offers an opinion on monetary relief, opines without factual basis that deceived consumers would still have borrowed from Defendant, and omits analysis of Defendant’s unjust gains, rendering his opinion incompatible with precedent.

I. LEGAL STANDARD

Pursuant to Federal Rule of Evidence 702, the proponent of expert testimony bears the burden of proving that such testimony: (a) provides expertise that would be helpful to the trier of fact; (b) “is based on sufficient facts or data;” and (c) results from reliable principles and methods that (d) have been reliably applied. Fed. R. Evid. 702; *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 590-91 (1993); *Lust v. Merrell Dow Pharms., Inc.*, 89 F.3d 594, 597-98 (9th Cir. 1996) (burden of proof). Thus, the Court must determine whether the witnesses are qualified as experts in a particular field. *Daubert v. Merrell Dow Pharms., Inc.*, 43 F.3d 1311, 1315 (9th Cir. 1995) (“*Daubert I*”). And then, it must be satisfied that “the proposed expert testimony is ‘relevant,’” *Daubert II*, 43 F.3d at 1315, and that the expert “employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.” *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 152 (1999). Relevant factors in determining the reliability of an expert’s theory or method include: (1) general acceptance by the scientific community; (2) whether it has been or is capable of being tested; (3) error rates; and (4) whether it has undergone peer review and publication. *Daubert*, 509 U.S. at 593-95.

II. WIND’S OPINIONS ARE IRRELEVANT AND UNRELIABLE

Wind would offer an opinion that Defendant did not mislead borrowers about its hidden

fee. In forming his opinion, he designed surveys¹ that avoided measuring whether borrowers noticed the fee. His key survey question led both respondents who knew of the fee and those who did not to answer the same way. Moreover, his survey tested a version of Defendant's application flow that only a small fraction of borrowers used, and that cannot be extrapolated to the versions used by the vast majority. Wind also used biased methodology to push respondents toward Defendant's preferred answers and relied on mere speculation as to why borrowers might know of the fee, making his opinions unreliable.

Although Ninth Circuit courts do not exclude surveys for "technical inadequacies," they exclude those that are not "conducted according to accepted principles and . . . relevant." *Fortune Dynamic Inc. v. Victoria's Secret Stores Brand Mgmt., Inc.*, 618 F.3d 1025, 1036 (9th Cir. 2010). Thus, "substantial deficiencies in the design or execution of a survey of individuals is grounds for its complete exclusion." *In re Autozone, Inc.*, 2016 WL 4208200, at *16 (N.D. Cal. Aug. 10, 2016) (quoting *Gibson v. Cnty. of Riverside*, 181 F. Supp. 2d 1057, 1067 (C.D. Cal. 2002)). Courts also exclude surveys that use "blatantly biased" methodologies. *Brighton Collectibles, Inc. v. RK Texas Leather Mfg.*, 923 F. Supp. 2d 1245, 1257 (S.D. Cal. 2013). As set forth below, the deficiencies in Wind's surveys are so substantial as to warrant complete exclusion.

A. Wind Asked the Wrong Question.

1. The Surveys Did Not Measure Whether Respondents Knew About the Fee.

Wind's surveys asked only one question regarding the issue in Count I: "Was the amount of money deposited in your bank account the amount that you expected after you obtained your loan approval?" The defect in this approach is apparent [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] PX1, Excerpts

from Deposition of Dr. Jerry (Yoram) Wind ("Wind Dep.") at 118:20 to 119:1 [REDACTED]

¹ Wind designed two surveys, an "initial" and an "expanded" survey, which used the same questionnaire and stimuli except that the latter included different fine-print footnotes and a "no hidden fees" representation. Both had similar results, and both suffer from the same defects.

[REDACTED]

[REDACTED]

Wind's opinion is based on the assumption that all "yes" responses come from those aware of the fee, but there is good reason to believe that in fact a large percentage of "yes" responses came from respondents who only *assumed* they had received the full amount. Indeed, many consumers likely would notice large deposits in their bank account roughly corresponding to their loan amounts, but, because funds constantly flow in and out of their accounts, not notice that they received only around 95 percent of the proceeds. For example, a borrower whose account balance went from \$1,251 to \$8,376 might not notice that it should have gone to \$8,751 (\$7,500 loan with five percent fee), especially if the balance fluctuated daily. In Wind's survey, this common scenario would generate "yes" responses (incorrectly suggesting lack of deception), whereas in the alternate (and better) formulation of the question, this consumer may have reported that she expected to receive the full amount of the loan proceeds (suggesting deception). Indeed, complaints show that some repeat borrowers did not realize that Defendant charged an up-front fee until their second loans. Upon learning that Defendant had withheld its fee from his second loan, one repeat borrower complained, [REDACTED]

[REDACTED]

[REDACTED] PX2, Complaint Excerpt from LC0005999.

Because "yes" responses to Wind's main question likely came from both borrowers who *did not* notice the fee and borrowers who *did*, the results do not differentiate between deceived and undeceived consumers and thus provide no relevant or helpful data. Furthermore, Wind's choice of the flawed question was deliberate. [REDACTED]

[REDACTED]

[REDACTED] PX3, Expert Report of Professor Yoram (Jerry) Wind ("Wind Report") ¶ 54 n.67. As noted above, this would have tested the key issue in this case and produced unambiguous results.

2. *Wind Designed the Surveys to Produce Ambiguous Results.*

The surveys suffered from other flaws as well. Wind should have taken steps to make the

“yes” results meaningful. For example, he could have asked additional questions to gauge whether consumers knew how much money they received or recalled their loan amounts. And [REDACTED]

[REDACTED] PX1, Wind

Dep., at 135:7-10, 19-20. [REDACTED]

[REDACTED] at
107:1-10, 23-25, 108:2-5.

3. *The Court Should Exclude the Ambiguous Results as Irrelevant.*

Courts have dismissed surveys similarly designed to solicit ambiguous results as irrelevant. In *Pinterest, Inc. v. Pintrips, Inc.*, a party attempted to prove trademark infringement with a survey that showed respondents both an allegedly infringing use and a permissible fair use of the trademark. 140 F. Supp. 3d 997, 1015 (N.D. Cal. 2015). The questionnaire did not ask respondents about each use but instead asked for responses based on the overall impression of both. *Id.* The court held that this “render[ed] their results meaningless” because it could not “disaggregate the responses of survey respondents,” and the survey asked “a different question than that posed to the Court by this lawsuit.” *Id.* at 1015-16. Courts similarly have deemed surveys reporting generic expressions of consumer satisfaction, such as consumers agreeing that they got “what they expected,” as irrelevant to consumer understanding of specific marketing claims. *See Low v. Trump Univ., LLC*, 2016 WL 6732110, at *9 (S.D. Cal. Nov. 15, 2016) (survey showing 98 percent satisfaction rating irrelevant as to whether claims were false because ratings “do not measure a student’s interpretation of marketing terms”).²

Here, Wind’s surveys likewise asked a different question than that posed by Count I, producing results in which deceived and undeceived borrowers cannot be disaggregated.

² *See also Anti-Monopoly, Inc. v. Gen. Mills Fun Grp., Inc.*, 684 F.2d 1316, 1323 (9th Cir. 1982) (survey irrelevant to whether “Monopoly” was generic term because it asked if respondents considered “Monopoly” a “brand name” rather than testing understanding of the term).

Therefore, the surveys' results are irrelevant, and the Court should exclude them.

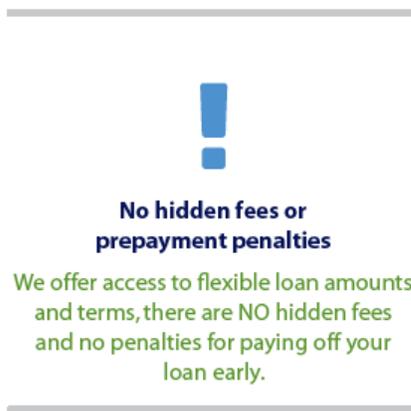
B. Wind Did Not Test Relevant Marketing.

Rather than test the marketing and application flow Defendant used for the vast majority of its existence, Wind tested marketing that Defendant attempted to clean up after the FTC filed this case. Borrowers who applied up to the filing of the Complaint would have seen advertising and an online application with different representations and disclosures than Wind's survey respondents.

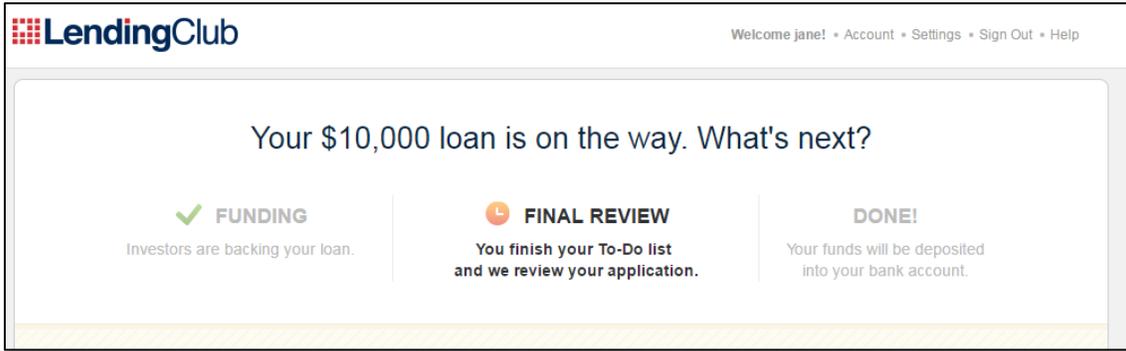
[REDACTED]

[REDACTED]

[REDACTED] Pre-Complaint, Defendant advertised its loans with prominent claims that its loans have “no hidden fees”:



PX4, Declaration of Emilie Saunders (“Saunders Dec.”) ¶ 4, Att. A. In addition, pre-Complaint applications included additional claims about the amount of money borrowers should have expected. For example, as shown below, during most of the pre-Complaint period, Defendant promised that the entire loan amount—with no deduction for the fee—was “on the way”: a misrepresentation Wind's survey stimuli lacked.



[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] See PX1, Wind Dep., at 79:11-14

(emphasis added). [REDACTED] *Id.*

at 81:13-14. [REDACTED]

[REDACTED]

[REDACTED] See *id.* at 87:25 to 88:5-17, 93:2-9, &16-23, 95:5-12.

Because Wind’s surveys provide no basis for conclusions about any version of Defendant’s application other than the one he tested, the results are irrelevant to the question whether Defendant deceived borrowers exposed to other versions. See *Kwan Soft. Eng’g, Inc. v. Foray Tech., LLC*, 2014 WL 572290, at *5 (N.D. Cal. Feb. 11, 2014) (survey not relevant because it did not test how people who actually purchased the product experienced the claims). Notably, Wind ran his surveys for several weeks in the third quarter of 2018 and the first quarter of 2019. According to Defendant’s data, less than 10 percent of its borrowers took out loans during those quarters. See PX4, Saunders Dec. ¶¶ 8-10, Atts. F-H (Defendant issued 2,778,775 loans through 2019, and 243,869 loans during the quarters in which Wind’s surveys ran).

C. Wind Used Biased, Unreliable Survey Methodologies.

Wind not only failed to measure whether borrowers knew about the fee, he also designed a methodology that deviated from standard practice to ensure the results Defendant wanted.

Coca-Cola Co., CV08-06237 SJO (Mar. 15, 2016), and [REDACTED]

[REDACTED] PX1, Wind Dep., at 151:23-25, 152:1-8. But in this case he used a question pointing towards Defendant's preferred response.³

Wind then compounded that bias in two ways. First, he revealed Defendant as the surveys' sponsor, violating standard practice for litigation surveys. Diamond, *Reference Guide on Survey Research*, at 410-11 ("To ensure objectivity . . . it is standard interview practice in surveys conducted for litigation to do double-blind research whenever possible: Both the interviewer and the respondent are blind to the sponsor of the survey and its purpose. Thus, the survey instrument should provide no explicit or implicit clues about the sponsorship of the survey or the expected responses."). [REDACTED]

[REDACTED] PX1, Wind Dep. at 152:14-18. His decision to do so here made respondents even more susceptible to leading bias because they knew that Defendant, to which they owed a substantial debt, had tremendous power over them. This pressured them to answer in a more agreeable manner to Defendant. The question here was particularly vulnerable to that effect because it asked respondents to merely agree with Defendant's prompt, meaning that respondents who chose an answer other than "yes" had to select an answer that would be disagreeable. And it was obvious that respondents would be casting Defendant in a bad light if they responded that they did *not* get what they expected. Furthermore, identifying Defendant as the sponsor skewed the respondent pool because borrowers angry at Defendant would be less likely to participate in a survey for Defendant's benefit. PX5, Expert Rebuttal Report of Dr. Itamar Simonson ("Simonson Rebuttal") ¶ 32.

Second, Wind asked a question that, even had he used standard double-blind protocol, would invite biased results. Specifically, the question pressured respondents to choose "yes" because answering otherwise would require them to admit that Defendant had deceived them.

³ Notably, Wind made no effort to counter his leading question's influence. He could have, as he has in other surveys, included a question testing whether respondents were paying attention. See PX4, Saunders Dec. ¶ 6, Att. D (Expert Report of Yoram (Jerry) Wind, *MillerCoors, LLC v. Anheuser-Busch Cos.*, Case No. 19-cv-00218 (D. Wis.) ¶ 40). And he could have instructed respondents not to guess, making them more comfortable with selecting "don't know" or had "don't recall" as an option.

Respondents will tend to avoid responses that make them appear less savvy, even when they are not at fault.⁴

Wind could have avoided all of these biases. [REDACTED]

[REDACTED] Unlike Wind's question, this open-ended question would not be leading, would not suggest an answer preferred by the sponsor, and would not include a proposed answer that makes respondents appear uninformed or gullible. [REDACTED]

[REDACTED] PX1, Wind Dep., at 106:14-21. [REDACTED]

[REDACTED] *Id.* at 53:15-25, 106:14-21.

2. *Other Methodological Flaws Biased the Results Toward Defendant.*

Even if Wind's question could have yielded reliable results, he failed to take basic steps to ensure that the results were unbiased. First, he surveyed a biased population because he failed to screen out respondents who only learned of the fee from sources other than Defendant's marketing and application. Specifically, he failed to ensure that respondents had not learned of the fee from this lawsuit, which he easily could have done by asking them and then screening out responses from those who had. Second, he did nothing to control for the fact that many respondents had likely learned of the fee when they got their loan proceeds, blamed themselves for not noticing it, and thus responded that they got what they expected. Finally, Wind surveyed respondents days or sometimes more than a week after they applied, even though the claims Wind was testing were in the application flow and Wind could have conducted the survey right after they had applied. This delay made it more likely that respondents who could not remember what they expected versus what they received would answer "yes," particularly because Wind did not include a "do not

⁴ See PX5, Simonson Rebuttal ¶ 26 n.7 (citing D. L. Paulhus, *Two-Component Models of Socially Desirable Responding*, 46 *J. Personality & Soc. Psychol.* 598–609 (1984); S. Booth-Kewley, J. E. Edwards & P. Rosenfeld, *Impression Management, Social Desirability, and Computer Administration of Attitude Questionnaires: Does the Computer Make a Difference?*, 77 *J. Applied Psychol.* 562–66 (1992); R. A. Gordon, *Social Desirability Bias: A Demonstration and Technique for its Reduction*, *Teaching of Psychol.* 40–42 (1987); W. M. Becker, *Biasing Effect of Respondents' Identification on Responses to a Social Desirability Scale: A Warning to Researchers*, 39 *Psychol. Rep.* 756–58 (1976).

recall” answer option. PX3, Wind Report ¶ 54.

D. Wind’s Other Opinions Are Mere Speculation.

Wind attempts to fortify his shaky survey results by speculating about why Defendant’s borrowers might not be deceived even if it hid the fee from them, but such speculation is not a reliable basis for expert opinion. *See Daubert*, 509 U.S. at 590 (Rule 702 requires expert testimony to be “more than subjective belief or unsupported speculation”); *Goomar v. Centennial Life Ins. Co.*, 855 F. Supp. 319, 326 (S.D. Cal. 1994) (“If proffered expert testimony is no more than unsupported speculation, the trial judge should exclude it.”).

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] PX1, Wind Dep. at 208:3-15. [REDACTED]

[REDACTED]

[REDACTED] *Id.* at 207:22-25, 208:1-7. [REDACTED]

[REDACTED] *d.* at 213:14-17. [REDACTED]

[REDACTED]

[REDACTED] *Id.* at 25:2-24. In sum, his opinions about whether consumers learned of the fee from sources other than Defendant are no more than speculation, and the Court should exclude them.

III. GRICE’S OPINIONS ABOUT DEFENDANT’S FEE DISCLOSURES ARE IRRELEVANT AND BEYOND HIS QUALIFICATIONS.

Grice offers irrelevant opinions about Defendant’s compliance with the Truth in Lending Act (TILA) that constitute pure legal conclusions, rehash facts and evidence, and set forth opinions that he is unqualified to provide. The Court therefore should exclude all of the TILA-related

⁵ Moreover, the survey responses Wind cites for this proposition are unreliable. His question about respondents’ research activities was leading in that it presumed they did in fact research loan options. PX5, Simonson Rebuttal ¶ 47. And social desirability bias also infects these results because respondents want to appear diligent. *See id.* ¶ 26 n.7.

portions of Grice's report (¶¶ 17, 20-22, 31-45, and 54-146).⁶

A. Grice's TILA Opinions Are Irrelevant and Improper.

1. Irrelevant Legal Opinions

It is well settled that “an expert witness cannot give an opinion as to her *legal conclusion*, i.e., an opinion about an ultimate issue of law.” *Hangerter v. Provident Life & Acc. Ins. Co.*, 373 F.3d 998, 1016 (9th Cir. 2004) (quoting *Mukhtar v. Cal. State Univ.*, 299 F.3d 1053, 1066 n.10 (9th Cir. 2002)). *See also Aguilar v. Int'l Longshoremen's Union Local No. 10*, 966 F.2d 443, 447 (9th Cir. 1992) (upholding exclusion of expert testimony on “matters of law” as “utterly unhelpful”). Thus, courts have repeatedly excluded expert testimony that a party has complied with a particular statute, regulation, or its internal procedures, because such testimony “provide[s] a legal conclusion about an ultimate issue . . . and do[es] no little more for a finder of fact than tell it what verdict to reach.” *Bona Fide Conglomerate, Inc. v. SourceAmerica*, 2019 WL 1369007 at *15 (S.D. Cal. Mar. 26, 2019) (internal citation and quotation marks omitted); *see also Hadley v. Kellogg Sales Co.*, 2019 WL 3804661 at *25 (N.D. Cal. Aug. 13, 2019) (“These opinions about Kellogg's compliance with FDA regulations opinions are purely legal in nature, and thus are not the proper subject matter of an expert opinion.”).

Indeed, a court in this Circuit has excluded an expert's testimony as to “whether the [defendant] had complied with TILA”—the exact issue on which Grice opines—because the issue was a “matter of law. As such, it is an inappropriate subject for expert witness testimony.” *Tachibana v. Colo. Mountain Dev., Inc.*, 2010 WL 11527368, at *5 (D. Haw. June 9, 2010).

Grice's opinions on TILA compliance are precisely the type of legal conclusions barred by Ninth Circuit precedent. His report contains a section titled “The Truth in Lending Act and Regulation Z,” which provides a lengthy recitation of the legal framework of the statute and its implementing regulation. PX6, Expert Report of Charles H. Grice (“Grice Report”) ¶¶ 31-45. Grice then (1) outlines his “process to evaluate the contents of the fee disclosures on [Defendant's] website and [to] show how they conform to the standards set by TILA and Regulation Z,” *id.* ¶¶

⁶ Grice's opinions on Defendant's TILA compliance are irrelevant because it is not at issue. The FTC has not alleged a TILA violation, and the Court has ruled that TILA compliance does not preclude the FTC's claims here. Order re: Defendant's Mot. to Dismiss at 18 (Dkt. No. 53).

54-68; (2) describes Defendant's TILA disclosure and related content and states that various aspects thereof purportedly complied with TILA and Regulation Z, *id.* ¶¶ 69-104; and (3) concludes that Defendant's fee disclosures as a whole "consistently align with the regulatory requirements" of TILA and Regulation Z. *Id.* ¶ 56. *See also id.* ¶ 17. These sections baldly opine on whether Defendant complied with the law—TILA and Regulation Z—that Defendant asserts as the basis of its first affirmative defense. They do not help the court understand facts in evidence, but simply provide legal conclusions about an ultimate issue and are therefore irrelevant.

Nationwide Transp. Fin. v. Cass Info. Sys., Inc., 523 F.3d 1051 (9th Cir. 2008); *Tachibana*, 2010 WL 11527368, at *5.

Perhaps anticipating this defect, Grice makes generic references to "industry standards" in his discussion of Defendant's TILA compliance as an additional benchmark against which he purports to evaluate Defendant's conduct. *See, e.g.*, PX6, Grice Report ¶¶ 14, 17, 56, 65, 68, 72, 76, 82, 87, 96, 102, 104. The methodology section of his report, however, contains no mention of industry standards – and as a consequence, contains no explanation of how he may have applied the unarticulated standards to the facts of this case. *Id.* ¶¶ 57-68. Moreover, Grice admitted he did not consider any "industry standards" in reaching his opinions – only the TILA statute – and that, in fact, no such standards exist. PX7, Excerpts from the Deposition of Charles H. Grice ("Grice Dep.") at 209:12-23. His conclusion that Defendant's disclosures complied with "industry standards" is therefore no more than a conclusion that they complied with the law.⁷ As such, his opinions on "industry standards" should be excluded as irrelevant and improper legal conclusions.

2. Irrelevant summaries of documents and facts

In addition to irrelevant legal conclusions, a large portion of Grice's discussion of TILA compliance, PX6, Grice Report ¶¶ 105-46, constitutes a mere summary of documents and facts that is plainly improper as expert testimony and should be excluded as irrelevant. A witness "may offer expert opinion testimony only if . . . 'the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.'"

⁷ The only specific references to "standards" in Grice's report are references back to the legal framework. PX7, Grice Report ¶¶ 44, 54, 69, 71, 78, 86 & 88.

United States v. Pac. Gas & Elec. Co., 2016 WL 1640462, at *2 (N.D. Cal. Apr. 26, 2016) (citing Fed. R. Evid. 702). “[E]xpert testimony that ‘simply rehash[es] otherwise admissible evidence about which [the expert] has no personal knowledge . . . is inadmissible,’” *Id.* at *2 (N.D. Cal. Apr. 26, 2016) (quoting *Highland Capital Mgmt., L.P. v. Schneider*, 379 F. Supp. 2d 461, 468-69 (S.D.N.Y. 2005)), because “[s]uch evidence is more ‘properly presented through percipient witnesses and documentary evidence.’” *Id.* (quoting *In re Rezulin Prods. Liab. Litig.*, 309 F. Supp. 2d 531, 551 (S.D.N.Y. 2004)). “[E]xperts should not be permitted to supplant the role of counsel in making argument at trial” *Id.*

Specifically, expert testimony is routinely excluded where it simply summarizes evidence rather than applying technical or specialized knowledge to aid the trier of fact in understanding the evidence or facts in issue. *See Pac. Gas & Elec.*, 2016 WL 1640462, at * 2 (noting plaintiff withdrew expert testimony regarding defendant’s “corporate culture” and “internal communications” after defendant argued the testimony “reflect[ed] no expertise or expert analysis, just a willingness to summarize evidence in a way the prosecution likes”); *In re Novatel Wireless Sec. Litig.*, 2011 WL 5827198, at *4 (S.D. Cal. Nov. 17, 2011) (excluding portions of an expert report that “quote[d] selectively from e-mails and prior sworn testimony” where “no specialized or technical knowhow [was] required to read and draw conclusions from the internal documents and testimony cited”); *In re Rezulin*, 309 F. Supp. 2d at 551 (excluding expert’s narrative of “selected regulatory events, . . . Advisory Committee meetings, . . . and approval and withdrawal decisions by regulators” where expert’s “glosses” on the narrative were “simple inferences drawn from uncomplicated facts”).

A substantial portion of Grice’s discussion of TILA compliance is precisely the type of summary rehash of a factual narrative that courts routinely exclude as irrelevant. *See* PX6, Grice Report ¶¶ 105-46. In these sections, Grice (1) describes the relationship of WebBank, third party auditors, and selected regulatory bodies to Defendant’s business and summarizes some of their reports and communications, *id.* ¶¶ 107-21, 132-46, and (2) summarizes selected actions taken and documents created by Defendant. *Id.* ¶¶ 122-31. In the course of that discussion, Grice applies no “scientific, technical, or other specialized knowledge” to any documents; he merely summarizes

them and comments that they “corroborate” his views of TILA compliance or otherwise demonstrate Defendant’s good conduct. *See, e.g., id.* ¶¶ 106, 131 & 144. If those topics were relevant to this matter at all, a trier of fact would be perfectly capable of understanding the documents Grice purports to summarize without expert assistance. At best, he is merely adding his own non-expert “glosses” onto a factual narrative. *In re Rezulin*, 309 F. Supp. 2d at 551. At worst, he is impermissibly attempting to “supplant the role of counsel in making argument at trial.” *Pac. Gas & Elec.*, 2016 WL 1640462, at *2 (quoting *In re Rezulin*, 309 F. Supp. 2d at 551). In either event, these portions of his report are irrelevant and should be excluded.

B. Grice is not qualified to opine on Defendant’s use of tooltips.

Grice’s report includes a discussion of Defendant’s use of a “tooltip” in connection with certain APR statements. PX6, Grice Report ¶¶ 95-101. To the extent that this discussion offers any opinions, they appear to be limited to two broad conclusions: first, that “[i]n [Grice’s] experience, tooltips are perfectly reasonable tools employed by industry participants to provide additional information to consumers”; and second, that he agrees with a view he attributes to an FTC witness regarding the purposes of tooltips (namely, that tooltips enable website creators “to save space and incorporate text that is not easily placed anywhere else on the page.”). *Id.* ¶ 99; *see also* PX8, Excerpts from the Deposition of the FTC, at 117:1-11.

In offering these opinions, Grice has stepped firmly outside his expertise, opining— with no basis in either case—on matters of website design, usability, and consumer behavior. Grice admitted that he has no expertise in any of these technical areas and that he is not being offered as an expert in these areas, and nothing in his background suggests otherwise. PX7, Grice Dep. 19:9-20:1. Indeed, Grice described himself as a “technology dinosaur.” *Id.* at 267:22.

Courts have routinely excluded the expert opinions of witnesses who possessed no background in the field on which they have opined. *Novalogic, Inc. v. Activision Blizzard*, 41 F. Supp. 3d 885, 896 (C.D. Cal. 2013); *Poosh v. Phillip Morris USA, Inc.*, 287 F.R.D. 543 (N.D. Cal. 2012); *see also United States v. Tsinnijinnie*, 601 F.2d 1035 (9th Cir. 1979). Courts also routinely exclude testimony from experts deemed qualified for other purposes when they opine outside their field of expertise. *In re Zicam Cold Remedy Mktg., Sales Practices, & Prod. Liab.*

Litig., 2011 WL 798898 (D. Ariz. Feb. 24, 2011) (professor of otolaryngology lacked expertise in pharmacology and thus was unqualified to opine on the effectiveness of a nasal congestion medication); *In re Countrywide Fin. Corp. Mortg. Mktg. & Sales Practices Litig.*, 277 F.R.D. 586, 605 (S.D. Cal. 2011) (expert qualified to discuss public policy aspects of loans was not qualified to opine on their affordability or suitability for a class of borrowers).

Here, where Grice's background evinces no familiarity with website design, usability, or consumer behavior, and where he admits to lacking expertise regarding the same, the Court should exclude the portions of his report pertaining to those matters.

IV. CARLIN'S OPINIONS ARE IRRELEVANT AND UNRELIABLE

Carlin baselessly opines that Defendant did not mislead consumers. But this amounts to no more than an improper legal opinion. Moreover, his improper legal opinion rests upon unreliable and untested methodology consisting of a hodgepodge of predicate opinions that are either irrelevant to whether consumers would find a hidden fee, or for which Carlin has no expertise. Carlin's opinions suffer from two major flaws. First, his conclusion that consumers were not misled is a legal opinion which improperly attempts to supplant the Court's judgment. Second, he uses unreliable methodology and does not have a sound basis for deciding what information to consider in forming his opinions.

A. Carlin's Opinion That Consumers Were Not Misled Is A Legal Opinion.

As with Grice, discussed above, Carlin's ultimate conclusion amounts to no more than legal opinions based on cherry-picked facts. Such testimony improperly attempts to substitute the expert's judgment for that of the finder of fact. *See United States v. Diaz*, 876 F.3d 1194, 1197 (9th Cir. 2017); *RSI Corp. v. Int'l Bus. Machs. Corp.*, 2013 WL 1087468, at *4 (N.D. Cal. Mar. 13, 2013) (striking expert declaration that provided "mostly legal opinion and an unhelpful restatement of the facts as he sees them"). Thus, it is improper for an expert "to act as a vehicle to present a factual narrative . . . for a case, in effect simply accumulating and putting together one party's story." *Hart v. BHH, LLC*, 2018 WL 3471813, at *6 (S.D.N.Y. July 19, 2018).

That, however, is exactly what Carlin did. He reviewed several disparate yet limited pieces of evidence and concluded that Defendant did not engage in the challenged conduct. That

conclusion supplants, rather than aids, the judgment of the Court, which is competent to review the record and make its own determination as to whether consumers were misled. *Konik v. Time Warner Cable*, 2009 WL 10681970, at *9 (C.D. Cal. Dec. 2, 2009) (excluding expert report that reviewed disputed advertisements and opined about whether “a reasonable consumer would be confused or misled,” as such testimony “is not helpful to the trier of fact”).

Carlin’s citations to legal guidance such as the FTC’s Dot-Com Disclosure guide⁸ and FTC case law to support his opinions further demonstrates that his opinions go to legal matters entirely within the Court’s competence. PX9, Expert Report of Bruce Carlin (“Carlin Report”) ¶¶ 99, 103 n.204, 104, 113. *See Claston, LLC v. United States*, 2012 WL 12957108, at *5 (D. N. Mar. I. Oct. 19, 2012) (expert’s use of “legal document to make his findings . . . requires . . . making a legal conclusion); *SEC v. Leslie*, 2010 WL 2991038, at *9 (N.D. Cal. July 29, 2010) (improper for expert to testify about whether auditors were misled or whether statements were misleading).

The portions of Carlin’s report where his attempt to render a legal opinion is especially jarring are his barebones discussions of the loan application flow, loan approval communications, consumer complaints, and consumer cancellations. PX9, Carlin Report, Sections VI.C (loan application flow), VII (loan approval communications), VIII (complaints and cancellations). Rule 702 allows expert testimony to be introduced if it “will assist the trier of fact to understand the evidence or determine a fact in issue,” which turns on whether the issue is “one that the trier of fact would not ordinarily be able to resolve without technical or specialized assistance.” *Konik*, 2009 WL 10681970, at *9 (citations omitted). Unless a witness has relevant expertise, determining whether advertising or marketing materials are misleading falls squarely within the Court’s competence. Courts have routinely conducted facial analysis of advertisements to determine whether they deceive. *See, e.g., id.* (excluding testimony despite expert’s relevant experience because report consisted of “merely restating” advertisement contents and “drawing the conclusion that a reasonable consumer would be confused or misled by such advertisements”). *See also FTC*

⁸ FTC, .com Disclosures: How to Make Effective Disclosures in Digital Advertising (2013), at i available at <https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-staff-revises-online-advertising-disclosure-guidelines/130312dotcomdisclosures.pdf> (.com Disclosures are an “FTC staff guidance document [that] describes the information businesses should consider as they develop ads for online media to ensure that they comply with the law.”).

v. *Stefanchik*, 2007 WL 4570879, at *1 (W.D. Wash. Feb. 15, 2007) (precluding expert testimony on whether advertising materials were false or misleading and noting that marketing and advertising representations were well documented and would “speak for themselves”); *FTC v. Cyberspace.Com LLC*, 453 F.3d 1196, 1200-01 (9th Cir. 2006) (conducting facial analysis to find small-print disclosures inadequate); *FTC v. Johnson*, 96 F. Supp. 3d 1110, 1121 (D. Nev. 2015) (evaluating disclosure placement); *FTC v. Medlab, Inc.*, 615 F. Supp. 2d 1068, 1077 (N.D. Cal. 2009) (evaluating disclosure placement). Carlin’s review of the loan application flow and Defendant’s communications to consumers regarding loan approval consist of no more than a simple facial analysis and therefore should be excluded. Notably, as discussed *infra* Section IV.B.3, Carlin lacks any expertise on these subject areas.

B. Carlin’s Ultimate Conclusion Is Based On Sub-Opinions Which Are Facially Unreliable, Beyond His Expertise, Or Both

Additional fatal problems exist below the surface of Carlin’s improper legal opinion. In concluding that Defendant did not mislead consumers, Carlin cobbled together: (1) inferences about financial literacy that do not illuminate whether borrowers would search for and find a hidden fee and rely upon incomplete information; (2) inferences about the likelihood that borrowers learned of the fee from prior financial experience that likewise has no bearing on ability to detect fees; and (3) opinions about the loan application flow and consumer complaint and cancellation rates that are outside his expertise.

Carlin’s opinions can be admitted only on the strength of “proof that the research and analysis supporting the proffered conclusions have been subjected to normal scientific scrutiny through peer review and publication.” *Daubert II*, 43 F.3d at 1318. But Carlin admitted that no recognized methodology exists for the inquiry he undertook. His report states that “there is no precise formula for calculating the probability that a borrower understands the terms of their loan.” PX9, Carlin Report ¶ 50. His testimony confirms as much: “To my knowledge, it’s not a common thing to do or it’s not used in practice. I’m not even sure I know of an existence of a formula like that that’s used commonly.” PX10, Excerpts from the Deposition of Bruce Carlin (“Carlin Dep.”) at 113:18-21. Furthermore, he cites no literature establishing that collective consideration of the

factors he considered is an accepted or peer reviewed method to determine whether consumers understand a specific financial product and its fees and disclosures. *Good v. Fluour Daniel Corp.*, 222 F. Supp. 2d 1236, 1242-43 (E.D. Wash. 2002) (excluding expert opinion where expert cited no literature supporting his choice of one methodology over another). His testimony highlights the absence of support for his methodology; he testified that Defendant's disclosures would suffice even for an indigent person, undermining his own methodology which weighs borrower financial literacy and experience. PX10, Carlin Dep. at 91 to 93:8.

1. Carlin's "Financial Literacy" Conclusion Is Irrelevant And Unreliable

A building block for Carlin's conclusion that borrowers were not misled is his opinion that they had relatively higher "financial literacy" and would therefore notice Defendant's hidden fee. This opinion is not "grounded in an accepted body of learning or experience," as required by Rule 702. 2000 Advisory Committee Notes to Rule 702. To begin with, Carlin admitted that it would not pass muster in his field to assess consumer financial literacy as it pertains to a specific product being offered by a specific financial provider, even though that was the precise approach he used. PX10, Carlin Dep. at 148:2-14

Carlin likewise cites no literature or research supporting the proposition that financial literacy is a predictor of the likelihood that a consumer is more likely to *locate, notice, or read* disclosures about a financial product, as opposed to *understand* financial products generally. *United States v. Marr*, 2017 WL 1540815, at *6 (N.D. Cal. Apr. 28, 2017), *aff'd sub nom United States v. Sanchez*, 760 F. App'x 533 (9th Cir. 2019) (excluding expert who failed to cite to "any objective source" to support methodology, any literature, or identify another expert who employed the methodology); *United States v. McCluskey*, 954 F. Supp. 2d 1224, 1286 (D.N.M. 2013) (rejecting methodology of expert who did not cite to scientific literature or studies). The literature he cites correlates financial literacy with outcomes related to financial planning decisions, such as whether and how consumers save for retirement, whether they refinance their mortgages, whether they invest wisely, or whether they take on too much debt, not whether they notice or understand specific terms or products. See PX9, Carlin Report ¶ 49. Thus, Carlin's use of "financial literacy" to draw conclusions that consumers were not misled about the origination fee has no basis in the

“accepted body of learning or experience” about financial literacy, and is inadmissible.

Equally problematic is Carlin’s predicate conclusion that Defendant’s borrowers are in fact “financially literate,” because Carlin does not possess reliable data to support that result.

According to the literature on financial literacy that Carlin himself cites, the accepted method of measuring consumers’ financial literacy is to survey them with a specific questionnaire that actually tests their financial literacy. PX11, Carlin Dep. Ex. 5, at 2; PX10, Carlin Dep. at 29:5-21 (acknowledging method of asking consumers specific questions to gauge financial literacy); PX10, Carlin Dep. at 33:17-24 (“So in the field. . . in the literature of financial literacy, the majority of it is correlating the demographic data with the . . . direct questions to find out who would be most at risk.”). Nonetheless, Carlin did not survey borrowers because Defendant did not ask him to do so. *Id.* at 26:2-10, 29:11-18. Instead, he relied on the results of previous surveys conducted by Defendant that queried other topics⁹ to draw an inference regarding borrowers’ *relative* financial literacy, PX9, Carlin Report ¶ 51, and was therefore unable to determine whether they actually were, in fact, financially literate.

Carlin’s underlying data for his financial literacy opinion was also limited in quantity. To draw conclusions about borrower age, education, and employment, Carlin relies upon the aforementioned surveys (*id.* ¶¶ 53, 55, 57), that cover limited periods of time, which, he conceded, made the survey data incomplete. PX10, Carlin Dep. at 131:13-14. Notably, Carlin did not opine as to how representative the survey results were of the overall borrower base and did not provide a statistical extrapolation. PX12, Carlin Report, Appendix E; PX10, Carlin Dep. at 133:21 to 135. But he nevertheless based his conclusions about the financial literacy of Defendant’s borrowers *as a whole* on this patchwork data. This “unjustified extrapolation” is therefore inadmissible. *In re Viagra (Sildenafil Citrate & Cialis (Tadalafil) Pro. Liabl Litig.*, -- F. Supp. 3d ----, 2020 WL

⁹ Those surveys measured borrower FICO scores and socioeconomic characteristics, among other things. But Carlin cited no literature to support his retrofitted measurement of financial literacy. When asked to quantify how much more financially literate a consumer with a good FICO score would be than one with a poor FICO score, he testified, “I don’t think there’s an exact formula to convert FICO score to financial literacy.” PX10, Carlin Dep. at 146:15-16. He also testified that research has quantified the strength of correlations between socioeconomic characteristics and financial literacy, but that he did not consider it in forming his opinions. *Id.* at 115:24 to 116:22.

204115, at *5 (N.D. Cal. Jan. 13, 2020).

2. Carlin's "Financial Experience" Conclusion Is Irrelevant And Unreliable

Another key component of Carlin's opinion is that borrowers were not misled because of their experience with other lenders and financial products. PX9, Carlin Report, Section VI.B (¶¶ 63, 64). First, as with "financial literacy," Carlin cites no literature or objective source connecting "financial experience" and a consumer's ability to identify specific features of—or find hidden disclosures regarding—a financial product. *Marr*, 2017 WL 1540815, at *6 (excluding expert who failed to cite to any objective sources); *McCluskey*, 954 F. Supp. 2d at 1286 (excluding expert opinion that did not cite to scientific literature or studies). Second, his conclusions with regard to all four types of "financial experience" outlined below rely on unfounded speculation embellished with a veneer of evidentiary support that dissolves upon examination. *Gen. Electric Co. v. Joiner*, 522 U.S. 136, 146 (1997) (*ipse dixit* opinions excluded where "there is simply too great an analytical gap between the data and the opinion proffered").

- *Repeat borrowers*: To accept Carlin's opinion that repeat borrowers knew of the hidden fee from their prior loans (PX9, Carlin Report, Section VI.B.1), one must assume that they knew of the fee the first time around. Carlin cites no evidence that this is so.¹⁰
- *Personal loans from other lenders*: To accept Carlin's opinion that borrowers who had previously taken out personal loans from other lenders knew of Defendant's hidden fee because they had paid up-front fees to their prior lenders (*id.* ¶ 75), one must assume that (a) all other personal lenders charge up-front fees, and (b) that consumers who paid such fees were aware of them. Carlin cites no valid evidence that this is so, and evidence indicates otherwise.¹⁰ His only source of information on other lenders' fees consists of screenshots of portions of their websites as they appeared in late 2019, PX13, Carlin Report, Ex. 7, at 3 (source note), but he was unable to view their loan application flows, leaving him in the dark about how they disclosed origination fees to borrowers, or what terms they offered prior to late 2019.¹¹

¹⁰ Some repeat borrowers did not know of the fee. *Infra*, at 3.

¹¹ Evidence cited in the FTC's motion for summary judgment shows that Defendant knew some of its competitors did not charge origination fees, a fact of which Carlin was aware. PX13,

- *Other loan products*: To accept Carlin's opinion that borrowers would have known about Defendant's hidden fee because they had paid origination fees for other financial products, such as mortgages (PX9, Carlin Report, Section VI.B.2.b), one must assume that those products charged an origination fee, that the consumer knew of the fee, and that the fee was deducted up-front from the loan as it was here. Carlin cites no evidence that this is so.¹²
- *Comparison shopping*: To accept Carlin's opinion that consumers would have known about Defendant's hidden fee from comparison shopping or because they would have seen it disclosed on comparison shopping websites (*id.*, Section VI.B.3), one must assume that those other lenders or websites charged an up-front fee and clearly and conspicuously disclosed their fees, and that comparison websites clearly and conspicuously disclosed Defendant's fee. Carlin provided no evidence that this is so.

3. *Carlin Summarizes The Application Flow And Consumer Complaints And Feedback Without Supplying Expert Analysis*

Not only are his opinions on the loan application flow, consumer complaints, and consumer cancellations improper legal conclusions, but Carlin lacks the requisite expertise to provide those opinions. Experts must have specific expertise and cannot rely upon general experience in a broader field. *Mendoza v. Gaylord Container Corp.*, 2005 WL 8162619, at *4 (N.D. Cal. Mar. 9, 2005). Carlin lacks expertise to draw inferences about what complaint or cancellation rates reveal about whether consumers were misled, or about whether Defendant's complaint, cancellation, and inquiry rates are comparatively "low." With respect to consumer complaints, Carlin admitted that his "experience is more of a general nature. . . the actions that they take are a result of their experience." PX10, Carlin Dep. at 166:13 to 167:7-19.

Carlin also lacks expertise in consumer cancellation behavior, which he attempted to shoehorn into his experience in "switching behavior," i.e., when a consumer switches from one

Carlin Report, Ex. 7.

¹² Rather, he testified that "many consumers in mortgage markets don't know all of the closing costs . . . and many . . . don't even know what a lot of these fees are," PX10, Carlin Dep. at 199:11-15. When asked to articulate his basis for assuming that a consumer, by virtue of having a mortgage, would be more likely to assume that *Defendant* would deduct an origination fee from non-mortgage loan proceeds, he pointed only to Defendant's complaint and cancellation rates, drawing no connection to prior mortgage borrowing specifically. *Id.* at 201:8 to 203:7.

product to another, (*id.* at 217:6 to 218:7), a topic he did not discuss in his report. Evidencing this lack of specific expertise, Carlin cited no research or studies whatsoever about consumer complaints, inquiries, or cancellations that would enable him to provide a useful opinion on whether Defendant's cancellation rates were comparatively high or low. The one paper Carlin cited, he used to attempt to establish that Defendant has a low complaint rate. That paper examined complaint rates in only four FTC cases, which Carlin improperly compared to Defendant's complaint rate. He failed to consider that in calculating Defendant's complaint rate, he excluded complaints unrelated to Counts I or II (depressing Defendant's complaint rate), where no similar relevance exclusion was applied to calculate the complaint rates of the defendants in the cited paper (making their complaint rate appear relatively higher). *See* PX9, Carlin Report, Section VIII n.305; PX10, Carlin Dep. at 213:21 to 214:19. Carlin's opinions about consumer complaints, inquiries, and cancellations have no basis in either the literature or his own expertise.

Carlin's opinion about the efficacy of the tooltip (PX9, Carlin Report ¶ 110) also lacks foundation in expertise. He neither surveyed borrowers nor cited literature on this point. PX10, Carlin Dep. at 220:22 to 221:12. Thus, his conclusion is no more illuminating than that of a lay person and should not be considered. *Lovejoy v. Arpaio*, 2011 WL 3687627, at *1 (D. Ariz. Aug. 23, 2011) (expert who drew "no more than basic inferences about human motives and conduct" excluded; testimony would not have addressed issue "beyond the common knowledge of a layperson."). And Carlin's opinion contradicts his own research, which indicates that the "no hidden fees" claim would deter consumers from accessing the tooltip. His research indicates that claims such as "no annual membership fee" or "zero percent introductory APR," actually decreased consumer time spent reading disclosures and use of links containing information about pricing terms. PX10, Carlin Dep. at 55:3-7, 55:20 to 58; PX14, Carlin Dep. Ex. 4.

V. FARRELL OFFERS IRRELEVANT AND UNRELIABLE OPINIONS

Farrell offers an opinion on the proper amount of monetary relief in this case. He opines that, had consumers not been misled by the upfront fee, they would have borrowed from Defendant anyway, and in slightly larger amounts. PX15, Expert Report of Joseph Farrell ("Farrell Report"); PX16, Rebuttal Expert Report of Joseph Farrell. He then opines that monetary relief for

Defendant's misrepresentations is limited to harm consumers suffered by taking slightly smaller loans than the ones they actually needed. PX15, Farrell Report ¶ 37. The Court should exclude this opinion because it ignores the unjust gain to Defendant stemming from the deceptive conduct, and contravenes Ninth Circuit law with respect to relief in FTC Act cases.

A qualified expert can testify only if the expertise “will help the trier of fact to understand the evidence or to determine a fact in issue.” Fed. R. Evid. 702; *see Daubert*, 509 U.S. at 590-91. “The ‘will assist’ requirement, under *Daubert*, ‘goes primarily to relevance.’ What is relevant depends on what must be proved” *Primiano v. Cook*, 598 F.3d 558, 567 (9th Cir. 2010). Under the relevance or “fit” analysis, “[t]estimony ‘fits’ a case if it ‘logically advances a material aspect of the proposing party’s case.’” *Fernlund v. TransCanada USA Servs. Inc.*, 2014 U.S. Dist. LEXIS 159386, at *9 (D. Or. Oct. 3, 2014) (quoting *Daubert II*, 43 F.3d at 1315); *see also Miletak v. Allstate Ins. Co.*, 2011 WL 13154033 at *3 (N.D. Cal. Oct. 19, 2011) (“In assessing relevance, the court must look to the governing substantive legal standard.”). The standard for fit is higher than relevance under Federal Rule of Evidence Rule 401. *See Daubert II*, 43 F.3d at 1321, n.17. Accordingly, a court “should exclude the scientific expert testimony under the [relevance] prong of the *Daubert* standard unless [the court] is convinced that it speaks clearly and directly to an issue in dispute in the case.” *FTC v. Wellness Support Network, Inc.*, 2013 WL 5513332, at *9 (N.D. Cal. Oct. 4, 2013) (quoting *Daubert II*). This requirement applies not only to scientific expert testimony, but to all expert testimony. *Kumho*, 526 U.S. at 147.

Thus, to be relevant, Farrell's testimony must “logically advance” Defendant's argument about the proper amount of monetary relief pursuant to applicable law. It does not. Ninth Circuit law on monetary relief in FTC Act cases is settled. In such cases, the court “carries with it the inherent power to deprive defendants of their unjust gains” and the purpose of such an award is to “recaptur[e]” those gains. *FTC v. Commerce Planet*, 815 F.3d 593, 599, 603 (9th Cir. 2016) (citation omitted).¹³ The Ninth Circuit has rejected the argument that monetary relief “should have

¹³ Because Defendant took the fee directly from consumers, this case is one of the “many” where the amount sought in restitution reasonably approximates its unjust gains, as demonstrated in the FTC's motion for summary judgment. *Commerce Planet*, 815 F.3d at 603 (unjust gains and losses “may diverge” when third-parties take consumers' money before it reaches defendants).

taken into account . . . consumers who have benefited” from a defendant’s services. *FTC v. Gill*, 265 F.3d 944, 958 (9th Cir. 2001). In *FTC v. Figgie International*, the Ninth Circuit refused to deduct the value of the goods deceptively sold from the judgment. 994 F.2d 595, 606 (9th Cir. 1993). It noted that the “misrepresentations tainted the customers’ purchasing decisions” and focused on the “fraud in the selling,” and “not the value of the thing sold.” *Id.*

Farrell’s method of calculation contradicts those cornerstones of the Ninth Circuit’s framework. He theorizes about how borrowers would have behaved had they not been deceived and subtracts the value of the loans they received from the value of the loans he speculates they otherwise would have taken. He omits from his conclusion the substantial fees that Defendant charged to deceived consumers, thereby ignoring Defendant’s unjust gains. This approach fails the *Commerce Planet* directive to prevent Defendant’s “unjust enrichment” and “recaptur[e]” its gains, *Commerce Planet*, 815 F.3d at 603, and per *Figgie*, ignores the “fraud in the selling” to focus on “the value of the thing sold.” 994 F.2d at 606.

Farrell’s testimony confirms the disparity between his method and that of the Ninth Circuit. In *FTC v. Publishers Business Services, Inc.*, Case No. 2:08-cv-00620-APG-GWF, 2017 WL 451953 (D. Nev. Feb. 1, 2017), *aff’d sub nom FTC v. Dantuma*, 748 F. App’x 735 (9th Cir. 2018), the defendant deceptively signed up consumers for magazine subscriptions. *Dantuma*, 748 F. App’x 735, 737 (9th Cir. 2018). Affirming an award of consumer losses measured by the cost of the subscriptions, the court specifically rejected the defendant’s argument that the magazines provided some benefit to consumers. *Id.* at 738. [REDACTED]

[REDACTED] PX17, Excerpts from the Deposition of Joseph Farrell (“Farrell Dep.”) at 59:10-62:25. In *Commerce Planet*, where the defendant offered “free” business guides for a shipping fee and then deceptively enrolled consumers in subscriptions, the Ninth Circuit affirmed full refunds without deduction for the value of the guides. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] PX17, Farrell Dep. at 65:7-9. Farrell's framework for calculating monetary relief conflicts with the substantive law and should therefore be excluded as irrelevant.

Farrell's testimony is also unreliable because, as he admits, he has insufficient data to support his underlying assumptions about Defendant's borrowers' behavior. Rule 702 only allows for the admission of expert testimony where it is "based on sufficient facts or data." Fed. R. Evid. 702(b). [REDACTED]

[REDACTED] *Id.* at 123:16-25. Given that Farrell lacked sufficient information to measure a necessary assumption of his report, his opinion is not reliable.

VI. CONCLUSION

For the foregoing reasons, the Court should exclude the challenged testimony of Defendant's four proffered expert witnesses.

Dated: February 27, 2020

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CERTIFICATE OF SERVICE

I, Katharine Roller, certify that on February 27, 2020, I electronically filed the foregoing Plaintiff's Notice of Motion, Motion to Exclude Expert Testimony, and Memorandum in Support Thereof with the Clerk of Court using the CM/ECF system, which will send notification of such filing to counsel of record.

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Exhibit C

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10 **UNITED STATES DISTRICT COURT**
11 **CENTRAL DISTRICT OF CALIFORNIA**

12 FEDERAL TRADE COMMISSION,

13 Plaintiff,

14 v.

15 DAMIAN KUTZNER, et al.,

16 Defendants.

No. SACV16-00999-BRO (AFMx)

**PLAINTIFF'S REPLY
MEMORANDUM IN SUPPORT OF
SUMMARY JUDGMENT AGAINST
DEFENDANTS JEREMY FOTI
AND CHARLES MARSHALL AS
TO ALL COUNTS**

Date: August 28, 2017
Time: 1:30 pm
Location: Courtroom 7C

United States Courthouse
350 West 1st Street
Los Angeles, CA 90012

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1 Neither Jeremy Foti nor Charles Marshall have identified or created any
2 genuine disputes as to any material facts concerning the Federal Trade
3 Commission’s (“FTC”) proof that the defendants¹ stole more than \$18 million
4 from consumers through bogus “mass joinder” lawsuits. Foti’s response on
5 summary judgment consists of his ineffective self-serving declaration, specious
6 arguments about the authentication of the Corporate Defendants’ business records,
7 unfounded attacks on the consumer survey confirming that the Corporate
8 Defendants made the misrepresentations at issue, and a faulty argument about the
9 FTC’s monetary calculations. Foti’s response is an implicit admission that the
10 mountain of facts and evidence adduced conclusively establish his liability.
11 Having come to this realization, he baselessly asks the Court to ignore all evidence
12 except, of course, his most recent self-serving declaration. Marshall seemingly
13 joins in these arguments. Unfortunately for them, their admissions, their
14 declarations, and the consumer declarations alone, establish their liability. They
15 offer no evidence to controvert a material fact to justify denying summary
16 judgment. Of course, the receivership documents and the expert report are
17 admissible and confirm their liability. Finally, the minimal objections to the
18 monetary relief are also baseless. Because the FTC is limited to 10 pages in its
19 combined reply, discussion of these defendants’ arguments will be brief. Given
20 they lack merit, a short discussion is all they deserve.²

21
22 ¹ “Corporate Defendants” means Brookstone Law P.C. (California),
23 Brookstone Law P.C. (Nevada), Advantis Law P.C., and Advantis Law Group P.C.
24 “Brookstone” means both Brookstone Law P.C. (California) and Brookstone Law
25 P.C. (Nevada). “Advantis” means Advantis Law P.C. and Advantis Law Group
26 P.C. “Advantis Law” means Advantis Law P.C. alone, while “Advantis Law
Group” means Advantis Law Group P.C. alone.

27 ² Foti and Marshall’s oppositions have a number of factual inaccuracies, the
28 most salient of which are addressed in the accompanying Declaration of Gregory J.
Madden.

1 **I. The FTC Has Presented Uncontroverted Evidence Entitling it to Relief**
2 **Even Without the Emails, Evidence Found on the Business Premises, or**
3 **Consumer Survey.**

4 Foti, and Marshall to an extent, seem to argue that the FTC's case falls apart
5 if the emails from the computers on site, the documents found on site, and the
6 consumer survey are all ignored. Even without that evidence, they have each
7 admitted or not controverted all of the basic details regarding who the Corporate
8 Defendants were, including the facts necessary to establish Brookstone and
9 Advantis were a common enterprise. USF ¶¶ 1-31, 64-67, 78, 80-81, 84. They
10 also fail to controvert the consumer declarations that, combined with their
11 admissions, establish their violations of the MARS Rule and the FTC Act.³

12 **A. The Corporate Defendants Violated the MARS Rule.**

13 The uncontroverted consumer declarations establish that consumers received
14 defendants' mailers offering to void their mortgage notes, USF ¶ 100, and then
15 were told that mass joinder litigation is also a way to obtain a loan modification or
16 principal reduction on their mortgage. USF ¶ 139, 158. The consumers then report
17 that they paid defendants advance fees. USF ¶¶ 168-70. Crucially, none of the
18 mailers or retainer agreements consumers testify to receiving and signing contain
19 the disclosures required under 12 C.F.R. § 1015.4 (failing to make the disclosures
20 "is a violation of this rule"). USF ¶ 185.

21 Neither Foti nor Marshall can assert a defense to these violations. Marshall
22 does not even try. Foti attempts to incorporate by reference his argument from his
23 separate summary judgment motion that the MARS Rule is inapplicable. But, as

24 ³ Marshall inaccurately asserts the FTC must prove its case by clear and
25 convincing evidence. He wrongly cites to the standard to prove "fraud on the
26 court" for relief under Rule 60, not the burden of proof in an FTC action. This is a
27 civil action with the familiar preponderance of the evidence standard. *See, e.g.,*
28 *FTC v. Commerce Planet Inc.*, 878 F. Supp. 2d 1048, [1055](#) (C.D. Cal. 2012)
(entering judgment based on "preponderance of the evidence"), *aff'd in relevant*
part, [815 F.3d 593](#) (9th Cir. 2016); *FTC v. Ross*,

1 the FTC detailed in its opposition to Foti's motion, he admitted the Corporate
2 Defendants were MARS providers in his answer, has waived the "attorney
3 exemption" defense, and could not establish the facts necessary to assert such a
4 defense because, among other reasons, the Corporate Defendants acted unethically
5 and did not use client trust accounts. See DE [303](#) at Page ID 9314-20.

6 **B. The Corporate Defendants Violated Section 5.**

7 The defendants have *not* controverted the FTC's consumer declarations,
8 which span interactions over multiple years with multiple sales people. As noted
9 above, the consumers declare they were solicited with mailers, claiming, among
10 other things, that the mass joinder litigation would seek to "void your note(s)," and
11 that "our team of experienced lawyers offers you a superior alternative or
12 recovery." USF ¶¶ 99-102. At in person meetings, sales people made various
13 false claims regarding consumers' likelihood of success and monetary relief,
14 including: they had "a very strong case;" prevailing in the litigation was "basically
15 a done deal;" "it was not a question of whether I would win my cases, but how
16 much money I would get;" "the minimum amount I would get would be \$75,000;"
17 we "were entitled to a refund as a result of litigation between the Department of
18 Justice and Bank of America;" and "Brookstone Law would succeed eventually."
19 USF at ¶¶ 149, 153, 155, 161-62; see also USF at ¶¶ 136-39, 147-48, 150-51, 154,
20 156-60, 163-66.⁴ Objective, uncontroverted evidence establishes that none of
21 these claims were true. The Corporate Defendants did not seek to void notes, did
22
23

24 ⁴ At one point, Foti criticizes the FTC's proof, claiming that even the survey
25 identifies only 138 dissatisfied consumers. Other defendants have made this
26 argument before, and it has been rejected. *FTC v. Gill*, 71 F. Supp. 2d 1030, [1040](#)
27 (C.D. Cal. 1999) ("The defendants miss the point. Plaintiff does not need to
28 submit a declaration for every single injured customer to meet its burden. If so,
this courthouse would be buried under a mountain of paper."), *aff'd*, [265 F.3d 944](#)
(9th Cir. 2001).

1 not have the promised experience or capabilities, and have never prevailed in a
2 mass joinder, thus failing to obtain the represented relief. USF ¶¶ 187-97, 199,
3 200-204.

4 Foti and Marshall both argue that the marketing was non-deceptive by
5 focusing on certain claims they assert are true. But, even if those extraneous
6 claims were in fact true, it does not alter the deceptiveness of the claims identified
7 in the consumer declarations, such as the likelihood of prevailing or obtaining
8 monetary relief. *Gill*, 71 F. Supp. 2d at [1044](#) (“[B]ecause each representation must
9 stand on its own merit, even if other representations contain accurate, non-
10 deceptive information, that argument fails.”) (citing *Removatron Int’l Corp. v.*
11 *FTC*, 884 F.2d 1489, [1496-97](#) (1st Cir. 1989)). Additionally, several of the claims
12 they highlight are in fact false. Although the defendants said they would add
13 consumers to mass joinder lawsuits, some were not. USF ¶ 199. Although
14 consumers were told the lawsuits would seek to void their mortgages, that was not
15 true. USF ¶ 197. Although the mailers claimed the defendants were experienced
16 and had the ability to prosecute the mass joinders, that was not true. USF ¶¶ 200-
17 204. Notably, neither Foti nor Marshall even attempt to defend the other
18 representations they list.

19 Foti argues that the disclaimer in the retainer agreement saves him, but his
20 argument does not address, and is rendered irrelevant by, the case law the FTC
21 cited in its moving papers. *See, e.g., Resort Car Rental v. FTC*, [518 F.2d 962](#) (9th
22 Cir. 1975) (“The Federal Trade Act is violated if [the advertising] induces the first
23 contact through deception, even if the buyer later becomes fully informed before
24 entering the contract.”); *FTC v. Gill*, 71 F. Supp. 2d at [1044](#) (disclaimers in
25 contract consumers received after initial sales pitch were not sufficient to defeat
26 summary judgment). Indeed, he admits a sales person told a consumer that the
27 disclaimer “was just legal words in the retainer and they had to use them in the
28 agreement, but there was no risk of losing.” USF ¶ 150.

C. The Evidence Establishes Individual Liability.

1 Foti argues that without the receivership documents, he cannot be held
2 individually liable. But, his declarations and admissions establish his control,
3 participation, and knowledge. He declared to the Court that he performed:

- 4 (1) “[M]anagement services related to referral services,
5 hiring/recruiting, vendor relations, IT relations, and data sources;”
- 6 (2) “Obtain[ing] estimates and costs for expenses associated with day
7 to day operations;”
- 8 (3) “Obtain[ing] or arrang[ing] for the preparation of law firm
9 supplied creative content, advertising, campaign management and
10 other related services;” and
- 11 (4) “Audit[ing] all invoices and expenses provided by third-parties to
12 ensure accuracy, including but not limited to payroll bonuses and
13 employee compensation.”

14 USF ¶ 231. Foti frequently cites to Torchia’s bar trial testimony, without noting
15 Torchia’s testimony that “**Jeremy Foti pretty much takes care of business
16 development.**” DE [303-2](#) at Page ID 9703; *see also* DE [304-1](#) at Page ID 9760-67
17 ¶¶ 14-20; (Foti admitting he arranged marketing, with knowledge of its contents),
18 9779 ¶ 55 (admitting he received complaints). This is enough. *FTC v. Medicor
19 LLC*, 217 F. Supp. 2d 1048, [1055-56](#) (C.D. Cal. 2002) (“consultant” with input on
20 hiring, financial matters, and marketing, but no final authority, held liable); *FTC v.
21 American Standard Credit Systems, Inc.*, 874 F. Supp. 1080, [1089](#) (C.D. Cal. 1994)
22 (“marketing director” liable because he “implemented the company’s policies and
23 procedures, and monitored the marketing activities of ASCS’s third-party
24 marketers. . . .”).⁵ As the FTC detailed in its opposition to Foti’s motion for
25 summary judgment, his assertion that others also had control or participated does
26 not affect *his* liability. DE [303](#) at Page ID 9327-28, 9330. His deep role, and
27 admitted knowledge of complaints, establishes his knowledge. *FTC v. Affordable*

28 ⁵ Because Foti repeatedly cites Damian Kutzner’s employment agreement as
evidence that Foti could not have control, the FTC conducted a search to see if
such an agreement existed for Foti. Indeed, Foti and Marshall signed a nearly
identical version, naming Foti the “Chief Operations Manager” in charge of “all
‘Non-Legal’ operations” of Advantis. Madden Decl. ¶ 7.

1 *Media*, 179 F.3d 1228, [1235](#) (9th Cir. 1999). His (incredible) statements that he
2 believed in the marketing and thought there were benefits is not a defense. *See*
3 *FTC v. Publishing Clearing House Inc.*, 104 F.3d 1168, [1171](#) (9th Cir. 1997)
4 (intent to defraud not required); *Affordable Media*, 179 F.3d at 1235 (defendants'
5 claim to have done due diligence regarding truth of claims does not defeat
6 “knowledge” component of FTC Act liability standard).

7 For his part, Marshall does not contest control of Advantis as part of the
8 common enterprise. Indeed, he admits the relevant facts. USF ¶¶ 19-31, 56-69.
9 He is, therefore, liable for injunctive relief. He only argues that he cannot be
10 monetarily liable because he lacked “full knowledge.” Unfortunately for him, he
11 admits he knew of Kutzner’s and Broderick’s history, the allegations of ethical
12 misconduct related to Brookstone’s mass joinder scheme, and chose to do business
13 with them anyway. USF ¶¶ 321-32. He therefore meets the knowledge standard,
14 having an “awareness of a high probability of fraud along with an intentional
15 avoidance of the truth.” *FTC v. Grant Connect LLC*, 763 F.3d 1094, [1101](#)-02 (9th
16 Cir. 2014); *Publishing Clearing House, Inc.*, 104 F.3d at [1171](#) (9th Cir. 1999)
17 (nominal president had “knowledge” when she knew principal was accused of
18 other crimes).

19 Importantly, neither Foti nor Marshall have introduced any documents or
20 testimony disputing this evidence. At best, both offer self-serving declarations.⁶
21 This is not sufficient. *Publishing Clearing House, Inc.*, 104 F.3d at [1171](#) (9th Cir.
22 1999) (self-serving affidavits do not create genuine disputes). Without such
23 evidence, they cannot defeat summary judgment.

24
25 ⁶ Foti’s only supporting witness is Peter Rodriguez, who claims he did “not
26 make any promises or guarantees,” but does not say what he actually told
27 consumers. DE [308](#) at Page ID 10147 ¶ 4. As the FTC has proven, the
28 defendants’ other sales staff told consumers they had a high likelihood of success.
Rodriguez’s declaration does not controvert that proof.

II. Foti's Argument that the Emails are Inauthentic is Specious.

1 The Receiver found the emails in question on the defendants' premises, then
2 copied them, and produced them to the FTC. DE [23](#) at Page ID 2354 and DE [57](#) at
3 Page ID 3088 (detailing that the Receiver is made the custodian of all the
4 Receivership's documents and assets). These documents are, therefore, authentic,
5 and business records certified by the Receiver. *MGM Studios Inc. v. Grokster,*
6 *Ltd.*, 454 F. Supp. 2d 966, [972](#) (C.D. Cal. 2006) (emails of individual employees
7 authenticated through production by corporate defendant); *Burgess v. Premier*, 727
8 F.2d 826, [835-36](#) (9th Cir. 1984) (documents found on the defendants' premises
9 were authentic).⁷ The majority of the emails are further authenticated by having
10 been found on one of Foti's computers. DE [284-8](#), Theisman Decl., at Page ID
11 7483-84 ¶¶ 2-4 (detailing, with declarations in support, how all emails with the
12 FTC-RAD-001 prefix were found on computers in Foti's office). As further
13 indicated in *Burgess*, to overcome this prima facie showing, Foti would need to
14 prove there was a "motive . . . to store false documents." 727 F.2d at [835](#). He
15 asserts that Kutzner could have altered them, but provides no basis for why
16 Kutzner would alter the documents at issue, let alone evidence to support such
17 conjecture.⁸ Indeed, because the documents are at least as damning for Kutzner, it
18

19
20 ⁷ The FTC need only establish a *prima facie* case of authenticity. *E.W.*
French & Sons, Inc. v. General Portland Inc., 885 F.2d 1392, [1398](#) (9th Cir. 1988).
21 Once it has done so, the emails are deemed authentic and Foti is limited to
22 introducing evidence to contradict that finding. *Id.*; *Orr v. Bank of Am., NT & SA*,
23 285 F.3d 764, [776](#) (9th Cir. 2002) ("We now hold that when a document has been
24 authenticated by a party, the requirement of authenticity is satisfied as to that
25 document with regards to all parties, subject to the right of any party to present
26 evidence to the ultimate fact-finder disputing its authenticity.")

27 ⁸ Any argument that all of the emails must be inauthentic because somebody
28 else at the office had access to employee email accounts ignores reality. At an
office with an enterprise email system there are always other people who can
access an individual's computer and emails. This is why the law requires that Foti
establish a motive.

1 would have been against Kutzner's interest to have forged and then stored them.
2 Nonetheless, Foti would have the court believe, without any proof of actual
3 manipulation of any the documents⁹ or motive for doing so, that they are all
4 inherently inauthentic. This is not the law. *See Scott v. Harris*, 550 U.S. 372, [380](#)
5 (2007) ("When opposing parties tell two different stories, one of which is blatantly
6 contradicted by the record, so that no reasonable jury could believe it, a court
7 should not adopt that version of the facts for purposes of ruling on a motion for
8 summary judgment.").

9 **III. Arguments that Documents Found on Site are Inadmissible Because**
10 **They Were Not in the Hands of Consumers are Also Specious.**

11 The documents found on site are not "irrelevant," as Foti appears to argue.
12 Without any basis, he asserts that evidence of mailers, scripts, and correspondence
13 confirming the allegations in the FTC's consumer declarations are "irrelevant." He
14 cites no support for this contention, because he cannot. These documents are
15 plainly relevant because they have a "tendency to make a fact more or less
16 probable than it would be without the evidence." FRE [401](#)(a). Furthermore, like
17 the emails, these documents have been authenticated by the Receiver.

18 **IV. The Expert Report is Sound, and Devastating.**

19 As Dr. Isaacson explains in his concurrently filed response, none of Foti's
20 criticisms have any merit. Dr. Isaacson testifies that he asked appropriate
21 questions in accordance with generally accepted procedures, appropriately blinded
22 the study to hide the purpose of the study from the respondents while giving the
23 respondents comfort in the legitimacy of the survey, determined that the response
24 rate was more than sufficient, and determined there were no inherent biases. As
25 Dr. Isaacson forcefully explains, his survey is not like the one in *In re Autozone*,

26
27
28 ⁹ Foti has in his possession all of the available metadata associated with the
emails.

1 *Inc.*, [2016 U.S. Dist. LEXIS 105746](#) (N.D. Cal. Aug. 10, 2016), and suffers from
2 none of the alleged defects of that survey. Unlike that survey, Dr. Isaacson’s
3 survey did not disclose the nature or purpose of the survey and has a much higher
4 response rate, greater than 20%. As Dr. Isaacson explains, even if this study had a
5 low response rate, it does not follow that it suffered from nonresponse bias or self-
6 interest bias. Furthermore, Dr. Isaacson explains that there is no basis to conclude
7 that the respondents answered with any biases, for or against the FTC.

8 While the FTC has put forward competent expert testimony on the nature
9 and sufficiency of the survey, neither Marshall nor Foti have countered with any
10 contrary expert testimony, either in the form of their own survey or expert critique
11 of Dr. Isaacson’s survey. The Court, therefore, has uncontroverted testimony
12 establishing the legitimacy of this study. *FTC v. Stefanchik*, 559 F.3d 924, [929](#)
13 (9th Cir. 2009) (criticizing survey not sufficient to defeat summary judgment).
14 Even were that not the case, any critiques like those levelled by Foti’s lay lawyer
15 would only go to weight, not admissibility. *See, e.g., Fortune Dynamic, Inc. v.*
16 *Victoria’s Secret Stores Brand Mgmt, Inc.*, 618 F.3d 1025, [1036](#) (9th Cir. 2010)
17 (“We have long held that survey evidence should be admitted ‘as long as [it is]
18 conducted according to accepted principles and [is] relevant.’ Furthermore, we
19 have made clear that ‘technical inadequacies’ in a survey, ‘including the format of
20 the questions or the manner in which it was taken, bear on the weight of the
21 evidence, not its admissibility.’”) (internal citations omitted); *FTC v. John Beck*
22 *Amazing Profits LLC*, 865 F. Supp. 2d 1052, [1065](#) (C.D. Cal. 2012) (admitting
23 consumer survey in FTC case where FTC was identified as a sponsor and the
24 consumers were told that the FTC’s mission is “protect[ing] American consumers
25 by monitoring and regulating businesses”). As a result, Foti and Marshall are left
26 with a devastating survey, establishing the Corporate Defendants systematically
27 lied to consumers.
28

V. The Objections to the Monetary Relief are Meritless.

1 The FTC has met its burden in proving revenues to establish the claimed
2 equitable monetary relief judgment. Because the uncontroverted testimony is that
3 all or nearly all of the Corporate Defendants' revenue came from the mass joinder
4 business at issue, the FTC's accountant reviewed the bank statements to determine
5 revenue, less chargebacks and refunds. Having done so, the defendants now have
6 the burden of showing what amounts, if any, should be further deducted. *FTC v.*
7 *Commerce Planet, Inc.*, 815 F.3d 593, [603](#)-04 (9th Cir. 2016) (describing burden
8 shifting process in determining redress figures in FTC cases). Marshall does
9 nothing to challenge the FTC's evidence or calculation.¹⁰ Foti claims the figures
10 are not reliable because they are not consistent with revenue figures on an
11 unrelated client list. DE [304](#) at Page ID 9751. He has the banking records and the
12 spreadsheet the FTC's accountant relied on to establish if the customer list shows
13 an actual conflict. He has not done so. Furthermore, there is no testimony or basis
14 for concluding that this separate spreadsheet accounts for all revenues. *See FTC v.*
15 *Inc21.com Corp.*, 745 F. Supp. 2d 975, [1013](#) fn.25 (N.D. Cal. 2010) (opposing
16 billing spreadsheet "bereft of foundation or analysis" insufficient to create an issue
17 for summary judgment). Foti also complains unquantified further amounts should
18 be deducted, but it is his burden to identify any such appropriate amounts. *Id.* at
19 1013; *Commerce Plant, Inc.*, 815 F.3d at [604](#) ("Any risk of uncertainty at this
20 second step 'fall[s] on the wrongdoer whose illegal conduct created the
21 uncertainty.'") (quoting *FTC v. Bronson Partners LLC*, 654 F.3d 359, [368](#) (2d Cir.
22 2011)). As Brookstone's "CFO," and a person who reviewed Brookstone's income
23 and invoices, Foti would appear to be well suited to make those determinations.
24

25
26
27 ¹⁰ At most, he mischaracterizes the FTC's explicit argument, failing to note the
28 FTC is seeking from him approximately \$2 million, the amount of revenues while
he had control. DE [284-1](#) at Page ID 7062-63; DE [284-2](#) at Page ID 7074.

1 **VI. Conclusion**

2 Foti and Marshall defrauded consumers out of millions of dollars. Summary
3 judgment is appropriate and they deserve orders holding them monetarily liable for
4 their misconduct and preventing them from engaging in similar misconduct in the
5 future.

6 /s/ Benjamin J. Theisman
7 BENJAMIN J. THEISMAN
8 GREGORY J. MADDEN
9 Attorneys for Plaintiff
10 FEDERAL TRADE COMMISSION

11 Executed this 14th day of August, 2017.
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PROOF OF SERVICE

I, Benjamin J. Theisman, on August 14, 2017, served the PLAINTIFF'S
REPLY MEMORANDUM IN SUPPORT OF SUMMARY JUDGMENT
AGAINST DEFENDANTS JEREMY FOTI AND CHARLES MARSHALL AS
TO ALL COUNTS, and all supporting documents, through the ECF system.

/s/ Benjamin J. Theisman

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GX303

**United States of America
Before the Federal Trade Commission**

In the Matter of:

Intuit Inc., a corporation.

Docket No. 9408

Expert Report of Nathan Novemsky, Ph.D.

December 9, 2022

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I. Summary of Opinions

1. I am a Professor of Marketing at the School of Management at Yale University in New Haven, Connecticut. I also have an appointment as a Professor of Psychology at the Department of Psychology at Yale University and have served on the editorial boards of leading consumer research journals, such as *Journal of Consumer Psychology*, *Journal of Consumer Research*, *Journal of Marketing Research*, and *Organizational Behavior and Human Decision Processes*. Counsel supporting the Federal Trade Commission's ("FTC") complaint in this matter ("Complaint Counsel" or "Counsel") asked me to evaluate Intuit Inc. ("Intuit")'s advertising and marketing of its TurboTax online tax preparation services as "free," including by designing and supervising an online consumer perception survey.

2. It is my understanding that, for many years, Intuit has had national marketing campaigns that advertised "free" versions of TurboTax, including TurboTax Free Edition.¹ In these marketing campaigns, Intuit communicated to potential customers that they can file their taxes for free with TurboTax even though TurboTax is (and has been) free for only some consumers.² Intuit disseminated a number of advertisements that made claims regarding free filing through multiple channels. Examples of such advertisements include:

- In 2015, Intuit played a video advertisement during the Super Bowl that included claims such as "you can file on TurboTax for absolutely nothing."³ Text that appeared briefly on the screen during the ad said in part "TurboTax Federal Free Edition is for simple U.S. returns only."⁴
- Over several tax seasons, Intuit disseminated video advertisements nationally on television channels and online in which "free" is essentially the only word spoken by the actors in the commercials, until the voice over at the end of the advertisement which stated "That's right. TurboTax Free is free. Free, free free

¹ I understand that Intuit advertises, markets, promotes, distributes, and sells TurboTax, a commonly used online tax preparation service that enables users to prepare and file their income tax returns. Complaint, *In the Matter of Intuit Inc.*, March 28, 2022 ("Complaint"), ¶ 4; Answer and Affirmative Defenses of Respondent Intuit Inc., *In the Matter of Intuit Inc.*, April 14, 2022 ("Answer"), ¶ 4. I also understand that Intuit offers a free tax preparation option for consumers who qualify. That tax preparation option has been called "TurboTax Free Edition" since tax year 2017. Complaint, ¶ 6, ¶ 13; Respondent Intuit Inc.'s Statement of Material Facts as to Which There Exists a Genuine Issue for Trial, *In the Matter of Intuit Inc.*, p. 9. See, e.g., footnote 125.

² Only some taxpayers can use TurboTax for free, depending on their tax situation. See RX 3. See also Complaint, ¶ 6; Answer, ¶ 6. In tax years 2018 and 2019, consumers filing their taxes on a Form 1040 without any attached schedules were eligible for TurboTax Free Edition. Complaint Counsel Statement of Material Facts, pp. 15–16; Declaration of Cathleen Ryan in Support of Intuit Inc.'s Opposition to Complaint Counsel's Motion for Summary Decision, *In the Matter of Intuit Inc.*, August 29, 2022 ("Declaration of Cathleen Ryan"), ¶¶ 6–7. However, only around a third of taxpayers during those years filed their returns on a Form 1040 without any attached schedules. See GX 342, ¶¶ 215–217 (calculating based on IRS-reported data, that, in tax year 2018, 69.54% of returns filed were not "[r]eturns that filed Form 1040 with no Schedules 1-6 or Schedule A attached"); GX 336; GX 342, ¶¶ 215, 218–219 (calculating, based on IRS-reported data, that, in tax year 2019, 63.43% of returns filed were not "[r]eturns that filed Form 1040 with no Schedules 1-6 or Schedule A attached"); GX 337.

³ See RX 200.

⁴ See RX 200; RX 17.

free.” The ads included a small text that appeared briefly on the screen stating in part “[f]or simple U.S. returns.”⁵

- As recently as 2022, Intuit disseminated video ads that similarly repeated the word “free,” followed by small text that appeared briefly on the screen stating in part “for simple U.S. returns only. See if you qualify at turbotax.com;” and a voiceover stating “That’s right, TurboTax Free Edition is Free. See details at TurboTax.com.”⁶
- The “simple return” language was included in various TurboTax advertisements, such as in video ads, and on TurboTax’s website.⁷

3. I understand that Intuit’s “free” TurboTax marketing campaign was widely disseminated and continued for multiple years, including during the last tax season for tax year 2021 taxes.⁸

4. In light of Intuit’s long-running and pervasive marketing campaign, one area of interest relevant to this case is the impact of Intuit’s advertising and marketing on the perceptions of those taxpayers who are not eligible to use a free version of TurboTax under Intuit’s eligibility criteria. This issue is informed by the likelihood of these taxpayers having the misimpression that they can file their income taxes for free using TurboTax, and the extent to which TurboTax sources (such as TurboTax advertisements and information on the TurboTax website) play a role in forming these misimpressions.

5. A related issue is these taxpayers’ understanding of the phrase “simple U.S. returns,” which is the term Intuit uses in its advertising of TurboTax. To address these questions, I designed and implemented an online consumer perception survey (hereafter, the “TurboTax Perception Survey” or the “Perception Survey”). The design, implementation, and fielding of the TurboTax Perception Survey, and analysis of the results were consistent with guidelines for survey research offered in litigation set forth in the Federal Judiciary Center’s “Reference Guide on Survey Research” (included in the *Reference Manual on Scientific Evidence*) and also articulated in the *Manual for Complex Litigation* (also published by the Federal Judiciary Center).⁹ I closely followed the standards put forth in these guidelines, and followed standard

⁵ See, e.g., RX 201; GX 348; GX 349; GX 350; GX 351; GX 356.

⁶ See, e.g., GX 200; RX 202.

⁷ See, e.g., RX 19; RX 201; RX 202; GX 200; GX 348; GX 349; GX 350; GX 351; GX 356; Declaration of Cathleen Ryan ¶¶ 30–32, 56–58.

⁸ See, e.g., footnote 125.

⁹ For a detailed discussion of scientific guidelines for surveys, see, e.g., Shari Seidman Diamond, “Reference Guide on Survey Research,” in *Reference Manual on Scientific Evidence*, Third Edition, (Washington, D.C.: The National Academies Press, 2011), pp. 359–423 (“Diamond (2011)”); Federal Judicial Center, *Manual for Complex Litigation*, Fourth Edition, (2004) (“Manual for Complex Litigation”), pp. 102–104.

scientific methods to ensure the reliability of the results.¹⁰ The TurboTax Perception Survey sample was chosen to be representative of the population of interest and the results of the survey can be generalized to the population at large with a degree of scientific certainty.¹¹

6. I designed the TurboTax Perception Survey to address several key questions of interest about the group of taxpayers who do not qualify for TurboTax Free Edition under Intuit's criteria. These questions of interest include:

- Whether, and to what extent, these taxpayers have the misimpression that they can file income taxes for free using TurboTax;
- Whether, and to what extent, these taxpayers point to TurboTax advertisements and the TurboTax website (or both) as playing a role in forming the misimpression that they can file income taxes for free using TurboTax; and
- Whether, and to what extent, these taxpayers (none of whom have a "simple" U.S. tax return, as Intuit uses the term) have the misimpression that their tax returns meet TurboTax's definition of a "simple U.S. return."

7. I analyzed the results of the TurboTax Perception Survey for two subgroups of the survey sample. The main group of interest is Group A, which consists of respondents who indicated that they have not filed their income taxes using TurboTax within the past three years and, as such, are less likely to respond to survey questions based on their past usage of TurboTax. I also collected responses from a second group, Group B, which consists of respondents who indicated that they have filed their income taxes using a *paid* online version of TurboTax within the past three years. Group A and Group B respondents could not have used TurboTax Free Edition to file their 2021 income taxes under Intuit's qualification criteria. My review of the data from the TurboTax Perception Survey, as well as evidence from produced documents and case facts, provide strong evidence for the following conclusions:

¹⁰ Manual for Complex Litigation, p. 103. These criteria include the following: the population was properly chosen and defined; the sample chosen was representative of that population; the data gathered were accurately reported; the data were analyzed in accordance with accepted statistical principles; the questions asked were clear and not leading; the survey and pretests were conducted by qualified persons following proper interview procedures; and the process was conducted so as to ensure objectivity. I discuss these in detail in Section III.

¹¹ See Section III.A.

8. *A substantial portion of the taxpayers who do not qualify to use TurboTax Free Edition under Intuit's criteria have the misimpression that they can file their income taxes for free using TurboTax.*

- Among Group A respondents (who had not used TurboTax in the past 3 years), 52.7% indicated that they think they can file their 2021 income taxes for free using TurboTax online software.
- Among Group B respondents (who had used a paid version of TurboTax in the past 3 years), 24.1% indicated that they think they can file their 2021 income taxes for free using TurboTax online software. Because Group B respondents have recently paid to use TurboTax, they are expected to be less likely than Group A respondents to form the misperception that they can file for free using TurboTax. Nevertheless, the misperception still existed in this subgroup for a substantial set of consumers.

9. *Intuit's TurboTax advertisements and the TurboTax website are the two most common sources identified as playing a role in taxpayers forming the misimpression that they can file their income taxes for free using TurboTax. A vast majority of the mistaken taxpayers identified at least one of these two sources as playing a role in forming their misimpression.*

- Among Group A respondents (who had not used TurboTax in the past 3 years) who thought that they could file income taxes for free using TurboTax online software, 72.3% picked either TurboTax advertisements or the TurboTax website, or both, as a source for that (inaccurate) belief. In fact, the two most commonly identified sources of the misperceptions that they would file for free with TurboTax were TurboTax advertisements (46.0%) and the TurboTax website (46.9%).
- Among Group B respondents (who had used a paid version of TurboTax in the past 3 years) and who thought that they could file income taxes for free using TurboTax online software, 73.5% picked either TurboTax advertisements or the TurboTax website, or both, as sources of that (inaccurate) belief. The most commonly identified sources of that misperception were TurboTax advertisements (46.9%) and the TurboTax website (61.2%).

10. *A substantial portion of the taxpayers who are not eligible to use TurboTax Free Edition under Intuit’s criteria (and hence, do not have a “simple U.S. return,” as Intuit uses the term) nevertheless have the misimpression that their returns meet TurboTax’s definition of a “simple U.S. return.”*

- TurboTax Perception Survey respondents have all been selected from potential taxpayers who do not satisfy Intuit’s criteria for filing their 2021 tax returns for free using TurboTax Free Edition. In other words, no respondent has a “simple U.S. return” as Intuit uses the term. Nevertheless, 55.0% of Group A respondents (who had not used TurboTax in the past 3 years) were under the misimpression that their 2021 income tax return meets Intuit’s definition of a “simple U.S. return.” The share of such respondents was 28.6% for Group B (who had used a paid version of TurboTax in the past 3 years).

11. *The results of the TurboTax Perception Survey, [REDACTED] [REDACTED] provide strong evidence that Intuit’s marketing is the most likely source of these consumer misperceptions.*

II. Qualifications and Assignment

12. I hold a Ph.D. and M.A. in Social Psychology from Princeton University. I am an expert in the psychology of judgment and decision-making, an area that overlaps with behavioral economics and consumer behavior. My fields of expertise are consumer decision making, consumer experiences, consumer information processing, marketing research, and consumer psychology. Most of my research focuses on individual decision-making—the manner in which individuals acquire and process information when forming perceptions and preferences, the effect of product attributes (such as price and product features) and information presentation on consumers’ purchase and consumption decisions, and the effect of different marketing mix activities (such as advertising) on consumers’ buying decisions and consumer experiences. This area of research has focused on demonstrating and explaining the systematic ways in which consumers deviate from rational economic models and predictions.

13. As noted in Section I, I have served on the editorial boards of leading consumer research journals. I have also been published in the leading marketing and psychology journals, including *Psychological Science*, *Journal of Behavioral Decision Making*, *Journal of Consumer Psychology*, *Journal of Consumer Research*, *Journal of Marketing Research*, *Organizational Behavior and Human Decision Processes*, and *Journal of Risk and Uncertainty* on topics that include how people make judgments and decisions based on the

information in front of them, how they know what they like, how the way they frame decisions affects the choices they make, how they choose and evaluate gifts, and how their goals influence their behavior. I am also an active member of the Yale Center for Customer Insights. As part of the Center, I partner with practitioners to develop new insights into customer behavior that are both relevant to practitioners and new to the academic literature. My professional and academic experience, education, and publications are described in more detail in the CV attached as Appendix A to this report.

14. My teaching responsibilities at Yale University's School of Management include two doctoral courses that examine advanced research topics in the area of consumer behavior, judgment, and decision-making. I also teach or have taught several different courses for graduate students who are enrolled in the MBA program or the Executive MBA program at Yale, including Consumer Behavior, Marketing Management, Customer Insights and Applications, and Probability Modelling and Statistical Estimation. I have taught and given seminars to mid-level and senior-level executives in major corporations in North America, Europe, and Asia.

15. In addition to my research and teaching, I have worked with many companies to better understand consumer perception, judgment, and choice issues in many different industries (including consumer products, high technology, healthcare, and financial services).

16. Over my career, I have conducted, supervised, or evaluated hundreds of surveys, including many related to consumer behavior and information processing, customer satisfaction, branding, consumer experiences, and advertising-related issues. I have also worked as a consultant for many organizations on a variety of marketing and buyer behavior topics, often with a focus on how to communicate with consumers.

17. I have served as an expert and a consultant to experts in prior litigations involving various marketing and buyer behavior issues, consumer confusion, false advertising, branding, and other areas. I have provided expert opinions on issues related to consumer understanding of financial documents, consumer package goods, software, and other products and services, including reactions to advertising, digital communication, face-to-face marketing, and other marketing. A list of my expert testimony over the past four years is attached as Appendix B.

18. My expertise in consumer psychology, consumer decision-making, consumer experiences, and consumer information processing are relevant in evaluating Intuit's advertising and marketing of its TurboTax online tax preparation services as "free."

III. Survey Design

19. The design, implementation, and fielding of the TurboTax Perception Survey, and analysis of the results were consistent with guidelines for survey research offered in litigation set forth in the Federal Judiciary Center’s “Reference Guide on Survey Research” (included in the *Reference Manual on Scientific Evidence*) and also articulated in the *Manual for Complex Litigation* (also published by the Federal Judiciary Center).¹² I closely followed the standards put forth in these guidelines, and followed standard scientific methods to ensure the reliability of the results, including the following:

- The population was properly chosen and defined;
- The sample chosen was representative of that population;
- The data gathered were accurately reported;
- The data were analyzed in accordance with accepted statistical principles;
- The questions asked were clear and not leading;
- The survey and pretests were conducted by qualified persons following proper interview procedures; and
- The process was conducted so as to ensure objectivity.¹³

20. In the following sections, I describe in detail the design of the survey, as well as the steps I took to ensure that the survey was designed and implemented consistent with rigorous scientific standards.

A. Target Population and Sample Selection

21. A key step in survey design is the selection of the appropriate target population (or universe) that is of interest.¹⁴ The target population is the segment of the population whose characteristics, beliefs, behavior, and perceptions the survey is intended to represent.¹⁵ The consumers of interest (and the appropriate target population) for the Perception Survey are potential taxpayers who at the time the survey was conducted were considering using an online tax software to file their 2021 taxes and would not have qualified for TurboTax Free Edition. Consistent with this target, I recruited into the survey respondents who: (i) were planning to file an income tax return in 2022 (based on income in 2021);¹⁶ (ii) make or

¹² For a detailed discussion of scientific guidelines for surveys, *see, e.g.*, Diamond (2011); *Manual for Complex Litigation*, pp. 102–104.

¹³ *Manual for Complex Litigation*, p. 103.

¹⁴ Diamond (2011), p. 376 (“One of the first steps in designing a survey or in deciding whether an existing survey is relevant is to identify the target population (or universe).”).

¹⁵ Diamond (2011), p. 376 (“The target population consists of all elements (*i.e.*, individuals or other units) whose characteristics or perceptions the survey is intended to represent.”).

¹⁶ *See* Appendix E, Question S60.

contribute to tax-filing decisions in their household;¹⁷ (iii) have considered or might consider using an online tax software;¹⁸ and (iv) who would not have qualified for TurboTax Free Edition if they were to use TurboTax software to file their 2021 taxes.¹⁹

22. The survey sample does not include respondents who had already filed an income tax return in 2022, since (1) such consumers may already know for a fact whether they are eligible to use TurboTax to file their returns for free, for example, by virtue of attempting to use TurboTax; and (2) the intended audience for TurboTax marketing at the time the survey was conducted was taxpayers who have not yet filed their returns. Because the survey was conducted between March 11, 2022, and March 24, 2022, the survey sample includes people who were planning to file their taxes in the last five weeks prior to the tax filing deadline as well as anybody who planned to file their taxes after having been granted an extension. This corresponds to a substantial portion of all tax filers.²⁰ Fielding the survey in this time period has the advantage of reaching potential taxpayers when tax filing is more top-of-mind and as many consumers are thinking in earnest about how they will file their taxes. It is this mindset that is most relevant to the issues at hand because this is the time when potential misperceptions about the cost filing options are most likely to be consequential. If the survey was conducted much earlier in the tax season, consumers who have not yet filed their tax returns may not have been thinking about tax filing or engaging with the topic of tax filing. As such, the attention consumers pay to advertisements about tax filing and how carefully they have thought about how they will approach filing their taxes would not be representative of their behavior when they are actually making tax filing decisions.

23. The survey sample does not include respondents who do not contribute to tax filing decisions in their household as the opinions, beliefs, and perceptions of such consumers are

¹⁷ See Appendix E, Question S70. Though I include respondents who contributed to, but did not make, tax-filing decisions, I exclude any respondents who don't know the tax preparation methods or the online tax software (if applicable) they have actually used when filing their income tax returns in any of the past 3 years. See Appendix E, Questions S120, S130.

¹⁸ See Appendix E, Question S80.

¹⁹ Specifically, one of the qualification criteria for the Perception Survey was to satisfy one or more of the following three conditions: (1) earned income either from unemployment, working as an independent contractor, self-employment, or a small business owner (reported on a 1099-NEC, 1099-MISC, or Schedule C), stock sales, or rental properties (See Appendix E, Question S90); (2) had only W-2 income, but plans to itemize deductions (See Appendix E, Question S100); or (3) had only W-2 income and plans to take the standard deduction, but received alimony or received, exercised, or disposed of stock options issued by an employer as part of their compensation (See Appendix E, Question S110).

²⁰ For example, an analysis of IRS data from 2015 suggests that approximately 40 percent of tax filers filed their taxes either in the five weeks prior to the tax filing deadline or between the tax filing deadline and the due date for tax return extensions. See Ben Casselman, "Everyone Files Their Taxes at the Last Minute," *FiveThirtyEight*, April 15, 2016, available at <https://fivethirtyeight.com/features/everyone-files-their-taxes-at-the-last-minute>. It was reported that, on average, nearly a third of taxpayers file their taxes in the three weeks leading up to the tax filing deadline. See Elliot Ramos, "How Many Taxpayers Are Procrastinators? Nearly 1 in 3, IRS Data Shows," *NBC News*, April 14, 2022, available at <https://www.nbcnews.com/data-graphics/data-point-almost-one-third-taxpayers-file-last-minute-rcna24093>. An Intuit publication reported that, according to the IRS, "20–25% of all Americans [will] wait until the last two weeks before the deadline to prepare their tax returns." See "What, Me Worry? Last-Minute Taxes," *Intuit*, December 1, 2022, available at <https://turbotax.intuit.com/tax-tips/tax-extensions/what-me-worry-last-minute-taxes/L6g58eRCf>.

not relevant for addressing the issues of interest.²¹ As such, the survey sample includes respondents who make tax filing decisions, either alone, or jointly with others in their households. Also included in the sample are those who contribute to tax filing decisions in their households even though they are not necessarily the decision maker.²² The inclusion of the latter group in the sample is appropriate: if these taxpayers have a misimpression about whether they can use TurboTax to file their taxes for free, that misimpression would be relevant by virtue of those taxpayers playing a role in the final tax filing decisions for their households. The robustness analyses I perform (discussed in Section IV.D below) also illustrate that the former group (*i.e.*, the respondents who make tax filing decisions alone or jointly) constitutes 95% of the final sample.²³ Limiting the sample to this group has a negligible effect on survey results and does not impact my conclusions.²⁴

24. To identify those who would not have qualified for TurboTax Free Edition to file their 2021 taxes, I consulted the criteria used by Intuit. Based on Intuit's criteria, taxpayers who were not eligible to use TurboTax Free Edition (for filing 2021 taxes) included those who had (i) itemized deductions, (ii) unemployment income reported on a 1099-G, (iii) business or 1099-NEC income, (iv) stock sales, (v) rental property income, or (vi) credits, deductions and income reported on other forms or schedules.²⁵

25. Consistent with Intuit's criteria described above, I designed screening questions to ensure that the respondents included in the sample satisfy one or more of the following conditions that make them ineligible to use TurboTax Free Edition:

- Earned income in 2021 from at least one of the following sources: unemployment (reported on a 1099-G), working as an independent contractor, self-employment, or a small business owner (reported on a 1099-NEC, 1099-MISC, or Schedule C), stock sales, or rental properties;²⁶
- Planned to itemize deductions when filing 2021 taxes;²⁷ or
- Received alimony or received, exercised, or disposed of stock options issued by an employer as part of their compensation.²⁸

²¹ These include respondents who responded "I do not contribute to the tax-filing decisions," or "Don't know / Not sure" when asked "Which of the below best describes your involvement in tax filing in your household?" See Appendix E, Question S70.

²² See Appendix E, Question S70.

²³ These respondents constitute 380 out of 404 respondents in Group A (who had not used TurboTax in the past 3 years), 196 out of 203 respondents in Group B (who had used a paid version of TurboTax in the past 3 years), or collectively 576 out of 607 total respondents (95%).

²⁴ See Section IV.D and Appendix J.

²⁵ See, *e.g.*, RX 3.

²⁶ Appendix E, Question S90.

²⁷ Appendix E, Question S100.

²⁸ Appendix E, Question S110.

26. Importantly, while the above conditions are based upon Intuit’s eligibility criteria as outlined in its disclosures for what constitutes a “simple U.S. tax return,” my screening questions do not require respondents to understand the full complexity of Intuit’s criteria. Rather, my screening questions simply ask respondents whether any of the above conditions apply to their own tax situation, broken down into separate inquiries, in a manner that can be easily understood by a potential taxpayer (which was confirmed by pre-test results, as discussed in Section III.F). Individuals who contribute to preparing taxes in their household can be reasonably expected to know their sources of income, have an expectation about whether they will itemize deductions, and know whether they received alimony or received, exercised, or disposed of stock options issued by an employer as part of their compensation.

B. Survey Structure

27. I designed and implemented the TurboTax Perception Survey to address several key questions of interest about the group of taxpayers who do not qualify for TurboTax Free Edition under Intuit’s criteria. These questions of interest include:

- Whether, and to what extent, these taxpayers have the misimpression that they can file income taxes for free using TurboTax;
- Whether, and to what extent, these taxpayers point to TurboTax advertisements and the TurboTax website (or both) as playing a role in forming the misimpression that they can file income taxes for free using TurboTax; and
- Whether, and to what extent, these taxpayers (none of whom have “simple” U.S. tax returns, as Intuit uses the term) have the misimpression that their tax returns meet TurboTax’s definition of a “simple U.S. return.”

28. In order to address these questions, I devised the following three-pronged approach:

- I first ask whether or not the respondents (none of whom are eligible to use TurboTax Free Edition) think they can file their 2021 income taxes for free using TurboTax online software.
- I then present an open-ended question, asking the respondents to explain why they think (or do not think) they can file their 2021 income taxes for free using TurboTax online software. This question serves as prelude to the next question, encouraging the respondents to consider the factors that inform their opinions regarding their ability to use TurboTax online software for free.

- Third, I ask the respondents which sources played a role in them forming their impression regarding their ability to use TurboTax online software for free.

29. The first prong of this structure is designed to assess taxpayers' existing opinions and beliefs in the marketplace. Given that Intuit has undertaken pervasive marketing campaigns over several years and employed other marketing methods (such as via the content it chose to present on its website) that allegedly misled consumers, the actual existence and extent of misimpressions among taxpayers about whether or not they can file their taxes for free using TurboTax is an empirical question. Once this question is answered, the follow-up prongs then investigate the factors that play a role in forming these misimpressions. The results of the first prong of the TurboTax Perception Survey on their own do not tie the existing misimpressions regarding TurboTax Free edition to any one TurboTax advertisement. However, to the extent that the follow-up questions identify information provided by Intuit (such as information in TurboTax advertisements or on TurboTax's website) as a factor in forming the misimpressions, [REDACTED] [REDACTED] the survey results can provide strong evidence that Intuit's marketing of "free" TurboTax is the most likely source of consumer misimpressions.²⁹

30. In designing the TurboTax Perception Survey, I considered whether a test / control framework would be appropriate.³⁰ I concluded that a test / control framework would be inappropriate for the objectives of this survey—that is, to measure the extent of taxpayers' opinions and beliefs as to whether they can file their taxes for free using TurboTax online software.³¹ In a test / control design, the focus is not on measuring existing consumer perceptions, but instead “on the difference between the response level of the experimental group and that of the control group.”³² A critical component of this framework is the ability to identify a control group that has not been exposed to the allegedly deceptive claims so that

²⁹ I discuss the evidence that Intuit is the primary cause of the misimpressions in Section V below.

³⁰ Diamond (2011), p. 398 (“In the simplest version of [a test / control] experiment, respondents are assigned randomly to one of two conditions. For example, respondents assigned to the experimental condition view an allegedly deceptive commercial, and respondents assigned to the control condition either view a commercial that does not contain the allegedly deceptive material or do not view any commercial. Respondents in both the experimental and control groups answer the same set of questions about the allegedly deceptive message. The effect of the commercial's allegedly deceptive message is evaluated by comparing the responses made by the experimental group members with those of the control group members.”).

³¹ Jacob Jacoby, “Experimental Design and the Section of Controls in Trademark and Deceptive Advertising Surveys,” *Trademark Reporter* 92, no. 1, 2002, pp. 890–956 at 956 (“First, although fully experimental designs are often the preferred strategy, not all real-world questions are amenable to the application of such designs. Scientifically acceptable alternatives do exist, including quasi-experimental designs (some of which do not rely on control groups) and non-experimental Structural Equation Modeling that generally does not involve control groups.”).

³² Diamond (2011), p. 399.

their perceptions are not tainted by the very claims being tested in the survey.³³ Test group respondents are shown a stimulus (such as a commercial) that contains the alleged deceptive claims, whereas control group respondents are shown a stimulus that does not contain the alleged deceptive claims (or are shown no stimulus at all), and the responses from each group are compared. This allows the researcher to isolate the influence of the single stimulus on the test group, netting out factors such as pre-existing beliefs that are unrelated to the deceptive contents of the stimulus.³⁴

31. Using a test / control framework is appropriate when feasible and can be advantageous as it can be used to directly measure the impact of a particular deception. However, such a test / control framework is not appropriate when there is no suitable control group, nor is it appropriate when the nature of the deception cannot realistically be replicated in the survey environment. In designing the Perception Survey, I had concerns regarding both of these dimensions due to the nature of Intuit's marketing. As discussed in Section I above, Intuit undertook long running and pervasive marketing campaigns in which the allegedly deceptive messages were communicated to consumers repeatedly and over various communication channels. These messages were further reinforced over time, across different tax seasons.³⁵

32. These facts create at least two problems with using a test / control framework in this case. First, the limited nature of a survey stimulus is likely to severely underrepresent the extent and the cumulative impact of Intuit's allegedly deceptive practices. Second, for the test / control framework to be meaningful, it is essential to find a control group solely consisting of respondents who do not bring into the survey the very misimpressions potentially arising from Intuit's marketing for free TurboTax that such a survey is designed to address. Otherwise, any difference between the test and control groups only measures the marginal (*i.e.*, additional) impact of one particular stimulus, while ignoring any misimpressions caused by all of Intuit's prior marketing that is captured within the control group. To the extent that Intuit marketing communications have already reached many consumers (as further explored in the preliminary study described in the next paragraph), it is likely not possible to find an appropriate control group untouched by Intuit's marketing. Thus, a test / control framework would have been inappropriate to measure the extent of taxpayers' opinions and beliefs as to whether they can file for free using TurboTax.

³³ Jacob Jacoby, "Experimental Design and the Section of Controls in Trademark and Deceptive Advertising Surveys," *Trademark Reporter* 92, no. 1, 2002, pp. 890-956 at 902 ("To qualify as a 'fully experimental' design, an experiment must possess three key features: (1) the presentation or insertion of the independent variable (the presumed cause) must be under the experimenter's control; ... When any of the three key features is missing, as often is the case when attempting to assess causal propositions in the real world rather than in the lab ... we have what is termed a 'quasi-experiment.' Although not as 'clean' as experiments, quasi-experiments also enable one to draw causal inferences and important treatises have been written on how this may be accomplished.")

³⁴ Diamond (2011), p. 399.

³⁵ See, e.g., Section I, ¶2.

33. Before finalizing my survey design, I empirically investigated the extent of potential respondents' pre-existing misimpressions about their ability to file taxes for free using TurboTax. For this purpose, the marketing research firm GBK Collective ("GBK"), working under my direction, programmed and fielded a preliminary study using a small sample of respondents that have similar characteristics to the target population of the TurboTax Perception Survey. This study was based on the three-pronged approach described above and used a questionnaire similar to the final one I used for the Perception Survey. The questionnaire used in the preliminary study is shown in Appendix D. The results of the preliminary study indicated that most consumers had existing beliefs about their ability to file for free using TurboTax and supported my conclusion that a test / control framework is not appropriate in this case since identifying a representative control group untouched by Intuit's marketing and advertising is not possible.³⁶

C. Survey Questions

34. The Perception Survey consisted of two main parts: Screening Questions and Main Questionnaire. I discuss both in detail below. The survey questionnaire is shown in Appendix E and the screenshots from the programmed survey are shown in Appendix F.

35. At the beginning of the Perception Survey, I provided a welcome page and instructions, as shown below:

"Thank you for taking time to complete this brief survey.

The responses you give to our questions are very important to us. If you don't know an answer to a question, or if you don't have an opinion, please indicate this in your response.

Your answers will be kept confidential. The results of this study will not be used to try to sell you anything.

If you normally wear glasses or contact lenses when viewing a screen, please wear them before continuing to the next page. Please take this survey when you have time to complete it uninterrupted and without distractions.

- I understand and agree to these instructions.
- I do not understand or do not agree to these instructions."³⁷

³⁶ See Workpaper 1.

³⁷ See Appendix E, p. 1.

36. Respondents were asked to select one of the two options shown above after viewing the instructions. Only the respondents who indicated that they understood and agreed to the instructions were allowed to continue.³⁸

37. I also provided language to assure respondents that the survey questions about their tax situations were “asked solely for the purposes of determining whether you qualify for the survey,” as shown below:

“We will now ask you some questions about the income tax return you may file this year, based on your income in 2021.

These questions are being asked solely for the purposes of determining whether you qualify for the survey.

Your responses will be kept confidential.

When you are ready to start, please click the “Continue” button.”³⁹

38. The purpose of this language was to ensure that respondents did not provide inaccurate answers resulting from any concerns they might have had about disclosing confidential or sensitive information about their tax situation. Importantly, this language does not indicate the kind of information that would qualify a respondent for participation in the Perception Survey. Thus, it would not have had any systematic biasing effect on respondents’ answers.

1. Screening Questions

39. I included questions to screen out individuals who satisfy one or more conditions below:

- Are using a TV-based browser or video game console, an eBook reading device, or any devices other than a laptop/notebook computer, a tablet computer, a desktop computer, or a smartphone to take the survey;⁴⁰
- May have specialized knowledge or expertise by virtue of working (or their household members working) for a company providing accounting or tax preparation services or software, or in the fields of advertising, public relations, or marketing;⁴¹
- Are under 18 years old, or prefer not to disclose age information;⁴²

³⁸ See Appendix E, p. 1.

³⁹ See Appendix E, p. 3.

⁴⁰ Appendix E, Question S10.

⁴¹ Appendix E, Question S20.

⁴² Appendix E, Question S30.

- Prefer not to disclose gender information;⁴³
- Prefer not to disclose current state of residence;⁴⁴
- Already filed or are not planning to file an income tax return in 2022, based on their income in 2021;⁴⁵
- Do not contribute to or are not sure whether they contribute to tax-filing decisions in their households;⁴⁶
- Have not considered or might not consider using any online tax software when filing their 2021 income tax return;⁴⁷
- Are eligible to use TurboTax Free Edition (as explained in Section III.A above);⁴⁸
- Do not know the tax preparation methods or the online tax software (if applicable) they actually have used when filing their income tax returns in any of the past 3 years;⁴⁹
- Have filed their income tax returns using a TurboTax product that was free in the past 3 years, or do not know if they have filed income tax returns using a TurboTax product that was free in the past 3 years, if applicable.⁵⁰

40. Respondents who satisfy one or more of the criteria above were disqualified and were not allowed to continue. In addition to the conditions above, respondents who did not meet any of the following qualification criteria were also terminated.

- Respondents must indicate that they understand and agree to the survey instructions;
- Respondents must correctly enter standard Captcha text;⁵¹
- Respondents must pass an Instructional Manipulation Check.⁵²

41. Such measures are important to screen out inattentive respondents who are not reading and responding to the questions carefully.⁵³ As a further check that the results are not biased

⁴³ Appendix E, Question S40.

⁴⁴ Appendix E, Question S50.

⁴⁵ Appendix E, Question S60.

⁴⁶ Appendix E, Question S70.

⁴⁷ Appendix E, Question S80.

⁴⁸ Appendix E, Question S90–S110.

⁴⁹ Appendix E, Question S120–S130.

⁵⁰ Appendix E, Question S140.

⁵¹ Appendix E, Question S05.

⁵² Appendix E, Question S150.

⁵³ Daniel M. Oppenheimer et al., “Instructional Manipulation Checks: Detecting Satisficing to Increase Statistical Power,” *Journal of Experimental Social Psychology* 45, no. 4, 2009, pp. 867–872.

by such respondents, I include a robustness check of the results below in Section IV.D that excludes the five percent of respondents who completed the survey most slowly.⁵⁴

42. As discussed in Section III.A and listed in the conditions above, I also screened respondents to ensure that the respondents included in the sample were ineligible to use TurboTax Free Edition.

2. Main Questionnaire

43. In designing a survey, one of the considerations is whether to use open-ended questions (*i.e.*, questions that require the respondent to formulate and express an answer in his or her own words), closed-ended questions (*i.e.*, questions that provide the respondent with an explicit set of responses from which to choose), or both.⁵⁵ Both open-ended and closed-ended questions have certain advantages and the choice depends on the particular goal of the study. The Reference Guide on Survey Research explains that “[o]pen-ended questions are more appropriate when the survey is attempting to gauge what comes first to a respondent’s mind, but closed-ended questions are more suitable for assessing choices between well-identified options.”⁵⁶ Given the clear objectives of the Perception Survey described above, and the existence of well-defined options for the inquiries of interest, I designed the survey around closed-ended questions. Additionally, I also used open-ended questions to prompt respondents to contemplate the issues relevant for answering closed-ended questions and motivate them to invest more effort into the thoughts that inform their answers to closed-ended questions. Open-ended questions also provided me with insight into respondents’ unprompted, top-of-mind thoughts and impressions.

44. In the beginning of the Main Questionnaire, I included two open-ended questions:

TAT220. What is your understanding about whether or not there is a cost to filing your own income taxes using TurboTax online software?⁵⁷

TAT230. You may have already said this above, but please tell us again, in your understanding, who, if anyone, can file their taxes for free using TurboTax online software?⁵⁸

⁵⁴ I have also conducted the same analysis excluding both the five percent of respondents who completed the survey most slowly and the five percent of respondents who completed the survey most quickly. The results of these robustness tests are consistent with my baseline results. *See* Workpaper 2.

⁵⁵ Diamond, pp. 391–392.

⁵⁶ Diamond, p. 394.

⁵⁷ Appendix E, Question TAT220.

⁵⁸ Appendix E, Question TAT230.

45. By asking these questions and getting the respondents to explain their thoughts in their own words, I aimed to “center” the respondents and get them to think actively about the issues of interest in this case; specifically, their understanding of the cost of using TurboTax online software and conditions associated with using TurboTax online software for free to file taxes. These questions are followed by a closed-ended question that is aimed at assessing the degree of misimpressions regarding respondents’ ability to file for free:

TAT240. You may have already said this above, but please tell us again, which of the following best describes your understanding of filing your 2021 income taxes for free using TurboTax online software?⁵⁹

46. Based on the respondents’ responses in TAT240, I then followed up with an open-ended question asking the respondents to expand on their reasoning for their answer to TAT240.⁶⁰

47. Next, I asked the respondents to indicate the sources that played a role in forming their impression based on the answer they provided to TAT240. If a respondent’s answer to TAT240 indicated that they think they can file their income taxes for free using TurboTax, I asked the following close-ended question:

TAT255. You have stated that you think you can file your 2021 income taxes for free using TurboTax online software. Which of the following sources played a role in you forming that impression?⁶¹

If a respondent’s answer to TAT240 indicated that they do not think they can file their income taxes for free using TurboTax, then I asked the following closed-ended question:

TAT265. You have stated that you don’t think you can file your 2021 income taxes for free using TurboTax online software. Which of the following sources played a role in you forming that impression?⁶²

In both instances, I provided various response options.⁶³

48. The final main question relates to respondents’ understanding of the term “simple return.” Specifically, I asked them:

⁵⁹ Appendix E, Question TAT240. Response options for this question are discussed below in Section IV.A.

⁶⁰ Appendix E, Questions TAT250, TAT260, TAT270.

⁶¹ Appendix E, Question TAT255.

⁶² Appendix E, Question TAT265.

⁶³ See Section IV.B below.

TAT290. In some of its advertisements, TurboTax mentions “simple U.S. returns.” Do you think that your 2021 income tax return meets TurboTax’s definition of a “simple U.S. return”?⁶⁴

Based on their response to TAT290, I then followed up with an open-ended question asking respondents to expand on their reasoning for their answer to TAT290.⁶⁵

49. I note that, for the TAT240 response options, I deliberately used phrases that let respondents express their state of mind, *i.e.* “I think I can file my 2021 income taxes for free using TurboTax online software” and “I don’t think I can file my 2021 income taxes for free using TurboTax online software.”⁶⁶ I chose these phrases rather than more definitive wording that expresses certainty or specific knowledge, such as “I can file for free” or “I am sure I can file for free.” This is because the level of certainty in a consumer’s knowledge about the cost of filing with TurboTax does not need to be absolute for that consumer to try using TurboTax for free. What matters is the consumer’s state of mind and understanding because “thinking” they can file income taxes for free using TurboTax is sufficient for a customer to try using TurboTax for free.

3. Opt-Out Question

50. As I designed my survey, I was informed by Counsel that when a survey is commissioned by a federal agency, federal law requires the disclosure of the agency’s authority, purpose, routine uses, whether the survey is voluntary or mandatory, and the consequences (or lack thereof) if the requested information is not provided. I understand that such information can be provided at the beginning of the survey or at the end, where respondents are given an option to opt out. To ensure respondents understood the survey before making this decision, my survey design includes the disclosures and option to opt out at the conclusion of the survey.⁶⁷

51. Per instructions from Counsel, I asked GBK to not record any of the responses provided by those who chose to opt-out of the survey, but to keep a count of such opt-outs. GBK informed me that the number of opt-outs was 164. These respondents may have had many reasons for choosing to opt out of the survey, and there is no evidence available to suggest that the set of opted-out respondents would have systematically different responses than the set that opted-in with respect to the questions I investigated in this survey. Moreover, the fact that the number of opt-outs (164) is only a fraction of the total completes (771 between

⁶⁴ Appendix E, Question TAT290.

⁶⁵ Appendix E, Questions TAT300, TAT310.

⁶⁶ Appendix E, Question TAT240.

⁶⁷ Appendix E, Question TAT400.

Group A, who had not used TurboTax in the past 3 years, Group B, who had used a paid version of TurboTax in the past 3 years, and opt-outs) indicates that any effect the opt-outs would have on the survey results is limited. I provide an assessment of such impact in Section IV.A below.

D. Data Collection and Management

52. GBK assisted me with managing and supervising the data collection and validation process for the Perception Survey. GBK has extensive experience conducting consumer surveys.⁶⁸ They have significant experience with online surveys, offer several technical capabilities, and have robust data integrity processes.⁶⁹ I reviewed the raw survey response data recorded by GBK.

53. Survey respondents were recruited from two online data panels: Dynata and Schlesinger Group. Dynata has 60 years of experience with market research sampling and data sources.⁷⁰ Dynata manages thousands of projects each month for which they provide sample, survey programming, data processing, and other field services.⁷¹ The services are executed by industry-leading programming and project-management teams.⁷²

54. Similarly, Schlesinger Group has 50 years of experience with qualitative and quantitative data collection.⁷³ They provide global samples for online and offline research projects.⁷⁴ They have 600 highly trained staff and are industry leaders who take an active role in the development of panels and ensuring data quality.⁷⁵

55. Dynata and Schlesinger Group incorporate various processes to ensure quality control over their consumer panels, including the use of a “third-party digital fingerprint technology” which ensures survey participants have valid identities and are not responding more than once to the same survey.⁷⁶

56. I directed GBK to ensure that the demographics of the inbound sample were balanced to the U.S. Census demographics in terms of age, gender, and geographic region. (This practice is often referred to by survey practitioners as “click balancing” or “census balancing.”)

⁶⁸ “The GBK Toolbox,” *GBK Collective*, available at <https://www.gbkcollective.com/thegbktoolbox>.

⁶⁹ “The GBK Toolbox,” *GBK Collective*, available at <https://www.gbkcollective.com/thegbktoolbox>.

⁷⁰ Dynata, “Panel Quality: Our Values. Answers to ESOMAR’s 28 Questions,” 2018, p. 4.

⁷¹ Dynata, “Panel Quality: Our Values. Answers to ESOMAR’s 28 Questions,” 2018, p. 4.

⁷² Dynata, “Panel Quality: Our Values. Answers to ESOMAR’s 28 Questions,” 2018, p. 4.

⁷³ Schlesinger Group, “ESOMAR’s 28 Questions,” 2018, p. 1.

⁷⁴ Schlesinger Group, “ESOMAR’s 28 Questions,” 2018, p. 1.

⁷⁵ Schlesinger Group, “ESOMAR’s 28 Questions,” 2018, p. 1.

⁷⁶ Dynata, “Panel Quality: Our Values. Answers to ESOMAR’s 28 Questions,” 2018, pp. 14–15; Schlesinger Group, “ESOMAR’s 28 Questions,” 2018, p. 6.

E. Other Design Considerations

57. In designing the Perception Survey, I followed best practices to minimize the possibility of bias and avoid potential demand artifacts.

58. The questions I asked, the answer choices I presented, and the instructions I provided were clear.⁷⁷ Using pretests, I verified that, by and large, the respondents had no difficulty understanding the survey as I designed it and were able to answer the questions without difficulty.⁷⁸ In a few minor instances where respondents provided feedback about wording choices, I updated the survey language consistent with the feedback I received. I discuss the pretests and resulting updates below in Section III.F. To avoid the possibility of respondents guessing in response to my closed-ended questions, I presented a clear set of choices and included options such as “I do not have enough information,” and “[o]ther.”⁷⁹ I also used “quasi-filters” by including “[d]on’t know / [n]ot sure” or “I’m not sure” options in closed-ended questions.⁸⁰ The use of quasi-filters is recommended to reduce guessing “[b]y ‘signaling’ to the respondent that it is appropriate not to have an opinion,” and is consistent with academic literature on the best practices to prevent guessing.⁸¹ In addition, respondents were explicitly directed not to guess when they do not know an answer or have an opinion as part of the instructions of the TurboTax Perception Survey.⁸² They were also required to express explicit agreement with these instructions before proceeding to the survey.⁸³ In order to further discourage respondents from guessing, I provided them with the following additional instruction after they qualified for the survey:

“Please answer the questions based on the information you have and do not guess! If you do not have enough information to answer a question, please indicate so.”⁸⁴

59. Additionally, many of the questions included in the survey—such as TAT240—are the types of questions respondents would need to answer for themselves when considering whether to use TurboTax online software. To the extent that respondents guess (despite the

⁷⁷ Diamond (2011), p. 388.

⁷⁸ See detailed discussion in Section III.F below.

⁷⁹ See, e.g., Appendix E, Questions S130, TAT240, TAT255, TAT265.

⁸⁰ See, e.g., Appendix E, Questions S70, S80, TAT240, TAT255, TAT290.

⁸¹ Diamond (2011), pp. 389–391 (“[T]he survey can use a quasi-filter question to reduce guessing by providing “don’t know” or “no opinion” options as part of the question ... By signaling to the respondent that it is appropriate not to have an opinion, the question reduces the demand for an answer and, as a result, the inclination to hazard a guess just to comply.”); Howard Schuman and Stanley Presser, *Questions & Answers in Attitude Surveys Experiments on Question Form, Wording, and Context*, (Thousand Oaks, CA: Sage Publications, 1981), pp. 158–160 (“First, a substantial minority of the public—in the neighborhood of 30%—will provide an opinion on a proposed law that they know nothing about *if* the question is asked without an explicit DK option. ... Thus, whether filtered or standard questions should be used in a questionnaire would seem to depend on whether an investigator is interested mainly in ‘informed opinion’ on an issue or mainly in underlying dispositions.”).

⁸² Appendix E, p. 1.

⁸³ Appendix E, p. 1.

⁸⁴ Appendix E, Question TAT10.

instructions outlined above), their guesses would likely be based on their impression of whether they can file their 2021 income taxes for free through TurboTax, an impression resulting from years of being exposed to Intuit’s advertising.

60. I controlled for potential “order effects” by rotating or randomizing the order of the response options across different respondents in closed-ended questions.⁸⁵ For example, the response options in TAT255 and TAT265, which ask respondents which sources played a role in their forming impressions about whether they can file their taxes for free using TurboTax, were randomized so that each response option appeared first for at least some respondents. To the extent respondents tend to choose the first option in a list, randomizing the response options evenly distributes that tendency, rendering it background noise.⁸⁶

F. Survey Pretest

61. Pretests are a common practice undertaken to “improve the clarity of communication with respondents,” and are recommended “as a way to increase the likelihood that questions are clear and unambiguous.”⁸⁷ In a pretest, “interviewers observe the respondents for any difficulties they may have with the questions and probe for the source of any such difficulties so that the questions can be rephrased if confusion or other difficulties arise.”⁸⁸ It is important to recognize that changes to a survey following pretest findings do not indicate that the survey is biased or unfair. On the contrary, pretesting “often results in word changes that increase clarity and correct misunderstandings. Thus, changes may indicate informed survey construction rather than flawed survey design.”⁸⁹ I utilized a cognitive interviewing pretest to refine my survey.⁹⁰

62. Under my direction, GBK conducted a total of nine pretests for the Perception Survey on March 9, 2022. The pretests were conducted in accordance with best research practices to explore respondent understanding of the measure of interest, and to ensure that the questions were clear and understandable.⁹¹ I attended the pretests and directed the pretest moderators as needed. After the respondents completed the online survey, the pretest moderator asked a series of follow-up questions aimed to determine whether the questions and answer options

⁸⁵ Diamond (2011), pp. 395–396 (“The order in which questions are asked on a survey and the order in which response alternatives are provided in a closed-ended question can influence the answers.”).

⁸⁶ Diamond (2011), p. 396 (“To control for order effects, the order of the questions and the order of the response choices in a survey should be rotated, so that, for example, one-third of the respondents have Product A listed first, one-third of the respondents have Product B listed first, and one-third of the respondents have Product C listed first. If the three different orders are distributed randomly among respondents, no response alternative will have an inflated chance of being selected because of its position, and the average of the three will provide a reasonable estimate of response level.”).

⁸⁷ Diamond (2011), p. 388.

⁸⁸ Diamond (2011), p. 389.

⁸⁹ Diamond (2011), p. 389.

⁹⁰ Diamond (2011), p. 388 (“Cognitive interviewing, which includes a combination of think-aloud and verbal probing techniques, may be used for questionnaire evaluation.”).

⁹¹ See, e.g., Diamond (2011), pp. 388, 409–411.

were understood by all respondents and whether respondents could guess the purpose of the survey. Respondents who participated in the pretests met the same qualification criteria as respondents included in my final sample. In Appendix G, I provide the pretest questions.

63. Pretest results showed that none of the respondents were able to guess the purpose of the survey based on the survey questionnaire. I also found that respondent had no issues recalling their income type or other details about their individual tax situation that were relevant to questions in my survey. The pretests verified that, by and large, the respondents had no difficulty understanding the survey questions, and were able to answer the questions without difficulty. In a few minor instances where respondents provided feedback about wording choices, I updated the survey language consistent with the feedback I received, as described below:

- For question S70, I changed the language in one of the responses to read, “I make the tax-filing decisions *jointly with* others in my household,” since pretesting indicated that this language better represented the various ways in which joint filing responsibilities can be shared compared to my prior language (“...*with input from others...*”).⁹²
- For question S90, I changed the responses to include “retirement income” alongside “wages,” to add an “income from stock sales” choice, and to expand the response covering independent contractors and small businesses, to clarify that the “independent contractor” response also includes small business income or self-employment income.
- For question S110, I expanded a response related to stock options to read “[r]eceived, exercised, or disposed of stock options *issued by your employer as part of your compensation,*” to better distinguish stock options received as compensation from an employer from other stock trading activity.
- For question TAT400, I rephrased my opt-out responses, as my initial language asked respondents to affirm an opt-out choice (“[y]es, I want to opt out, please delete my submission”).

64. For a summary of the changes I implemented following pretesting, see Appendix H.

⁹² Emphasis added. See Appendix H.

G. Survey Implementation

65. GBK administered the Perception Survey online from March 11, 2022, to March 24, 2022. A total of 12,249 participants began the Perception Survey.⁹³ Of these, 874 respondents did not complete screening questions; 8 respondents did not complete the main survey; 252 respondents were terminated due to overquota; and 10,508 respondents were terminated due to their responses to survey screening questions or quality control. Ultimately, the number of respondents in my sample for the Perception Survey was 607. These results are reported in in Appendix I.

IV. Survey Results

66. My review of the data and results from the TurboTax Perception Survey provides strong evidence for the following conclusions:

- A substantial portion of the taxpayers who do not qualify to use TurboTax Free Edition under Intuit's criteria have the misimpression that they can file their income taxes for free using TurboTax;
- Intuit's TurboTax advertisements and the TurboTax website are the two most common sources identified as playing a role in these taxpayers forming the misimpression that they can file their income taxes for free using TurboTax, and a vast majority of these mistaken taxpayers identified at least one of these two sources as playing a role in forming their misimpression; and
- A substantial portion of the taxpayers who are not eligible to use TurboTax Free Edition under Intuit's criteria (and hence, do not have a "simple U.S. return," as Intuit uses the term) nevertheless have the misimpression that their returns meet TurboTax's definition of a "simple U.S. return."

A. A substantial portion of ineligible taxpayers have the misimpression that they can use TurboTax for free

67. I designed the selection criteria of the TurboTax Perception Survey such that all respondents who took the survey have tax filing circumstances that make them ineligible to file for free under Intuit's qualification criteria for TurboTax Free Edition.⁹⁴ Nevertheless, a substantial portion of these respondents have the misimpression that they can file their income taxes for free using TurboTax.

⁹³ Includes only respondents who clicked on the survey and understood and agreed to instructions (Appendix E, Question S0), passed the Captcha term (Appendix E, Question S05), and were taking the survey on an appropriate device (Appendix E, Question S10).

⁹⁴ See Section III.A.

68. This opinion is supported by responses (summarized in Figure 1) to the following survey question:⁹⁵

“You may have already said this above, but please tell us again, which of the following best describes your understanding of filing your 2021 income taxes for free using TurboTax online software? (Select one only)

- I think I can file my 2021 income taxes for free using TurboTax online software
- I don’t think I can file my 2021 income taxes for free using TurboTax online software
- I do not have enough information to say whether or not I can file my 2021 income taxes for free using TurboTax online software
- I’m not sure”

69. As shown in Figure 1, 52.7% of those in Group A (who had not used TurboTax in the past 3 years) responded that they think they can file their 2021 income taxes for free using TurboTax online software. In other words, even though these respondents do not qualify for TurboTax Free Edition for filing 2021 taxes, a substantial portion of them have the misimpression that they can use TurboTax online software to file for free. Those who say they do not think they can file for free account for only 27.5% of Group A.⁹⁶

70. Group B respondents also do not qualify for TurboTax Free Edition for filing 2021 taxes, but they have used a paid TurboTax product in the past three years. The survey results show that 24.1% of Group B respondents have the misimpression that they can file their 2021 income taxes for free using TurboTax online software. Because Group B respondents have recently paid to use TurboTax, they may be expected to be less likely than Group A respondents to form the misimpression that they can file for free using TurboTax. Indeed, the share of respondents with the misimpression in Group B is lower than for Group A, a result that is likely connected to the fact that respondents’ expectations are impacted by their past usage of TurboTax (though other explanations are possible). Nonetheless, 24.1% that have the misimpression that they can use TurboTax for free still represents a substantial portion of Group B respondents.⁹⁷ To the extent that these respondents’ misimpressions result from Intuit’s advertising, this provides some indication of the power of “free” messaging, and its

⁹⁵ See Appendix E, Question TAT240.

⁹⁶ Out of a total of 404 Group A respondents, 213, or 52.7%, stated that they think they can file for free. A further 111 respondents, 27.5% of Group A, indicated that they don’t think they can file for free, while the remaining 80 responded that they would need more information (61 respondents) or were not sure (19 respondents).

⁹⁷ Among the 203 Group B respondents, 49 respondents, or 24.1% of the group, indicated that they think they can file for free, while 133 respondents, or 65.5% of the group, indicated that they don’t think they can file for free. The remaining 21 respondents in Group B either indicated that they would need more information (14 respondents) or were not sure (7 respondents).

potential to overcome even the past experiences of those who have previously paid to use TurboTax. They may have believed that TurboTax changed the criteria for free filing since the time when they paid to use the product in the past. This possible explanation would not be unfounded as TurboTax has indeed changed the criteria from year to year.⁹⁸

71. As I discussed above, I provided the respondents with the option to opt out of the survey, as required by federal law. 164 out of the 771 respondents who completed the survey chose to opt-out. There is no evidence available to suggest that the set of opted-out respondents would have systematically different responses than the set that opted-in with respect to the questions I investigated in this survey. Moreover, the fact that the number of opt-outs is only a fraction of the total completes indicates that any effect the opt-outs would have on the survey results is limited. For example, even presuming that all respondents who opted out of the survey fell within Group A (an unrealistic assumption) and none had any misimpressions (another unrealistic assumption), the survey results would still show that 37.5% of consumers who did not use TurboTax in the last three years were under the misimpression that they could use TurboTax for free.⁹⁹ In other words, there is strong evidence of a significant amount of misimpressions no matter how conservative the assumptions about opt-out respondents are when analyzing the Perception Survey data.

⁹⁸ See, e.g., RX 3 (“A simple tax return is Form 1040 only”) and RX 21 (“A simple tax return is Form 1040 only OR Form 1040 + Unemployment Income.”).

⁹⁹ Of the 404 Group A respondents, 213, or 52.7%, confirmed their misimpression that they can file their income taxes for free using TurboTax. See Section IV.A. Thus, even if all 164 opt-outs were in Group A and did *not* report the same misimpression, it would still be true that 213 out of (404 + 164 = 568), or 37.5%, of Group A respondents would have confirmed their misimpression.

FIGURE 1

Which of the following best describes your understanding of filing your 2021 income taxes for free using TurboTax online software?

Response ^[2]	Group A (No TurboTax) ^[1]		Group B (Paid TurboTax) ^[1]	
	N	Percent	N	Percent
1. I think I can file for free using TurboTax	213	52.7%	49	24.1%
2. I don't think I can file for free using TurboTax	111	27.5%	133	65.5%
3. I do not have enough information	61	15.1%	14	6.9%
4. I'm not sure	19	4.7%	7	3.4%
Total	404	100.0%	203	100.0%

Source: TurboTax Perception Survey Results

Note:

[1] Group A (No TurboTax) consists of respondents who did not use TurboTax when filing income taxes in the past 3 years. Group B (Paid TurboTax) consists of respondents who used TurboTax but did not use a free TurboTax product when filing income taxes in the past 3 years.

[2] The response options in the survey were: (1) "I think I can file my 2021 income taxes for free using TurboTax online software;" (2) "I don't think I can file my 2021 income taxes for free using TurboTax online software;" and (3) "I do not have enough information to say whether or not I can file my 2021 income taxes for free using TurboTax online software."

72. Responses to open-ended questions provide additional insight into the nature of taxpayers' misimpressions regarding the criteria for using TurboTax online software for free. Some respondents wrongly believed that everyone is eligible for using TurboTax for free, some respondents identified incorrect criteria determining eligibility for using TurboTax for free, and some respondents had an incomplete understanding of criteria determining eligibility for using TurboTax for free.

73. In their responses to open-ended questions, several respondents indicated that they believe everyone is eligible for using TurboTax for free when asked who, if anyone, respondents believed could file their taxes for free using TurboTax online software. Examples of this include:

- “anyone for free”¹⁰⁰
- “Anyone can file for free”¹⁰¹

74. Another misimpression relates to the type of tax return: Many respondents think that filing federal tax returns is free with TurboTax, even though the eligibility in tax year 2021 for TurboTax Free Edition was not based on whether a tax return is a federal or state tax return.¹⁰² Examples of this notion in open-ended responses include:

- “I understand that you are able to file a federal return for free, but their [*sic*] may be additional fees to file your state taxes.”¹⁰³
- “Federal is free but State costs money”¹⁰⁴

75. The open-ended responses also illustrate another type of misimpression by some respondents: associating TurboTax free online software with only one, or only some, of all eligibility criteria, and mistakenly thinking they could use TurboTax for free because they do not appreciate other disqualifying factors. For example, when asked who can file their taxes for free using TurboTax online software, a respondent answered in their own words “Anyone who takes the std deduction.”¹⁰⁵ This respondent indicated that they plan to take the standard deduction, and accordingly indicated that they can file 2021 income taxes for free using TurboTax online software. However, the respondent also reported having income from stock sales and income reported on a 1099-NEC, 1099-MISC or Schedule C, tax situations disqualifying them from using TurboTax for free. This example illustrates that even if the information taxpayers have is correct, it is not enough to prevent misimpressions if the information is incomplete.

76. Thus, both the closed-ended and open-ended responses to the Perception Survey indicate that a substantial portion of the taxpayers who do not qualify to use TurboTax Free Edition under Intuit’s eligibility criteria have the misimpression that they can file their income taxes for free using TurboTax.

¹⁰⁰ Respondent ID 8726.

¹⁰¹ Respondent ID 10551.

¹⁰² See RX 3.

¹⁰³ Respondent ID 1386.

¹⁰⁴ Respondent ID 14798.

¹⁰⁵ Respondent ID 2142.

B. TurboTax advertisements and the TurboTax website are identified as a significant source of taxpayer misimpressions about being able to file income taxes for free using TurboTax

77. TurboTax Perception Survey respondents who are under the misimpression that they can file income taxes for free using TurboTax online software identified Intuit's TurboTax advertisements and the TurboTax website as the two most common sources playing a role in forming their misimpression. A vast majority of the mistaken taxpayers identified at least one of these two sources as playing a role in forming their misimpression.

78. Evidence for this analysis comes from responses (summarized in Figure 2 below) to the survey question:¹⁰⁶

“You have stated that you think you can file your 2021 income taxes for free using TurboTax online software. Which of the following sources played a role in you forming that impression? (Select all that apply)

- TurboTax advertisements
- TurboTax website
- Word-of-mouth (such as information from family, friends, etc.)
- Advice from a financial professional (such as an accountant or a tax-preparer)
- Information online not from TurboTax (such as articles on websites, blog posts, etc.)
- Other
- Don't know / Not sure”

79. In their responses to this question, Group A respondents (who had not used TurboTax in the past 3 years) who thought that they could file income taxes for free using TurboTax online software most commonly identified TurboTax advertisements (46.0%) and the TurboTax website (46.9%) as two sources that played a role in forming that misimpression. Together, 72.3% of the Group A respondents picked either TurboTax advertisements or the TurboTax website, or both, as a source for thinking they can file taxes for free using TurboTax online software. The results for Group B (who had used a paid version of TurboTax in the past 3 years) are similar to those of Group A: 73.5% of Group B respondents who thought that they could file income taxes for free using TurboTax online

¹⁰⁶ See Appendix E, Question TAT255.

software identified either TurboTax advertisements or the TurboTax website, or both, as a source of their misimpression.¹⁰⁷

FIGURE 2

You have stated that you think you can file your 2021 income taxes for free using TurboTax online software. Which of the following sources played a role in you forming that impression?

Response ^[2]	Group A (No TurboTax) ^[1]		Group B (Paid TurboTax) ^[1]	
	N	Percent	N	Percent
1. Either TurboTax advertisements or TurboTax website	154	72.3%	36	73.5%
2. TurboTax advertisements	98	46.0%	23	46.9%
3. TurboTax website	100	46.9%	30	61.2%
4. Word-of-mouth	55	25.8%	15	30.6%
5. Financial Professional	39	18.3%	4	8.2%
6. Online, not from TurboTax	68	31.9%	17	34.7%
7. Other	12	5.6%	3	6.1%
8. Don't know / Not sure	10	4.7%	1	2.0%
Total	213		49	

Source: TurboTax Perception Survey Results

Note:

[1] Group A (No TurboTax) consists of respondents who did not use TurboTax when filing income taxes in the past 3 years. Group B (Paid TurboTax) consists of respondents who used TurboTax but did not use a free TurboTax product when filing income taxes in the past 3 years.

[2] The response options in the survey were: (4) "Word-of-mouth (such as information from family, friends, etc.);" (5) "Advice from a financial professional (such as an accountant or a tax-preparer);" and (6) "Information online not from TurboTax (such as articles on websites, blog posts, etc)."

80. Responses to open-ended questions provide additional insight into the source of taxpayers' misimpressions regarding the eligibility criteria for using TurboTax online software for free. When asked why they think they can file their income taxes for free using TurboTax online software, numerous respondents referred to TurboTax advertisements with answers such as:

- "Because free. Free free free free. The commercial."¹⁰⁸
- "Advertising."¹⁰⁹
- "Because it is widely advertised on all media outlets."¹¹⁰
- "Based on the advertisements that were on popular media sites"¹¹¹

¹⁰⁷ Of the 49 Group B respondents who think they can file for free, 36 of them, or 73.5%, indicated that the TurboTax website and/or TurboTax advertisements played a role in forming their impression.

¹⁰⁸ Respondent ID 8621.

¹⁰⁹ Respondent ID 7994.

¹¹⁰ Respondent ID 2795.

¹¹¹ Respondent ID 3240.

81. The results from both the closed-ended and open-ended survey questions are consistent with my assessment of consumer expectations that some companies offer online services for free. Modern consumers, particularly those who are familiar with online products, are not inherently skeptical that a product can be free, as they have been conditioned by years of exposure to numerous free and “freemium” products, like the Google suite of products, Facebook, or smart phone games, to name a few. In each of these cases, consumers can reasonably expect to and do receive free use of a product without any eligibility restrictions. Additionally, in many cases, consumers can choose to upgrade from the free product to a paid premium version with enhanced capabilities, for example by subscribing to ad-free YouTube or making an in-app purchase in a smartphone game. In such cases, the provider of the upgradable product is employing the “freemium” business model to upsell customers. Thus, many consumers in the digital age are conditioned to expect that online products can be free. In addition to other free online services, free options are available in the online tax preparation market.¹¹² The breadth and frequency of consumers’ experiences with free online products and services means that they are likely to be open to such offers from TurboTax, and receptive to the pervasive and long-running messaging claiming that TurboTax is free.

82. I note that, although Intuit’s approach for TurboTax is similar to the “freemium” business model mentioned above, it is distinct in an important way. For consumers who are conditioned by the more typical “freemium” business model associated with so many other online products and services, it would not be surprising to see that TurboTax is available for free and in paid versions (*i.e.*, that Intuit appears to be utilizing a “freemium” business model for its online TurboTax products), and on that basis to form an expectation that they will be able to access Intuit’s free TurboTax service and only pay if they choose to add on additional upgrades to the service. However, Intuit’s free offering, while it is offered alongside the upgraded paid service, is only available to the customers who meet Intuit’s eligibility requirements.¹¹³

C. A substantial portion of the taxpayers who do not qualify to use TurboTax Free Edition under TurboTax’s criteria mistakenly think that their returns meet TurboTax’s definition of a “simple U.S. return”

83. I also asked TurboTax Perception Survey respondents whether they think their 2021 income tax return meets TurboTax’s definition of a “simple U.S. return,” the same description that Intuit uses in its disclosures to describe tax returns that are eligible for TurboTax Free Edition.¹¹⁴ Survey respondents have all been selected from potential taxpayers who do not satisfy Intuit’s criteria for filing their 2021 tax returns for free using TurboTax.

¹¹² See “Cash App Taxes,” *Cash App*, available at <https://cash.app/taxes>; see also Answer ¶ 35.

¹¹³ See RX 3.

¹¹⁴ See Section I ¶ 2.

In other words, no respondent has a “simple U.S. return” as Intuit uses the term. Nevertheless, a substantial portion of the respondents have the misimpression that their returns meet TurboTax’s definition of a “simple U.S. return.” This response exhibits a high degree of overlap with a belief that they can file for free using TurboTax, suggesting that the term “simple U.S. return” is not sufficient to inform taxpayers about whether they are eligible to file for free.

84. Evidence for this analysis comes from responses (summarized in Figure 3 below) to the survey question:¹¹⁵

“In some of its advertisements, TurboTax mentions ‘simple U.S. returns’.

Do you think that your 2021 income tax return meets TurboTax’s definition of a ‘simple U.S. return’?

- Yes, I think my 2021 income tax return meets TurboTax’s definition of a ‘simple U.S. return’
- No, I don’t think my 2021 income tax return meets TurboTax’s definition of a ‘simple U.S. return’
- Don’t know / Not sure”

85. The results show that 55.0% of Group A respondents (who had not used TurboTax in the past 3 years, and none of whom qualify for TurboTax Free Edition for 2021 taxes, and hence by definition do not have “simple U.S. returns” according to Intuit’s use of the term), are under the misimpression that their 2021 income tax return meets Intuit’s definition of a “simple U.S. return.” The share of such respondents was 28.6% for Group B (who had used a paid version of TurboTax in the past 3 years).

¹¹⁵ See Appendix E, Question TAT290.

FIGURE 3

Do you think that your 2021 income tax return meets TurboTax's definition of a "simple U.S. return"?

	Response ^[2]	Group A (No TurboTax) ^[1]		Group B (Paid TurboTax) ^[1]	
		N	Percent	N	Percent
1.	Yes	222	55.0%	58	28.6%
2.	No	130	32.2%	124	61.1%
3.	Don't know / Not sure	52	12.9%	21	10.3%
	Total	404	100.0%	203	100.0%

Source: TurboTax Perception Survey Results

Note:

[1] Group A (No TurboTax) consists of respondents who did not use TurboTax when filing income taxes in the past 3 years. Group B (Paid TurboTax) consists of respondents who used TurboTax but did not use a free TurboTax product when filing income taxes in the past 3 years.

[2] The response options in the survey were: (1) "Yes, I think my 2021 income tax return meets TurboTax's definition of a 'simple U.S. return,'" and (2) "No, I don't think my 2021 income tax return meets TurboTax's definition of a 'simple U.S. return.'"

86. The results of the Perception Survey also illustrate a high degree of overlap between taxpayers thinking they have "simple U.S. returns" and thinking they can file taxes for free using TurboTax. As shown in Figure 4 below, for Group A (who had not used TurboTax in the past 3 years), 76.1% of respondents who believed they had a "simple U.S. return" also believed that they could file their 2021 income taxes for free using TurboTax's online software. In contrast, 16.9% of the respondents who did not believe they had a "simple U.S. return" also believed that they could file their 2021 income taxes for free using TurboTax's online software.

FIGURE 4

Responses to: Which of the following best describes your understanding of filing your 2021 income taxes for free using TurboTax online software?

Given a “Yes” or “No” response to: Do you think that your 2021 income tax return meets TurboTax’s definition of a “simple U.S. return”?

Response ^[2]	Group A (No TurboTax) ^[1]		Group B (Paid TurboTax) ^[1]	
	N	Percent	N	Percent
Meets “simple U.S. return” definition^[3]	222		58	
1. I think I can file for free using TurboTax	169	76.1%	35	60.3%
2. I don’t think I can file for free using TurboTax	23	10.4%	16	27.6%
3. I do not have enough information	22	9.9%	5	8.6%
4. I’m not sure	8	3.6%	2	3.4%
Does not meet “simple U.S. return” definition^[3]	130		124	
5. I think I can file for free using TurboTax	22	16.9%	12	9.7%
6. I don’t think I can file for free using TurboTax	81	62.3%	103	83.1%
7. I do not have enough information	22	16.9%	6	4.8%
8. I’m not sure	5	3.8%	3	2.4%

Source: TurboTax Perception Survey Results

Note:

[1] Group A (No TurboTax) consists of respondents who did not use TurboTax when filing income taxes in the past 3 years. Group B (Paid TurboTax) consists of respondents who used TurboTax but did not use a free TurboTax product when filing income taxes in the past 3 years.

[2] The response options in the survey were: (1) and (5) “I think I can file my 2021 income taxes for free using TurboTax online software;” (2) and (6) “I don’t think I can file my 2021 income taxes for free using TurboTax online software;” and (3) and (7) “I do not have enough information to say whether or not I can file my 2021 income taxes for free using TurboTax online software.”

[3] The response options in the survey were: “Yes, I think my 2021 income tax return meets TurboTax’s definition of a ‘simple U.S. return;” and “No, I don’t think my 2021 income tax return meets TurboTax’s definition of a ‘simple U.S. return.’”

87. Responses to open-ended questions provide additional insight into the taxpayers’ misimpressions about whether their return constitutes a “simple U.S. return” as Intuit defines the term. The phrase “simple returns” suggests a standard for consumers to determine for themselves. Because the word “simple” has a pre-existing meaning, consumers can ask themselves, “Is my tax return simple” and answer “yes” using their own pre-existing definition of “simple.” In fact, they are more likely to answer “yes” to this question because motivated reasoning, wishful thinking and optimistic bias, will drive many consumers to give

themselves the answer that is advantageous for them—namely, that their tax return is indeed simple and therefore they can file for free.¹¹⁶

88. When respondents were asked why they believe their return meets TurboTax’s definition of a “simple U.S. return” or not, some respondents identified either incorrect or insufficient criteria. For example, when asked why they thought they had a “simple U.S. return,” respondents answered with incorrect criteria such as:

- “because i dont have extravagant expenses”¹¹⁷
- “Not a large income.”¹¹⁸

89. Similarly, when asked why they thought they had a “simple U.S. return,” respondents answered with insufficient criteria such as:

- “Because i have no deductions”¹¹⁹
- “I do not own a business.”¹²⁰

90. Further, some respondents also indicated their feelings of confusion regarding TurboTax’s definition of a “simple U.S. return.” For example:

- “I think it SHOULD meet the definition of “simple tax return.” I also had some self employment income which I needed to report, but THEY NEED TO SPECIFY WHAT THEY COUNT AS “”SIMPLE”””¹²¹

91. The survey results from both the closed-ended and open-ended questions indicate that a statement that TurboTax is available for free for “simple returns” is not sufficient to prevent or undo consumers’ misimpression that they can file for free with TurboTax.

D. Tests of Robustness

92. Robustness testing of survey results is a common practice to confirm that results are consistent under other reasonable approaches or assumptions (and thus not an artifact of baseline assumptions). To apply this practice to the baseline results of the Perception Survey, described and reported in tables in Sections IV.A-C above and shown in the first row of the

¹¹⁶ Ziva Kunda, “The Case for Motivated Reasoning,” *Psychological Bulletin* 108, no. 3, 1990, pp. 480–498; Neil D. Weinstein, “Unrealistic Optimism about Future Life Events,” *Journal of Personality and Social Psychology* 39, 1980, pp. 806–820.

¹¹⁷ Respondent ID 5248.

¹¹⁸ Respondent ID 11750.

¹¹⁹ Respondent ID 1088.

¹²⁰ Respondent ID 1291.

¹²¹ Respondent ID 8119.

tables presented in Appendix J, I have performed the same calculations described in my baseline results for different subsets of respondents under additional, more conservative assumptions.

93. Appendix J includes Perception Survey results for:

- The subset of respondents who were either solely or jointly responsible for tax-filing decisions in their household. The baseline results described in this section also included respondents who indicated only that they contributed to tax-filing decisions. The results of this robustness test are described in more detail in row 2.1 of the tables reported in Appendix J.
- The subset of respondents whose survey completion time did not exceed the 95th percentile of the distribution of all survey completion times.¹²² The baseline results described in this section include all respondents regardless of survey completion time. The results of this robustness test are described in more detail in row 2.2 of the tables reported in Appendix J.
- The subset of respondents who selected four or fewer options in questions which enabled respondents to select multiple options (TAT255 and TAT265). The baseline results described in this section include all respondents regardless of how many options they selected in these questions. The results of this robustness test are described in more detail in row 2.3 of the tables reported in Appendix J.
- The subset of respondents who jointly meet all three criteria outlined above: respondents (i) who make tax filing decisions alone or jointly; (ii) who had a survey completion time that did not exceed the 95th percentile of the distribution of all survey completion times; and (iii) who selected four or fewer options in questions which enabled respondents to select multiple options. The results of this robustness test are described in more detail in row 3 of the tables reported in Appendix J.

94. For each robustness test described above, I replicate the analyses presented in Figures 1, 2, 3, and 4 in Sections IV.A-C above. I find that my baseline results are qualitatively unchanged across each of these robustness tests.

¹²² I have also conducted the same analysis excluding both the five percent of respondents who completed the survey most slowly and the five percent of respondents who completed the survey most quickly. I find that my baseline results are qualitatively unchanged in this additional check. *See* Workpaper 2.

V. There Is Strong Evidence That Intuit’s Marketing is the Most Likely Source of Consumer Misimpressions Regarding Their Ability to Use TurboTax for Free.

95. The TurboTax Perception Survey identified TurboTax advertisements and the TurboTax website as the two most common sources playing a role in ineligible taxpayers forming the misimpression that they can file their income taxes for free using TurboTax.¹²³ More than 70% of the respondents who had this misimpression identified either TurboTax advertisements or the TurboTax website, or both, as a source of their misimpressions, a share substantially larger than the share of any of the other sources information such as online information from non-TurboTax sources, word-of-mouth, and financial professionals.¹²⁴

These results, [REDACTED] provide strong evidence that Intuit’s marketing is the most likely source of consumer misimpressions.

96. As I discussed in Section III.B, I designed the TurboTax Perception Survey with the goal of assessing consumer perceptions as they exist in the marketplace, rather than identifying the incremental impact of a specific advertisement on existing perceptions. A key advantage of measuring existing consumer perceptions is that these perceptions are shaped by all the information consumers have accumulated from various sources, for example, the potentially misleading content of the TurboTax “free, free, free” advertisements,¹²⁵ as well as any disclosures the consumers may notice and access. To the extent these other sources of information (such as TurboTax disclosures) counteract any misperceptions caused by Intuit’s marketing, and to the extent that consumers have done research that leads them to such sources, the cumulative effect of all those factors would manifest itself in my survey results.

97. [REDACTED]

¹²³ See Section IV.B.

¹²⁴ See Section IV.B, Figure 2. In asking this closed-ended question, I employed best practices in survey design and followed the solutions offered in literature to prevent guessing for closed-ended questions, including, for example, the kinds of quasi-filters that allow respondents to select “[o]ther”, or “[d]on’t know / [n]ot sure” options. See Diamond (2011), pp. 389–391. In addition, as I have noted above, respondents explicitly agreed that they would not guess when they do not know an answer or have an opinion as part of the instructions for the Perception Survey.

¹²⁵ Intuit’s “free” advertisements were widely disseminated in national advertising campaigns. [REDACTED] GX 431; GX 432; GX 433; GX 432; [REDACTED] GX 436; GX 437.

¹²⁶ See GX 460, p. 28.

¹²⁷ See GX 460, p. 28.

[REDACTED]

[REDACTED]

[REDACTED] 128 [REDACTED]

[REDACTED] 129 [REDACTED]

[REDACTED] 130 [REDACTED]

98. Additionally, [REDACTED]

[REDACTED]

[REDACTED] 131 [REDACTED]

[REDACTED] 132 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] 133 [REDACTED]

VI. Information, Documents, and Written Materials Relied Upon and Considered

99. In formulating my opinions in this case, I relied on my experience and expertise in fields such as consumer behavior and marketing, as a professor of marketing and psychology, as well as my experience conducting, supervising, and evaluating surveys. I have also received from Counsel and reviewed a variety of materials, including TurboTax commercials from previous tax years and screenshots of various pages that existed on the TurboTax website. In

128 [REDACTED]

See GX 460.

¹²⁹ In tax years 2018 and 2019, consumers filing their taxes on a Form 1040 without any attached schedules were eligible for TurboTax Free Edition. Complaint Counsel Statement of Material Facts, pp. 15–16; Declaration of Cathleen Ryan, ¶¶ 6–7. However, only around a third of taxpayers during those years filed their returns on a Form 1040 without any attached schedules. *See GX 342, ¶¶ 215–217* (calculating based on IRS-reported data, that, in tax year 2018, 69.54% of returns filed were not “[r]eturns that filed Form 1040 with no Schedules 1-6 or Schedule A attached”); *GX 336; GX 342, ¶¶ 215, 218–219* (calculating, based on IRS-reported data, that, in tax year 2019, 63.43% of returns filed were not “[r]eturns that filed Form 1040 with no Schedules 1-6 or Schedule A attached”); *GX 337.*

¹³⁰ *See GX 460, p. 28.*

¹³¹ *See GX 460, p. 8.*

¹³² [REDACTED] *See GX 460, p. 10.* [REDACTED] *See GX 460, p. 30.*

¹³³ *See GX 460, pp. 9–10.*

addition, I reviewed materials and information produced by Intuit, legal filings (and associated supporting materials) from this proceeding and related prior proceedings, publicly available materials and websites (including turbotax.intuit.com), and published literature relevant to the issues and theories in this matter, some of which are cited in this expert report. A list of the materials I have relied upon in designing the survey and forming my opinions is attached as Appendix C.

100. I reserve the right to supplement my report and modify my opinions if additional relevant data or information should become available.

VII. Compensation

101. I am being compensated at my billing rate of \$500 per hour. Staff at Cornerstone Research, a consulting firm, worked under my direction and assisted me in this matter, and GBK assisted me with managing and supervising the data collection and validation process for the survey. My compensation in this matter is in no way contingent upon the outcome of this or any other matter.

VIII. Conclusion

102. My review of the data and results from the TurboTax Perception Survey provides strong evidence for the following conclusions:

- A substantial portion of the taxpayers who do not qualify to use TurboTax Free Edition under Intuit's criteria have the misimpression that they can file their income taxes for free using TurboTax;
- Intuit's TurboTax advertisements and the TurboTax website are the two most common sources identified as playing a role in taxpayers forming the misimpression that they can file their income taxes for free using TurboTax, and a vast majority of the mistaken taxpayers identified at least one of these two sources as playing a role in forming their misimpression; and
- A substantial portion of the taxpayers who are not eligible to use TurboTax Free Edition under Intuit's criteria (and hence, do not have a "simple U.S. return," as Intuit uses the term) nevertheless have the misimpression that their returns meet TurboTax's definition of a "simple U.S. return."

103. The results of the TurboTax Perception Survey, [REDACTED] [REDACTED] provide strong evidence that Intuit's marketing is the most likely source of these consumer misimpressions.

Signed this 9th day of December 2022.

A handwritten signature in black ink, appearing to read "Nathan Novemsky", written over a horizontal line.

Nathan Novemsky, Ph.D.

Nathan Novemsky

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Education

Ph.D., Social Psychology, Princeton University, Dissertation Advisor: Daniel Kahneman
M.A., Social Psychology, Princeton University
B.A., Physics, Math (with Honors), Psychology, Wesleyan University

Academic Appointments

2009-present	Professor of Marketing School of Management, Yale University
2011-present	Professor of Psychology Psychology Dept., Yale University
2005-2009	Associate Professor of Marketing School of Management, Yale University
2000-2005	Assistant Professor of Marketing School of Management, Yale University

Publications

Voickek, G. and Novemsky, N. (2021). Asymmetric Hedonic Contrast: Pain is More Contrast-Dependent Than Pleasure, Psychological Science.

Baskin, E., Gorlin, M., Chance, Z., Novemsky, N., Dhar, R., Huskey, K., & Hatzis, M. (2016). Proximity of snacks to beverages increases food consumption in the workplace: A field study. Appetite, *103*, 244-248.

Baskin, E., Wakslak, C., Trope, Y. and Novemsky, N. (2014), “Why Feasibility Matters More to Gift Receivers Than to Givers: A Construal-Level Approach to Gift-Giving,” Journal of Consumer Research 41 (June).

Kim, J, Novemsky, N. and Dhar, R. (2013), “Adding Small Differences Can Increase Similarity and Choice,” Psychological Science, *24* (February), 225-229.

- Wang, J., Novemsky, N., Dhar, R. and Baumeister, R. (2010), "Tradeoffs and Depletion in Choice," Journal of Marketing Research 47 (October), 910-919.
- Pocheptsova, A and Novemsky, N. (2010), "When Do Incidental Mood Effects Last? Lay Beliefs versus Actual effects," Journal of Consumer Research, 36 (April), 992-1001.
- Frederick, S., Novemsky, N., Wang, J., Dhar, R., and Nowlis, S. (2009), "Opportunity Cost Neglect," Journal of Consumer Research, 36(December), 553-561.
- Wang, J, Novemsky, N. and Dhar, R. (2009), "Anticipating Adaptation to Products," Journal of Consumer Research 36 (August, lead article), 149-159.
- Dhar, R and Novemsky, N. (2008), "Beyond Rationality: The Content of Preferences," Journal of Consumer Psychology, 18 (July), 175-178.
- Novemsky, N., Dhar, R., Schwarz, N., & Simonson, I. (2007) "Preference Fluency in Consumer Choice" Journal of Marketing Research, 44 (August), 347-356.
* Awarded Emerald Citations of Excellence Award based on impact.
- Novemsky, N & Dhar, R. (2005) "Goal Fulfillment and Goal Targets in Sequential Choice," Journal of Consumer Research, 32 (December), 396-404.
- Novemsky, N & Kahneman, D. (2005), "The Boundaries of Loss Aversion," Journal of Marketing Research, 42 (May, lead article), 119-128.
- Novemsky, N & Kahneman, D. (2005), "How do Intentions Affect Loss Aversion?" Journal of Marketing Research, 42 (May), 139-140.
- Novemsky, N & Schweitzer, M. (2004), "What Makes Negotiators Happy? The Differential Effects of Internal and External Social Comparisons on Negotiator Satisfaction," Organizational Behavior and Human Decision Processes 95 (November), 186-197.
- Novemsky, N. and Ratner, R. (2003) "The Time Course and Impact of Consumers Erroneous Beliefs about Hedonic Contrast." Journal of Consumer Research, 29 (March) 507-516.
- Wathieu, L., Brenner, L, Carmon, Z., Chattopadhyay, A., Drolet, A., Gourville, J., Muthukrishnan, A, Novemsky, N., Ratner, R., Wertenbroch, K., and Wu, G. (2002) "Consumer Control and Empowerment: A Primer." Marketing Letters, 13(3), 297-305.
- Kunreuther, H., Novemsky, N., & Kahneman D. (2001). "Making Low Probabilities Useful." Journal of Risk and Uncertainty, 23, p.103-120.
- Novemsky, N. & Kronzon, S. (1999). "How base-rates are used, when they are used: A comparison of additive and Bayesian models of base-rate use." Journal of Behavioral Decision Making, 12(1), p. 55-69.

Invited Presentations

Ben Gurion University
Carnegie Mellon University
Cornell University
Harvard University
INSEAD
MIT
New York University
Northwestern University
Tel Aviv University
Temple University
University of British Columbia
University of California at Berkeley
University of California at San Diego
University of Chicago
University of Florida
University of Massachusetts at Amherst
University of Pennsylvania
University of Southern California
University of Texas at Dallas
University of Western Ontario
Washington University

Teaching Experience

Problem Framing (MBA, Executives)
Modeling Managerial Decisions (MBA, Executives)
Behavioral Decision Making I & II (Ph.D.)
Consumer Behavior (MBA)
Marketing Management (MBA)
Probability Modeling and Statistical Estimation (MBA)
Behavioral Economics Immersion (Executives)
Leading Effective Decision Making (Executives)
The Executive Perspective (MBA)

***Professional Service
(Past and Present)***

Dissertation Chair
Anastasiya Pocheptsova (Winner - Society for Consumer Psychology Sheth Dissertation Award)
Jing Wang (Runner-Up - Society for Consumer Psychology Sheth Dissertation Award)
Jongmin Kim
Ernest Baskin
Guy Voichek

Dissertation Committees: Uzma Khan, Aaron Sackett (Psychology), Kelly Goldsmith, Eunice Kim, Jennifer Savary, Andrew Meyer, Elizabeth Friedman

Associate Editor: Journal of Marketing Research

Editorial Boards:

Journal of Consumer Research

Journal of Marketing Research

Organizational Behavior and Human Decision Processes

Journal of Consumer Psychology

Doctoral Consortium – Association for Consumer Research, Society for Consumer Psychology

Program Committee – Association for Consumer Research, Society for Judgment and Decision Making (Chair), Behavioral Decision Research in Management

Ad Hoc Reviewer

Journal of Consumer Research, National Science Foundation – Directorate for Social, Behavioral and Economic Sciences, Journal of Experimental Psychology: General, Psychological Science, Journal of Economic Psychology, Journal of Advertising Research, Journal of Conflict Resolution, Management Science, Marketing Science, Journal of Marketing, American Economic Review, Israel Science Foundation, Organizational Behavior and Human Decision Processes, Decision Analysis, Journal of Economic Behavior & Organization, Cognitive Science, Judgment and Decision Making, Service Industries Journal, Emotion, US-Israel Binational Science Foundation, Journal of Neuroscience, Psychology and Economics, Cognition.

Professional affiliations

Association for Consumer Research, Society for Consumer Psychology, Society for Judgment and Decision Making, Society for Personality and Social Psychology.

Prior Testimony of Nathan Novemsky in the Last Four Years

State of Oklahoma, ex rel., Mike Hunter, Attorney General of Oklahoma v. Purdue Pharma L.P., et al., the District Court of Cleveland County of the State of Oklahoma, Case No. CJ-2017-816.

Eden Smiles v. Walgreens Co., Superior Court of the State of California, County of Alameda, Case No. RG17862495.

City and County of San Francisco et al. v. Purdue Pharma L.P. et al. United States District Court, Northern District of California, Case No. 3:18-CV-07591-CRB.

Documents Considered List

Academic Articles

- Daniel M. Oppenheimer et al., “Instructional Manipulation Checks: Detecting Satisficing to Increase Statistical Power,” *Journal of Experimental Social Psychology* 45, no. 4, 2009, pp. 867–872.
- Jacob Jacoby, “Experimental Design and the Section of Controls in Trademark and Deceptive Advertising Surveys,” *Trademark Reporter* 92, no. 1, 2002, pp. 890–956.
- Neil D. Weinstein, “Unrealistic Optimism about Future Life Events,” *Journal of Personality and Social Psychology* 39, 1980, pp. 806–820.
- Ziva Kunda, “The Case for Motivated Reasoning,” *Psychological Bulletin* 108, no. 3, 1990, pp. 480–498.

Books and Book Chapters

- Federal Judicial Center, *Manual for Complex Litigation*, Fourth Edition, (2004).
- George E. Belch and Michael Belch, *Advertising and Promotion: An Integrated Marketing Communications Perspective*, Twelfth Edition, (New York, NY: McGraw Hill, 2021).
- Howard Schuman and Stanley Presser, *Questions & Answers in Attitude Surveys: Experiments on Question Form, Wording, and Context*, (Thousand Oaks, CA: Sage Publications, 1981).
- Shari Seidman Diamond, “Reference Guide on Survey Research,” in *Reference Manual on Scientific Evidence*, Third Edition, (Washington, D.C.: The National Academies Press, 2011), pp. 359–423.

Corporate Documents

- GX 460 (Intuit Internal Presentation, [REDACTED] September 2020).

Expert Reports and Declarations

- Declaration of John R. Hauser, SC.D., *Federal Trade Commission, v. Intuit Inc.*, April 4, 2022.
- Declaration of John R. Hauser, SC.D., *In the Matter of: Intuit Inc.*, August 30, 2022.
- Expert Report of Professor Peter N. Golder, Ph.D., November 10, 2020.

- Declaration of Peter Golder, Ph.D., *Federal Trade Commission, v. Intuit Inc.*, April 4, 2022.
- Declaration of Professor Peter N. Golder, Ph.D., *In the Matter of: Intuit Inc.*, August 30, 2022.
- Letter from Rebecca Kirk Fair to Federal Trade Commission, “Analysis of Consumer Choices in a Test and Control Study of TurboTax Upgrade Screens,” November 4, 2020, and associated computer files
 - 2020.12.23 - Tables for Survey with Income Question.pdf
 - Survey Data (Kirk Fair).xlsx
 - Survey Data (December Re-Run).xlsx
- Declaration of Rebecca Kirk Fair, *In the Matter of: Intuit Inc.*, August 30, 2022.

Legal Documents

- Letter from April J. Tabor to D. Reed Freeman, Jr., “FTC Matter No. 1923119,” Undated.
- Letter from April J. Tabor to D. Reed Freeman, Jr., “FTC Matter No. 1923119,” May 19, 2020.
- Order Denying Petition to Quash in Part Civil Investigative Demand, *In the Matter of: Intuit Inc.*, August 17, 2020.
- Submission to the Federal Trade Commission by Intuit Inc., *In the Matter of: Intuit Inc.*, October 27, 2020.
- Second Submission to the Federal Trade Commission by Intuit Inc., *In the Matter of: Intuit Inc.*, November 4, 2020.
- Third Submission to the Federal Trade Commission by Intuit Inc., *In the Matter of: Intuit Inc.*, November 10, 2020.
- Fifth Submission to the Federal Trade Commission by Intuit Inc., *In the Matter of: Intuit Inc.*, December 28, 2020.
- Complaint, *In the Matter of: Intuit Inc.*, March 28, 2022.
- Answer and Affirmative Defenses of Respondent Intuit Inc., *In the Matter of: Intuit Inc.*, April 14, 2022.
- Order Denying Motion for Emergency Relief, *Federal Trade Commission, v. Intuit Inc.*, April 22, 2022.
- Complaint Counsel’s Motion for Summary Decision, *In the Matter of: Intuit Inc.*, August 22, 2022, and associated materials.

- Exhibits GX 45–356.
- Complaint Counsel’s Statement of Material Facts as to Which There Is No Genuine Issue for Trial.
- Respondent Intuit Inc.’s Opposition to Complaint Counsel’s Motion for Summary Decision, *In the Matter of: Intuit Inc.*, August 30, 2022, and associated materials.
 - Exhibits RX 1–106.
 - Respondent Intuit Inc.’s Statement of Material Facts as to Which There Exists a Genuine Issue for Trial, *In the Matter of: Intuit Inc.*, Undated.
 - Declaration of Cathleen Ryan in Support of Intuit Inc.’s Opposition to Complaint Counsel’s Motion for Summary Decision, *In the Matter of: Intuit Inc.*, August 29, 2022.
 - Declaration of David Gringer in Support of Intuit Inc.’s Opposition to Complaint Counsel’s Motion for Summary Decision, *In the Matter of: Intuit Inc.*, August 29, 2022.
- Reply in Support of Complaint Counsel’s Motion for Summary Decision, *In the Matter of: Intuit Inc.*, September 8, 2022.
 - Complaint Counsel’s Responses and Objections to Intuit Inc.’s Statement of Material Facts as to Which There Exists a Genuine Issue for Trial, *In the Matter of: Intuit Inc.*, September 8, 2022.
- Complaint Counsel’s First Set of Interrogatories to Intuit Inc., *In the Matter of: Intuit Inc.*, October 14, 2022.
- Respondent Intuit Inc.’s Responses and Objections to Complaint Counsel’s First Set of Interrogatories, *In the Matter of: Intuit Inc.*, November 14, 2022.
- [Proposed] Temporary Restraining Order and Order to Show Cause Why a Preliminary Injunction Should Not Issue, *Federal Trade Commission, v. Intuit Inc.*, Undated.
- Proposed Complaint for Permanent Injunction, Monetary Relief, and Other Relief, *Federal Trade Commission et al., v. Intuit Inc.*, Undated.

Publicly Available Reports

- Dynata, “Panel Quality: Our Values. Answers to ESOMAR’s 28 Questions,” 2018.
- Schlesinger Group, “ESOMAR’s 28 Questions,” 2018.
- The MITRE Corporation, “Independent Assessment of the Free File Program,” October 3, 2019.

- Treasury Inspector General for Tax Administration, “Complexity and Insufficient Oversight of the Free File Program Result in Low Taxpayer Participation,” February 3, 2020.

Websites

- “Cash App Taxes,” *Cash App*, available at <https://cash.app/taxes>.
- “The GBK Toolbox,” *GBK Collective*, available at <https://www.gbkcollective.com/thegbktoolbo>
- “What, Me Worry? Last-Minute Taxes,” *Intuit*, December 1, 2022, available at <https://turbotax.intuit.com/tax-tips/tax-extensions/what-me-worry-last-minute-taxes/L6g58eRCf>.
- Ben Casselman, “Everyone Files Their Taxes At the Last Minute,” *FiveThirtyEight*, April 15, 2016, available at <https://fivethirtyeight.com/features/everyone-files-their-taxes-at-the-last-minute>.
- Elliot Ramos, “How Many Taxpayers Are Procrastinators? Nearly 1 in 3, IRS Data Shows,” *NBC News*, April 14, 2022, available at <https://www.nbcnews.com/data-graphics/data-point-almost-one-third-taxpayers-file-last-minute-rcna24093>.
- Justin Elliot and Lucas Waldron, “Here’s How TurboTax Just Tricked You Into Paying to File Your Taxes,” *ProPublica*, April 22, 2019, <https://www.propublica.org/article/turbotax-just-tricked-you-into-paying-to-file-your-taxes>.
- Justin Elliot and Paul Kiel, “Inside TurboTax’s 20-Year Fight to Stop Americans From Filing Their Taxes for Free,” *ProPublica*, October 17, 2019, available at <https://www.propublica.org/article/inside-turbotax-20-year-fight-to-stop-americans-from-filing-their-taxes-for-free>.
- Justin Elliot, “TurboTax Deliberately Hid Its Free File Page From Search Engines,” *ProPublica*, April 26, 2019, available at <https://www.propublica.org/article/turbotax-deliberately-hides-its-free-file-page-from-search-engines>.

Bates-Numbered Documents

- F01-TUT-00068566
- F01-TUT-00068567
- F01-TUT-00070711
- F01-TUT-00070712
- F01-TUT-00071155

- F01-TUT-00071190
- F01-TUT-00071204
- F01-TUT-00071205
- F01-TUT-00071206
- F01-TUT-00071207
- F01-TUT-00071208
- F01-TUT-00071209
- F01-TUT-00071210
- F01-TUT-00077361
- F01-TUT-00077408
- F01-TUT-00078273
- F01-TUT-00078282
- F01-TUT-00078468
- F01-TUT-00078495
- INTUIT_FFA_FTC_000169115.mov
- INTUIT_FFA_FTC_000169116.mp4
- INTUIT_FFA_FTC_000169117.mp4
- INTUIT_FFA_FTC_000169118.mp4
- INTUIT_FFA_FTC_000169119.mp4
- INTUIT_FFA_FTC_000169120.mp4
- INTUIT_FFA_FTC_000169121.mp4
- INTUIT_FFA_FTC_000169122.mp4
- INTUIT_FFA_FTC_000528209.mp4
- INTUIT_FFA_FTC_000528210.mp4
- INTUIT_FFA_FTC_000528211.mp4
- INTUIT_FFA_FTC_000528212.mp4
- INTUIT_FFA_FTC_000528218.mp4
- INTUIT_FFA_FTC_000528219.mp4

- INTUIT_FFA_FTC_000528220.mp4
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- INTUIT_FFA_FTC_000528225.mp4
- INTUIT_FFA_FTC_000528226.mp4
- INTUIT_FFA_FTC_C001
- INTUIT_FFA_FTC_C002
- INTUIT_FFA_FTC_C003
- INTUIT_FFA_FTC_C004
- INTUIT_FFA_FTC_C005
- INTUIT_FFA_FTC_C006
- INTUIT_FFA_FTC_C007
- INTUIT_FFA_FTC_C012
- INTUIT_FFA_FTC_C013
- INTUIT_FFA_FTC_C014
- INTUIT-FTC-PART3-000490335
- INTUIT-FTC-PART3-000490336
- INTUIT-FTC-PART3-000490337
- INTUIT-FTC-PART3-000490439
- INTUIT-FTC-PART3-000490440
- INTUIT-FTC-PART3-000485310

[NOTES TO PROGRAMMER IN BOLD CAPS AND BRACKETS]

SURVEY NAME: TURBOTAX PILOT

Introduction and Screening

Thank you for taking time to complete this brief survey.

The responses you give to our questions are very important to us. If you don't know an answer to a question, or if you don't have an opinion, please indicate this in your response.

Your answers will be kept confidential. The results of this study will not be used to try to sell you anything.

If you normally wear glasses or contact lenses when viewing a screen, please wear them before continuing to the next page. Please take this survey when you have time to complete it uninterrupted and without distractions.

[PROGRAMMER: TERMINATE IF RESPONDENT SELECTS 2 ("I do not understand or do not agree to these instructions"); OTHERWISE GO TO S05.]

1. I understand and agree to these instructions
2. I do not understand or do not agree to these instructions

S05. As an additional security measure, please enter the code exactly as it appears in the image below, and then click the "Continue" button.

Please enter it exactly as it appears, including upper and lower case letters. Do not include any spaces. Type them all together.

[PROGRAMMER: PIPE IN ONE RANDOMLY SELECTED CODE. CONFIRM THAT WHAT THE RESPONDENT TYPES IN MATCHES THE PIPED-IN CODE FOR SPELLING AND CASE.]

TEXT BOX: _____

[PROGRAMMER: IF THE CODE DOES NOT MATCH ON THE FIRST TRY, PIPE IN A DIFFERENT RANDOMLY SELECTED CODE AND ALLOW RESPONDENT TO TRY AGAIN. TERMINATE IF THE CODE DOES NOT MATCH THE THIRD TIME RESPONDENT TRIES.]

First, there are a few short questions to determine whether you qualify for the study.

[NEXT PAGE]

S10. Which type of electronic device are you using to take this survey?

Select one only.

[PROGRAMMER: RANDOMIZE CHOICES EXCEPT “Other.” ALLOW ONLY ONE SELECTION.]

[TERMINATE IF RESPONDENT SELECTS 5 (“A TV-based browser or video game console”) OR 6 (“An eBook reading device”) OR 7 (“Other”). ALL OTHERS GO TO S20.]

1. A laptop/notebook computer
2. A tablet computer (for example, Apple iPad, Samsung Galaxy Tab, Amazon Fire, or similar)
3. A desktop computer
4. A smartphone (for example, Apple iPhone, Samsung Galaxy, or similar)
5. A TV-based browser or video game console (for example, Android TV, Microsoft Xbox, Sony PlayStation, or similar)
6. An eBook reading device (for example, Kindle, Nook, Sony Reader, or similar)
7. Other

S20. Do you, or does any member of your household, currently work for any of the following?

Select all that apply.

[PROGRAMMER: RANDOMIZE CHOICES EXCEPT 7 (“None of the above”). ALLOW MULTIPLE SELECTIONS.]

[TERMINATE IF RESPONDENT SELECTS 1 (“A market research department of a company or an advertising, public relations, or marketing department of a company”), 2 (“A market research firm or an advertising, public relations, or marketing agency”), OR 3 (“A company providing accounting or tax preparation services or software”). ALL OTHERS GO TO S30.]

1. A market research department of a company or an advertising, public relations, or marketing department of a company
2. A market research firm or an advertising, public relations, or marketing agency
3. A company providing accounting or tax preparation services or software
4. A developer, seller, or marketer of mobile devices
5. A developer, seller, or marketer of motor vehicles (such as automobiles or motorcycles)
6. A social media company
7. None of the above **[SINGLE PUNCH]**

S30. Which one of the following ranges includes your age?

Select one only.

[PROGRAMMER: DO NOT RANDOMIZE. ALLOW ONLY ONE SELECTION.]

[TERMINATE IF RESPONDENT SELECTS 1 (“Under 18 years old”) OR 7 (“Prefer not to answer”). ALL OTHERS GO TO S40.]

1. Under 18 years old
2. 18-24 years old
3. 25-34 years old
4. 35-44 years old

5. 45-54 years old
6. 55 years or older
7. Prefer not to answer

S40. What is your gender?

Select one only.

[PROGRAMMER: RANDOMIZE CHOICES EXCEPT 4 (“Prefer not to answer”). ALLOW ONLY ONE SELECTION.]

[TERMINATE IF RESPONDENT SELECTS 4 (“Prefer not to answer”). ALL OTHERS GO TO S50.]

1. Male
2. Female
3. Other
4. Prefer not to answer

S50. In which of the following states do you currently live?

Select one only.

[PROGRAMMER: INCLUDE DROPDOWN LIST OF STATES INCLUDING “Washington D.C.” AND “None of the above.” ALLOW ONLY ONE SELECTION.]

[TERMINATE IF RESPONDENT SELECTS “None of the above.” ALL OTHERS GO TO S60.]

We will now ask you some questions about the income tax return you plan to file for 2021.

These questions are being asked solely for the purposes of determining whether you qualify for the survey.

Your responses will be kept confidential.

When you are ready to start, please click the “Continue” button.

[NEXT PAGE]

S60. Are you planning to file an income tax return in 2022, based on your income in 2021 (i.e. income earned between January 1, 2021 and December 31, 2021)?

Select one only.

[PROGRAMMER: RANDOMIZE CHOICES.]

[TERMINATE IF RESPONDENT SELECTS 2 “No.” or 3 “I already filed” ALL OTHERS GO TO S70.]

1. Yes, I am planning to file an income tax return in 2022, based on my income in 2021
2. No, I am not planning to file an income tax return in 2022, based on my income in 2021
3. I already filed my income tax return in 2022, based on my income in 2021

S70. Which of the below best describes your involvement in tax filing in your household?

Select one only.

[PROGRAMMER: RANDOMIZE 1 to 4 ASCENDING OR DESCENDING, KEEP 5 LAST.]

[TERMINATE IF RESPONDENT SELECTS 4 (“I do not contribute to the tax-filing decisions”) OR 5 (“Don’t know/ Not sure”). ALL OTHERS GO TO S80.]

1. I alone make the tax-filing decisions
2. I make the tax-filing decisions with input from others in my household
3. I contribute to the tax-filing decisions, but someone else in my household makes the decisions
4. I do not contribute to the tax-filing decisions
5. Don’t know / Not sure

S80. Which of the following tax preparation methods will you (or others in your household) consider when preparing your 2021 income tax return?

Please select all tax preparation methods you have considered using, as well as those you may consider using when preparing your 2021 income tax return.

Select all that apply.

[PROGRAMMER: RANDOMIZE 1 to 3. KEEP 4 and 5 LAST.]

[GO TO S90 IF RESPONDENT SELECTS 1 (“an online tax software”)]

[TERMINATE OTHERWISE]

1. An online tax software
2. A paper tax-return form
3. A third-party professional (such as an accountant or a tax-preparer)
4. None of the above **[SINGLE PUNCH]**
5. Don't know / Not sure **[SINGLE PUNCH]**

S90. Which of the following income types did you earn in 2021?

Select all that apply.

[PROGRAMMER: RANDOMIZE 1 to 5. KEEP 6 and 7 LAST.]
[ALL GO TO S100]

1. Wages (reported on a W-2 form)
2. Unemployment income (reported on a 1099-G form)
3. Independent contractor income (reported on a 1099-NEC form)
4. Business income
5. Rental Property income
6. None of the above **[SINGLE PUNCH]**
7. Don't know / Not sure **[SINGLE PUNCH]**

S100. Which type of deductions are you planning to claim on your 2021 income tax return?

Select one only

[PROGRAMMER: RANDOMIZE 1 to 2. KEEP 3 LAST.]
[ALL GO TO S110]

1. I am planning to claim the standard deduction
2. I am planning to claim itemized deductions
3. Don't know / Not sure

S110. Which of the below, if any, did you do in 2021?

Select all that apply

[PROGRAMMER: RANDOMIZE 1 to 4. KEEP 5 and 6 LAST.]
[ALL GO TO S120]

1. Received alimony
2. Received, exercised, or disposed of stock options
3. Paid mortgage interest
4. Paid student loan interest
5. None of the above **[SINGLE PUNCH]**
6. Don't know / Not sure **[SINGLE PUNCH]**

[GO TO S120 IF:

S90 = 2, 3, 4, 5 OR

S90 = 1 AND S100 = 2 OR

S90 = 1 AND S100 = 1 AND S110 IS NOT 4, 5, OR 6

OTHERWISE TERMINATE]

S120. Please select "Yellow" from the following list in order to continue into the survey. *Select one only.*

[PROGRAMMER: RANDOMIZE. ALLOW ONLY ONE SELECTION.

[TERMINATE IF RESPONDENT DOES NOT SELECT YELLOW.]

[ELSE QUALIFY AND GO TO TAT10]

1. Green
2. Blue
3. Yellow
4. Red

Main Questionnaire

TAT10.

Thank you. You qualify for this study!

You indicated that you consider using an online tax software to prepare your 2021 income tax return.

One such online tax software is TurboTax. We will now ask you questions about TurboTax.

Please answer the questions based on the information you have and do not guess! If you do not have enough information to answer a question, please indicate so.

[NEXT PAGE]

TAT220. Based on your current information and understanding, what can you tell us about whether there is a cost to filing your taxes with TurboTax?

[PROGRAMMER: OPEN ENDED CAPTURE RESPONSE]

[NEXT PAGE]

TAT230. Based on your current information and understanding, who, if anyone, is eligible to file taxes for free with TurboTax?

[PROGRAMMER: OPEN ENDED CAPTURE RESPONSE]

[NEXT PAGE]

TAT240. Based on your current information and understanding, which of the following best describes your understanding of filing your 2021 income taxes for free with TurboTax?

Select one only.

[PROGRAMMER: RANDOMIZE ASCENDING / DESCENDING 1 to 3. KEEP 4 LAST.]

[IF RESPONDENT SELECTS 1, GO TO TAT250]

[IF RESPONDENT SELECTS 2, GO TO TAT260]

[IF RESPONDENT SELECTS 3, GO TO TAT270]

[OTHERWISE GO TO TAT290]

1. I think I can file my 2021 income taxes for free with TurboTax
2. I don't think I can file my 2021 income taxes for free with TurboTax
3. I do not have enough information to say whether or not I can file my 2021 income taxes for free with TurboTax
4. I'm not sure

TAT250. You may have already said this above, but please tell us again why you think you can file your 2021 income taxes for free with TurboTax?

[PROGRAMMER: OPEN ENDED CAPTURE RESPONSE]

[GOTO TAT290]

TAT260. You may have already said this above, but please tell us again why you don't think you can file your 2021 income taxes for free with TurboTax?

[PROGRAMMER: OPEN ENDED CAPTURE RESPONSE]

[GOTO TAT290]

TAT270. You may have already said this above, but please tell us again what information you need to say whether or not you can file your 2021 income taxes for free with TurboTax?

[PROGRAMMER: OPEN ENDED CAPTURE RESPONSE]

[GOTO TAT290]

TAT290. Please consider the statement "TurboTax Free Edition is for simple U.S. returns only."

Do you think that your 2021 income tax return meets the definition of a "simple U.S. return" as used in this sentence?

[PROGRAMMER: RANDOMIZE 1, 2. ANCHOR 3 LAST]

[IF RESPONDENT SELECTS 1 ("Yes"), GO TO TAT300]

**[IF RESPONDENT SELECTS 2 (“No”), GO TO TAT310]
[OTHERWISE GO TO TAT320]**

1. Yes, I think my 2021 income tax return meets the definition of a “simple U.S. return”
2. No, I don’t think my 2021 income tax return meets the definition of a “simple U.S. return”
3. Don’t know / Not sure

TAT300. Why do you think that your 2021 income tax return meets the definition of a “simple U.S. return”?

[PROGRAMMER: OPEN ENDED, CAPTURE]

[NEXT PAGE]

TAT310. Why do you think that your 2021 income tax return does not meet the definition of a “simple U.S. return”?

[PROGRAMMER: OPEN ENDED, CAPTURE]

[NEXT PAGE]

Main Questionnaire Post Measures

TAT320. In the past, have you ever begun to use TurboTax online software with the intention of filing for free using that software?

1. Yes, I have
2. No, I have not
3. Don’t know / Not sure

[NEXT PAGE]

TAT330. In the past, have you ever filed your taxes using a TurboTax product that was not free?

1. Yes, I have
2. No, I have not
3. Don’t know / Not sure

[NEXT PAGE]

Main Questionnaire OPT OUT

You finished the survey! Thank you for your participation.

This survey is being conducted on behalf of the United States Federal Trade Commission (FTC), the nation's consumer protection agency, in order to collect information about the reactions and experiences of potential customers to advertisements by Intuit, the maker of TurboTax.

The FTC investigates unfair and deceptive conduct by companies. The information you provide could help us further our mission under the FTC Act to protect consumers.

The FTC will treat your responses as confidential and will handle your information as outlined in the FTC's privacy policy, which you can read at <http://www.ftc.gov/ftc/privacy.shtm>.

The information collected in this survey may be made available to our law enforcement partners or in the course of litigation, as required by a court.

Your participation in this survey is strictly voluntary. If you wish to opt out, please let us know and we will honor this request and delete your submission from our records.

TAT400. Do you wish to opt-out?

[PROGRAMMER: RANDOMIZE]

[DELETE RESPONDENT DATA IF 1 ("Yes")]

1. Yes, I want to opt-out, please delete my submission
2. No, I do not want to opt-out, please keep my submission

[NOTES TO PROGRAMMER IN BOLD CAPS AND BRACKETS]**SURVEY NAME: TURBOTAX PERCEPTION(TAT)****Introduction and Screening**

Thank you for taking time to complete this brief survey.

The responses you give to our questions are very important to us. If you don't know an answer to a question, or if you don't have an opinion, please indicate this in your response.

Your answers will be kept confidential. The results of this study will not be used to try to sell you anything.

If you normally wear glasses or contact lenses when viewing a screen, please wear them before continuing to the next page. Please take this survey when you have time to complete it uninterrupted and without distractions.

[PROGRAMMER: TERMINATE IF RESPONDENT SELECTS 2 ("I do not understand or do not agree to these instructions"); OTHERWISE GO TO S05.]

1. I understand and agree to these instructions
2. I do not understand or do not agree to these instructions

S05. As an additional security measure, please enter the code exactly as it appears in the image below, and then click the "Continue" button.

Please enter it exactly as it appears, including upper and lower case letters. Do not include any spaces. Type them all together.

[PROGRAMMER: PIPE IN ONE RANDOMLY SELECTED CODE. CONFIRM THAT WHAT THE RESPONDENT TYPES IN MATCHES THE PIPED-IN CODE FOR SPELLING AND CASE.]

TEXT BOX: _____

[PROGRAMMER: IF THE CODE DOES NOT MATCH ON THE FIRST TRY, PIPE IN A DIFFERENT RANDOMLY SELECTED CODE AND ALLOW RESPONDENT TO TRY AGAIN. TERMINATE IF THE CODE DOES NOT MATCH THE THIRD TIME RESPONDENT TRIES.]

[NEXT PAGE]

S10. Which type of electronic device are you using to take this survey?

Select one only.

[PROGRAMMER: RANDOMIZE CHOICES EXCEPT "Other." ALLOW ONLY ONE SELECTION.]

[TERMINATE IF RESPONDENT SELECTS 5 ("A TV-based browser or video game console") OR 6 ("An eBook reading device") OR 7 ("Other"). ALL OTHERS GO TO S20.]

1. A laptop/notebook computer

Appendix E

2. A tablet computer (for example, Apple iPad, Samsung Galaxy Tab, Amazon Fire, or similar)
3. A desktop computer
4. A smartphone (for example, Apple iPhone, Samsung Galaxy, or similar)
5. A TV-based browser or video game console (for example, Android TV, Microsoft Xbox, Sony PlayStation, or similar)
6. An eBook reading device (for example, Kindle, Nook, Sony Reader, or similar)
7. Other

S20. Do you, or does any member of your household, currently work for any of the following?

Select all that apply.

[PROGRAMMER: RANDOMIZE CHOICES EXCEPT 7 (“None of the above”). ALLOW MULTIPLE SELECTIONS.]

[TERMINATE IF RESPONDENT SELECTS 1 (“A market research department of a company or an advertising, public relations, or marketing department of a company”), 2 (“A market research firm or an advertising, public relations, or marketing agency”), OR 3 (“A company providing accounting or tax preparation services or software”). ALL OTHERS GO TO S30.]

1. A market research department of a company or an advertising, public relations, or marketing department of a company
2. A market research firm or an advertising, public relations, or marketing agency
3. A company providing accounting or tax preparation services or software
4. A developer, seller, or marketer of mobile devices
5. A developer, seller, or marketer of motor vehicles (such as automobiles or motorcycles)
6. A social media company
7. None of the above **[SINGLE PUNCH]**

S30. Which one of the following ranges includes your age?

Select one only.

[PROGRAMMER: DO NOT RANDOMIZE. ALLOW ONLY ONE SELECTION.]

[TERMINATE IF RESPONDENT SELECTS 1 (“Under 18 years old”) OR 7 (“Prefer not to answer”). ALL OTHERS GO TO S40.]

1. Under 18 years old
2. 18-24 years old
3. 25-34 years old
4. 35-44 years old
5. 45-54 years old
6. 55 years or older
7. Prefer not to answer

S40. What is your gender?

Select one only.

[PROGRAMMER: RANDOMIZE CHOICES EXCEPT 3 (“Other”) AND 4 (“Prefer not to answer”). ALLOW ONLY ONE SELECTION.]

[TERMINATE IF RESPONDENT SELECTS 4 (“Prefer not to answer”). ALL OTHERS GO TO S50.]

1. Male
2. Female
3. Other
4. Prefer not to answer

S50. In which of the following states do you currently live?

Select one only.

[PROGRAMMER: INCLUDE DROPDOWN LIST OF STATES INCLUDING “District of Columbia” AND “None of the above.” ALLOW ONLY ONE SELECTION.]

[TERMINATE IF RESPONDENT SELECTS “None of the above.” ALL OTHERS GO TO S60.]

We will now ask you some questions about the income tax return you may file this year, based on your income in 2021.

These questions are being asked solely for the purposes of determining whether you qualify for the survey.

Your responses will be kept confidential.

When you are ready to start, please click the "Continue" button.

[NEXT PAGE]

S60. Are you planning to file an income tax return in 2022, based on your income in 2021 (i.e. income earned between January 1, 2021 and December 31, 2021)?

Select one only.

[PROGRAMMER: RANDOMIZE CHOICES.]

[TERMINATE IF RESPONDENT SELECTS 2 "No." or 3 "I already filed." ALL OTHERS GO TO S70.]

1. Yes, I am planning to file an income tax return in 2022, based on my income in 2021
2. No, I am not planning to file an income tax return in 2022, based on my income in 2021
3. I already filed my income tax return in 2022, based on my income in 2021

S70. Which of the below best describes your involvement in tax filing in your household?

Select one only.

[PROGRAMMER: RANDOMIZE 1 to 4 ASCENDING OR DESCENDING, KEEP 5 LAST.]

[TERMINATE IF RESPONDENT SELECTS 4 ("I do not contribute to the tax-filing decisions") OR 5 ("Don't know/ Not sure"). ALL OTHERS GO TO S80.]

1. I alone make the tax-filing decisions
2. I make the tax-filing decisions jointly with others in my household
3. I contribute to the tax-filing decisions, but someone else in my household makes the decisions
4. I do not contribute to the tax-filing decisions
5. Don't know / Not sure

S80. Which of the following are tax preparation methods you (or others in your household) have considered using or might consider using when filing your 2021 income tax return?

Select all that apply.

[PROGRAMMER: RANDOMIZE 1 to 3. KEEP 4 and 5 LAST.]

[GO TO S90 IF RESPONDENT SELECTS 1 ("An online tax software")]

[TERMINATE OTHERWISE]

1. An online tax software

2. A paper tax-return form
3. A third-party professional (such as an accountant or a tax-preparer)
4. None of the above **[SINGLE PUNCH]**
5. Don't know / Not sure **[SINGLE PUNCH]**

S90. Which of the following income types did you earn in 2021?

Select all that apply.

[PROGRAMMER: RANDOMIZE 1 to 5. KEEP 6 and 7 LAST.]

[ALL GO TO S100.]

1. Wages (reported on a W-2 form) or retirement income
2. Unemployment income (reported on a 1099-G form)
3. Income reported on 1099-NEC, 1099-MISC or Schedule C (such as independent contractor income, self-employment income or small business income)
4. Income from stock sales
5. Rental Property income
6. None of the above **[SINGLE PUNCH]**
7. Don't know / Not sure **[SINGLE PUNCH]**

S100. Are you planning to itemize your deductions or claim the standard deduction on your 2021 income tax return?

Select one only

[PROGRAMMER: RANDOMIZE 1 to 2. KEEP 3 LAST.]

[ALL GO TO S110.]

1. I am planning to claim the standard deduction
2. I am planning to itemize my deductions
3. Don't know / Not sure

S110. Which of the below, if any, did you do in 2021?

Select all that apply

[PROGRAMMER: [PROGRAMMER: RANDOMIZE 1 to 3. KEEP 4 and 5 LAST.]

1. Received alimony
2. Received, exercised, or disposed of stock options issued by your employer as part of your compensation
3. Paid student loan interest
4. None of the above **[SINGLE PUNCH]**
5. Don't know / Not sure **[SINGLE PUNCH]**

[GO TO S120 IF:**S90 = 2, 3, 4, 5 OR****S90 = 1 AND S100 = 2 OR****S90 = 1 AND S100 = 1 AND S110 IS NOT 3, 4, OR 5****OTHERWISE TERMINATE]**

S120. Which of the following are tax preparation methods you have actually used when filing your income tax returns in any of the past 3 years?

Select all that apply.

[PROGRAMMER: RANDOMIZE 1 to 3. KEEP 4 and 5 LAST.]

[GO TO S130 IF RESPONDENT SELECTS 1 (“An online tax software”)]

[TERMINATE IF RESPONDENT SELECTS 5 (“Don’t know / Not sure”)]

[OTHERWISE ASSIGN TO GROUP A AND GO TO S150]

1. An online tax software
2. A paper tax-return form
3. A third-party professional (such as an accountant or a tax-preparer)
4. None of the above **[SINGLE PUNCH]**
5. Don’t know / Not sure **[SINGLE PUNCH]**

S130. You indicated that you used online tax software when filing your income tax returns in the past 3 years.

Which of the following online tax software providers have you used in the past 3 years?

Select all that apply.

[PROGRAMMER: RANDOMIZE 1 to 5. KEEP 6 and 7 LAST.]

[GO TO S140 IF RESPONDENT SELECTS 1 (“TurboTax”)]

[TERMINATE IF RESPONDENT SELECTS 7 (“Don’t know / Not sure”)]

[OTHERWISE ASSIGN TO GROUP A AND GO TO S150]

1. TurboTax
2. TaxAct
3. TaxSlayer
4. H&R Block
5. FreeTaxUSA
6. Other
7. Don’t know / Not sure **[SINGLE PUNCH]**

S140. You indicated that you used TurboTax when filing your income tax returns in the past 3 years.

In the past 3 years, have you ever filed your income tax returns using a TurboTax product that was free?

Select one only.

[PROGRAMMER: RANDOMIZE 1 to 2. KEEP 3 LAST.]

[ASSIGN TO GROUP B AND GO TO S150 IF RESPONDENT SELECTS 2 (“No, I have not”)]

[TERMINATE OTHERWISE]

1. Yes, I have
2. No, I have not
3. Don’t know / Not sure

S150. Please select “Yellow” from the following list in order to continue into the survey. *Select one only.*

[PROGRAMMER: RANDOMIZE. ALLOW ONLY ONE SELECTION.]

[TERMINATE IF RESPONDENT DOES NOT SELECT YELLOW.]

[ELSE QUALIFY AND GO TO TAT10]

1. Green
2. Blue
3. Yellow
4. Red

Main Questionnaire

TAT10.

Thank you. You qualify for this study!

You indicated that you have considered using or might consider using an online tax software to file your 2021 income tax return. One such software is TurboTax.

We will now ask you questions about using TurboTax online software.

Please answer the questions based on the information you have and do not guess! If you do not have enough information to answer a question, please indicate so.

[NEXT PAGE]

TAT220. What is your understanding about whether or not there is a cost to filing your own income taxes using TurboTax online software?

[PROGRAMMER: OPEN ENDED CAPTURE RESPONSE]

[NEXT PAGE]

TAT230. You may have already said this above, but please tell us again, in your understanding, who, if anyone, can file their taxes for free using TurboTax online software?

[PROGRAMMER: OPEN ENDED CAPTURE RESPONSE]

[NEXT PAGE]

TAT240. You may have already said this above, but please tell us again, which of the following best describes your understanding of filing your 2021 income taxes for free using TurboTax online software?

Select one only.

[PROGRAMMER: RANDOMIZE ASCENDING / DESCENDING 1 to 3. KEEP 4 LAST.]

[IF RESPONDENT SELECTS 1, GO TO TAT250]

[IF RESPONDENT SELECTS 2, GO TO TAT260]

[IF RESPONDENT SELECTS 3, GO TO TAT270]

[OTHERWISE GO TO TAT290]

1. I think I can file my 2021 income taxes for free using TurboTax online software
2. I don't think I can file my 2021 income taxes for free using TurboTax online software
3. I do not have enough information to say whether or not I can file my 2021 income taxes for free using TurboTax online software
4. I'm not sure

TAT250. You may have already said this above, but please tell us again why you think you can file your 2021 income taxes for free using TurboTax online software?

[PROGRAMMER: OPEN ENDED CAPTURE RESPONSE]

[GOTO TAT255]

TAT255. You have stated that you think you can file your 2021 income taxes for free using TurboTax online software. Which of the following sources played a role in you forming that impression ?

Select all that apply.

[PROGRAMMER: RANDOMIZE 1 TO 5. KEEP 6 AND 7 LAST.]

1. TurboTax advertisements
2. TurboTax website
3. Word-of-mouth (such as information from family, friends, etc.)
4. Advice from a financial professional (such as an accountant or a tax-preparer)
5. Information online not from TurboTax (such as articles on websites, blog posts, etc.)
6. Other
7. Don't know / Not sure **[SINGLE PUNCH]**

[GOTO TAT290]

TAT260. You may have already said this above, but please tell us again why you don't think you can file your 2021 income taxes for free using TurboTax online software?

[PROGRAMMER: OPEN ENDED CAPTURE RESPONSE]**[GOTO TAT265]**

TAT265. You have stated that you don't think you can file your 2021 income taxes for free using TurboTax online software. Which of the following sources played a role in you forming that impression?

Select all that apply.

[PROGRAMMER: RANDOMIZE 1 TO 5. KEEP 6 AND 7 LAST.]**[IF RESPONDENT SELECTS 2, GO TO TAT267]****[OTHERWISE GO TO TAT290]**

1. TurboTax advertisements
2. TurboTax website
3. Word-of-mouth (such as information from family, friends, etc.)
4. Advice from a financial professional (such as an accountant or a tax-preparer)
5. Information online not from TurboTax (such as articles on websites, blog posts, etc.)
6. Other
7. Don't know / Not sure **[SINGLE PUNCH]**

TAT267. Which of the following best describes your experience on the TurboTax website?

Select only one.

[PROGRAMMER: RANDOMIZE 1 TO 2. KEEP 3 LAST.]**[ALL GO TO TAT290]**

1. I learned that I cannot file income taxes for free using TurboTax on the TurboTax website without entering my personal tax information.
2. I learned that I cannot file income taxes for free using TurboTax on the TurboTax website after I started entering my personal tax information.
3. Don't know / Not sure

TAT270. You may have already said this above, but please tell us again what information you need to say whether or not you can file your 2021 income_taxes for free using TurboTax online software?

[PROGRAMMER: OPEN ENDED CAPTURE RESPONSE]

[GOTO TAT290]

TAT290. Thank you! You are almost done. Just a few more questions...

In some of its advertisements, TurboTax mentions “simple U.S. returns”.

Do you think that your 2021 income tax return meets TurboTax’s definition of a “simple U.S. return”?

[PROGRAMMER: RANDOMIZE 1, 2. ANCHOR 3 LAST]

[IF RESPONDENT SELECTS 1 (“Yes”), GO TO TAT300]

[IF RESPONDENT SELECTS 2 (“No”), GO TO TAT310]

[OTHERWISE GO TO NEXT PAGE]

1. Yes, I think my 2021 income tax return meets TurboTax’s definition of a “simple U.S. return”
2. No, I don’t think my 2021 income tax return meets TurboTax’s definition of a “simple U.S. return”
3. Don’t know / Not sure

TAT300. Why do you think that your 2021 income tax return meets TurboTax’s definition of a “simple U.S. return”?

[PROGRAMMER: OPEN ENDED, CAPTURE]

[NEXT PAGE]

TAT310. Why do you think that your 2021 income tax return does not meet TurboTax’s definition of a “simple U.S. return”?

[PROGRAMMER: OPEN ENDED, CAPTURE]

[NEXT PAGE]

Main Questionnaire OPT OUT

You finished the survey! Thank you for your participation.

This survey is being conducted on behalf of the United States Federal Trade Commission (FTC), the nation's consumer protection agency, in order to collect information about the reactions and experiences of potential customers to advertisements by Intuit, the maker of TurboTax.

The FTC investigates unfair and deceptive conduct by companies. The information you provide could help us further our mission under the FTC Act to protect consumers.

The FTC will treat your responses as confidential and will handle your information as outlined in the FTC's privacy policy, which you can read at <http://www.ftc.gov/ftc/privacy.shtm>.

The information collected in this survey may be made available to others (for example, in the course of litigation against companies for potential alleged violations of consumer protection laws, or if required by a court).

Your participation in this survey is strictly voluntary. If you wish to opt out, please let us know and we will honor this request and delete your submission from our records.

TAT400. Do you wish to opt-out?

[PROGRAMMER: RANDOMIZE]

[DELETE RESPONDENT DATA IF 1 ("Yes")]

1. Please delete my submission, I want to opt-out
2. Please keep my submission, I do not want to opt-out

**Turbo Tax Perceptions
Survey Screen Shots
March 2022**

0%

Thank you for taking time to complete this brief survey.

The responses you give to our questions are very important to us. If you don't know an answer to a question, or if you don't have an opinion, please indicate this in your response.

Your answers will be kept confidential. The results of this study will not be used to try to sell you anything.

If you normally wear glasses or contact lenses when viewing a screen, please wear them before continuing to the next page. Please take this survey when you have time to complete it uninterrupted and without distractions.

I understand and agree to these instructions

I do not understand or do not agree to these instructions

[Continue](#)

S05

0%

As an additional security measure, please enter the code exactly as it appears in the image below, and then click the "Continue" button.

Please enter it exactly as it appears, including upper and lower case letters. Do not include any spaces. Type them all together.

CH8WA

Continue

S10

3%

Which type of electronic device are you using to take this survey?
Select one only.

- A laptop/notebook computer
- An eBook reading device (for example, Kindle, Nook, Sony Reader, or similar)
- A tablet computer (for example, Apple iPad, Samsung Galaxy Tab, Amazon Fire, or similar)
- A smartphone (for example, Apple iPhone, Samsung Galaxy, or similar)
- A desktop computer
- A TV-based browser or video game console (for example, Android TV, Microsoft Xbox, Sony PlayStation, or similar)
- Other

Continue

S20

7%

Do you, or does any member of your household, currently work for any of the following?
Select all that apply.

- A company providing accounting or tax preparation services or software
- A social media company
- A developer, seller, or marketer of motor vehicles (such as automobiles or motorcycles)
- A market research firm or an advertising, public relations, or marketing agency
- A developer, seller, or marketer of mobile devices
- A market research department of a company or an advertising, public relations, or marketing department of a company
- None of the above

Continue

S30

10%

Which one of the following ranges includes your age?
Select one only.

Under 18 years old

18-24 years old

25-34 years old

35-44 years old

45-54 years old

55 years or older

Prefer not to answer

Continue

S40

14%

What is your gender?
Select one only.

- Female
- Male
- Other
- Prefer not to answer

Continue

S50

18%

In which of the following states do you currently live?
Select one only.

Select one...

- Select one...
- Alabama
- Alaska
- Arizona
- Arkansas
- California
- Colorado
- Connecticut
- Delaware
- District of Columbia
- Florida
- Georgia
- Hawaii
- Idaho
- Illinois
- Indiana
- Iowa
- Kansas
- Kentucky
- Louisiana

Continue



We will now ask you some questions about the income tax return you may file this year, based on your income in 2021.

These questions are being asked solely for the purposes of determining whether you qualify for the survey.

Your responses will be kept confidential.

When you are ready to start, please click the "Continue" button.

Continue

S60

25%

Are you planning to file an income tax return in 2022, based on your income in 2021 (i.e. income earned between January 1, 2021 and December 31, 2021)?

Select one only.

- Yes, I am planning to file an income tax return in 2022, based on my income in 2021
- I already filed my income tax return in 2022, based on my income in 2021
- No, I am not planning to file an income tax return in 2022, based on my income in 2021

Continue

S70

28%

Which of the below best describes your involvement in tax filing in your household?
Select one only.

- I do not contribute to the tax-filing decisions
- I contribute to the tax-filing decisions, but someone else in my household makes the decisions
- I make the tax-filing decisions jointly with others in my household
- I alone make the tax-filing decisions
- Don't know / Not sure

Continue

S80

32%

Which of the following are tax preparation methods you (or others in your household) have considered using or might consider using when filing your 2021 income tax return?

Select all that apply.

- A third-party professional (such as an accountant or a tax-preparer)
- An online tax software
- A paper tax-return form
- None of the above
- Don't know / Not sure

Continue

S90

35%

Which of the following income types did you earn in 2021?
Select all that apply.

- Income reported on 1099-NEC, 1099-MISC or Schedule C (such as independent contractor income, self-employment income or small business income)
- Unemployment income (reported on a 1099-G form)
- Income from stock sales
- Wages (reported on a W-2 form) or retirement income
- Rental Property income
- None of the above
- Don't know / Not sure

Continue

S100

43%

Are you planning to itemize your deductions or claim the standard deduction on your 2021 income tax return?
Select one only.

- I am planning to claim the standard deduction
- I am planning to itemize my deductions
- Don't know / Not sure

Continue

S110

47%

Which of the below, if any, did you do in 2021?
Select all that apply.

- Paid student loan interest
- Received alimony
- Received, exercised, or disposed of stock options issued by your employer as part of your compensation
- None of the above
- Don't know / Not sure

Continue

S120

50%

Which of the following are tax preparation methods you have actually used when filing your income tax returns in any of the past 3 years?

Select all that apply.

- A paper tax-return form
- An online tax software
- A third-party professional (such as an accountant or a tax-preparer)
- None of the above
- Don't know / Not sure

Continue

S130

54%

You indicated that you used online tax software when filing your income tax returns in the past 3 years.

Which of the following online tax software providers have you used in the past 3 years?
Select all that apply.

- TaxAct
- H&R Block
- TaxSlayer
- FreeTaxUSA
- TurboTax
- Other
- Don't know / Not sure

Continue

S140

56%

You indicated that you used TurboTax when filing your income tax returns in the past 3 years.

In the past 3 years, have you ever filed your income tax returns using a TurboTax product that was free?
Select one only.

No, I have not

Yes, I have

Don't know / Not sure

Continue

S150

57%

Please select "Yellow" from the following list in order to continue into the survey.
Select one only.

- Yellow
- Green
- Blue
- Red

Continue

TAT10



Thank you. You qualify for this study!

You indicated that you have considered using or might consider using an online tax software to file your 2021 income tax return. One such software is TurboTax.

We will now ask you questions about using TurboTax online software.

Please answer the questions based on the information you have and do not guess! If you do not have enough information to answer a question, please indicate so.

Continue

TAT220

66%

What is your understanding about whether or not there is a cost to filing your own income taxes using TurboTax online software?
Please be as specific as possible.

Continue

TAT230

70%

You may have already said this above, but please tell us again, in your understanding, who, if anyone, can file their taxes for free using TurboTax online software?
Please be as specific as possible.

Continue

TAT240

73%

You may have already said this above, but please tell us again, which of the following best describes your understanding of filing your 2021 income taxes for free using TurboTax online software?

Select one only:

- I do not have enough information to say whether or not I can file my 2021 income taxes for free using TurboTax online software
- I don't think I can file my 2021 income taxes for free using TurboTax online software
- I think I can file my 2021 income taxes for free using TurboTax online software
- I'm not sure

Continue

TAT250

77%

You may have already said this above, but please tell us again why you think you can file your 2021 income taxes for free using TurboTax online software?
Please be as specific as possible.

Continue

TAT255

78%

You have stated that you think you can file your 2021 income taxes for free using TurboTax online software. Which of the following sources played a role in you forming that impression?

Select all that apply.

- Word-of-mouth (such as information from family, friends, etc.)
- TurboTax website
- Advice from a financial professional (such as an accountant or a tax-preparer)
- Information online not from TurboTax (such as articles on websites, blog posts, etc.)
- TurboTax advertisements
- Other
- Don't know / Not sure

Continue

TAT260

77%

You may have already said this above, but please tell us again why you don't think you can file your 2021 income taxes for free using TurboTax online software?
Please be as specific as possible.

Continue

TAT265

77%

You have stated that you don't think you can file your 2021 income taxes for free using TurboTax online software. Which of the following sources played a role in you forming that impression?

Select all that apply.

- Advice from a financial professional (such as an accountant or a tax-preparer)
- Word-of-mouth (such as information from family, friends, etc.)
- TurboTax website
- TurboTax advertisements
- Information online not from TurboTax (such as articles on websites, blog posts, etc.)
- Other
- Don't know / Not sure

Continue

TAT267

81%

Which of the following best describes your experience on the TurboTax website?
Select only one.

- I learned that I cannot file income taxes for free using TurboTax on the TurboTax website without entering my personal tax information.
- I learned that I cannot file income taxes for free using TurboTax on the TurboTax website after I started entering my personal tax information.
- Don't know / Not sure

Continue

TAT270

77%

You may have already said this above, but please tell us again what information you need to say whether or not you can file your 2021 income taxes for free using TurboTax online software?
Please be as specific as possible.

Continue

TAT290

81%

Thank you! You are almost done. Just a few more questions...

In some of its advertisements, TurboTax mentions "simple U.S. returns".

Do you think that your 2021 income tax return meets TurboTax's definition of a "simple U.S. return"?

Select one only.

Yes, I think my 2021 income tax return meets TurboTax's definition of a "simple U.S. return"

No, I don't think my 2021 income tax return meets TurboTax's definition of a "simple U.S. return"

Don't know / Not sure

Continue

TAT300

85%

Why do you think that your 2021 income tax return meets TurboTax's definition of a "simple U.S. return"?
Please be as specific as possible.

Continue

TAT310

85%

Why do you think that your 2021 income tax return does not meet TurboTax's definition of a "simple U.S. return"?
Please be as specific as possible.

Continue

TAT400

88%

You finished the survey! Thank you for your participation.

This survey is being conducted on behalf of the United States Federal Trade Commission (FTC), the nation's consumer protection agency, in order to collect information about the reactions and experiences of potential customers to advertisements by Intuit, the maker of TurboTax.

The FTC investigates unfair and deceptive conduct by companies. The information you provide could help us further our mission under the FTC Act to protect consumers.

The FTC will treat your responses as confidential and will handle your information as outlined in the FTC's privacy policy, which you can read at <http://www.ftc.gov/ftc/privacy.shtm>.

The information collected in this survey may be made available to others (for example, in the course of litigation against companies for potential alleged violations of consumer protection laws, or if required by a court).

Your participation in this survey is strictly voluntary. If you wish to opt out, please let us know and we will honor this request and delete your submission from our records.

Do you wish to opt-out?
Select one only.

Please keep my submission. I do not want to opt-out

Please delete my submission. I want to opt-out

[Continue](#)

TurboTax Perception Survey - Pretest Interview Questions

The pretest sample will include respondents who meet the study screening criteria. A minimum of eight pretest interviews will be conducted over the phone or via videoconferencing by a trained interviewer. Both Group A and Group B respondents will be represented in the pretest sample.

After introductions, respondents should be asked to start the survey. Moderator should ask all of the follow-up questions listed below after the respondent finishes taking the survey, but before the Opt-out page. Moderator should add probes as needed to ensure that the respondents have given a complete answer.

INTRODUCTION SCRIPT

Today we will have you share your screen and take a survey followed by a few questions about your experience. First, I will send you the link to the survey. **[SHARE UNIQUE LINK TO SURVEY]** Please click on that link, which will open a survey in your browser but do not begin the survey yet. Now, please share your screen. **[INSTRUCT RESPONDENT TO SHARE SCREEN]**.

I will be on the phone the entire time you are taking the survey, so feel free to “think out loud” or bring up anything you would like while you are taking the survey. Please be thorough in your response and take as much time as you need.

FOLLOW-UP QUESTIONS AFTER RESPONDENT FINISHES TAKING THE SURVEY

Q1. Did you have any problems while taking the survey?

Q2. Did you think any aspects of the questions were unclear? If so, which ones and why?

Q3. Did you think any answer options were unclear? If so, which ones and why?

Q4. Did you think any instructions or explanations were unclear? If so, which ones and why?

Q5. I will now remind you some of the information you were asked about in the survey. For each, please tell me if there was anything unclear that caused problems for you while answering the question.

[ASK EACH SUB-QUESTION AND LET RESPONDENT RESPOND BEFORE ASKING NEXT]

Q5A. The income types you earned in 2021

Q5B. The deductions you plan to claim in your 2021 tax return

Q5C. Whether you “received alimony,” “received, exercised, or disposed of stock options,” or “Paid student loan interest” in 2021

Q6. In the survey, you were asked questions about the tax preparation methods you used in the past 3 years. Was there anything unclear that caused problems for you while answering these questions?

Q7. What do you think might be the purpose of conducting this survey?

Q7A. What makes you think so?

[ASK RESPONDENT TO CONTINUE. ASK FOLLOWING QUESTIONS AFTER THE END OF THE SURVEY]

Q8. Did you think any aspects of the Opt-out information that you read were unclear? If so, what aspect and why?

Q9. Is there anything else you would like to say about the survey?

Edits Resulting from Pre-Test Interviews Perception Survey, Conducted 3/9/22

No.	Original Question	Original Question Text	Adjusted Question Text
1	S70	<p>Which of the below best describes your involvement in tax filing in your household?</p> <p>Select one only.</p> <ol style="list-style-type: none"> 1. I alone make the tax-filing decisions 2. I make the tax-filing decisions with input from others in my household 3. I contribute to the tax-filing decisions, but someone else in my household makes the decisions 4. I do not contribute to the tax-filing decisions 5. Don't know / Not sure 	<p>Which of the below best describes your involvement in tax filing in your household?</p> <p>Select one only.</p> <ol style="list-style-type: none"> 1. I alone make the tax-filing decisions 2. I make the tax-filing decisions jointly with others in my household 3. I contribute to the tax-filing decisions, but someone else in my household makes the decisions 4. I do not contribute to the tax-filing decisions 5. Don't know / Not sure
2	S90	<p>Which of the following income types did you earn in 2021?</p> <p>Select all that apply.</p> <ol style="list-style-type: none"> 1. Wages (reported on a W-2 form) 2. Unemployment income (reported on a 1099-G form) 3. Independent contractor income (reported on a 1099-NEC form) 4. Business income 5. Rental Property income 6. None of the above 7. Don't know / Not sure 	<p>Which of the following income types did you earn in 2021?</p> <p>Select all that apply.</p> <ol style="list-style-type: none"> 1. Wages (reported on a W-2 form) or retirement income 2. Unemployment income (reported on a 1099-G form) 3. Income reported on 1099-NEC, 1099-MISC or Schedule C (such as independent contractor income, self-employment income or small business income) 4. Income from stock sales 5. Rental Property income 6. None of the above 7. Don't know / Not sure
3	S110	<p>Which of the below, if any, did you do in 2021?</p> <p>Select all that apply.</p> <ol style="list-style-type: none"> 1. Received alimony 2. Received, exercised, or disposed of stock options. 3. Paid student loan interest 4. None of the above 5. Don't know / Not sure 	<p>Which of the below, if any, did you do in 2021?</p> <p>Select all that apply.</p> <ol style="list-style-type: none"> 1. Received alimony 2. Received, exercised, or disposed of stock options issued by your employer as part of your compensation 3. Paid student loan interest 4. None of the above 5. Don't know / Not sure
4	TAT400	<p>Do you wish to opt-out?</p> <ol style="list-style-type: none"> 1. Yes, I want to opt-out, please delete my submission 2. No, I do not want to opt-out, please keep my submission 	<p>Do you wish to opt-out?</p> <ol style="list-style-type: none"> 1. Please delete my submission, I want to opt-out 2. Please keep my submission, I do not want to opt-out

Survey Response Statistics

	Number of Respondents	Percent of Total
Completed Survey^[1]	607	5.0%
Screened Out Of Survey Due To:		
Employment (S20) ^[2]	798	6.5%
Age (S30) ^[3]	68	0.6%
Gender (S40) ^[4]	28	0.2%
Location (S50) ^[5]	1	0.0%
Already filed or not planning to file 2021 income tax return (S60) ^[6]	5,646	46.1%
Tax preparation role (S70) ^[7]	311	2.5%
Tax preparation method (S80) ^[8]	1,887	15.4%
Qualify for TurboTax Free Edition (S90/S100/S110) ^[9]	756	6.2%
Tax filing methods in the past 3 years (S120/S130/S140) ^[10]	799	6.5%
Quality Control (S150/Unintelligible Open-ended Responses) ^[11]	214	1.7%
Self-Terminated During Screening	874	7.1%
Exceeded Quota^[12]	252	2.1%
Self-Terminated During Main Survey	8	0.1%
Total Survey Starts^[13]	12,249	100.0%

Note:

- [1] Includes the respondents who qualified for and completed the survey.
- [2] Respondents who selected that they or a family member worked for “[a] market research department of a company or an advertising, public relations, or marketing department of a company,” “[a] market research firm or an advertising, public relations, or marketing agency,” or “[a] company providing accounting or tax preparation services or software” in response to question S20 were screened out of the survey.
- [3] Respondents who were under the age of 18 or did not provide age information in response to question S30 were screened out of the survey.
- [4] Respondents who did not provide gender information in response to question S40 were screened out of the survey.
- [5] Respondents who selected “[n]one of the above” as the current U.S. State they lived in to question S50 were screened out of the survey.
- [6] Respondents who selected “[n]o” or “I already filed” in response to question S60 were screened out of the survey.
- [7] Respondents who selected “I do not contribute to the tax-filing decisions” or “[d]on’t know / [n]ot sure” in response to question S70 were screened out of the survey.
- [8] Respondents who selected “[a] paper tax-return form,” “[a] third-party professional (such as an accountant or a tax-preparer),” “[n]one of the above,” or “[d]on’t know / [n]ot sure” in response to question S80 were screened out of the survey.
- [9] Respondents who selected options that make them eligible for TurboTax Free Edition in response to questions S90, S100, and S110 were screened out of the survey.
- [10] Respondents who selected “[d]on’t know / [n]ot sure” in response to questions S120 or S130 were screened out of the survey. Respondents who selected “[d]on’t know / [n]ot sure” or “[y]es I have” in response to question S140 were screened out of the survey.
- [11] Respondents who were unable to select “Yellow” in question S150 or provided an unintelligible response to any of the open-ended questions were screened out of the survey.
- [12] Respondents who started the survey after the quota for their respective age, region, or gender had been filled were terminated.
- [13] Includes only respondents who clicked on the survey and understood and agreed to instructions (question S0), passed the Captcha term (question S05), and were taking the survey on an appropriate device (question S10).

Respondents Indicating They Think They Can File Their 2021 Income Taxes for Free Using TurboTax Online Software

	N	Group A (No TurboTax) ^[1]		Group B (Paid TurboTax) ^[1]			
		Total Respondents	Percent	N	Total Respondents	Percent	
1. Baseline Results	213	404	52.7%	49	203	24.1%	
2. Tests of Robustness							
2.1	Using the subset of respondents who make tax-filing decisions alone or jointly ^[2]	199	380	52.4%	49	196	25.0%
2.2	Using the subset of respondents whose survey completion time did not exceed the 95 percentile of duration distribution	201	382	52.6%	46	194	23.7%
2.3	Using the subset of respondents who selected four or fewer options in question TAT255 and TAT265 ^[3]	208	399	52.1%	49	203	24.1%
3.	Applying all Robustness Tests concurrently ^[4]	183	354	51.7%	46	188	24.5%

Source: TurboTax Perception Survey Results

Note:

[1] Group A (No TurboTax) consists of respondents who did not use TurboTax when filing income taxes in the past 3 years. Group B (Paid TurboTax) consists of respondents who used TurboTax but did not use a free TurboTax product when filing income taxes in the past 3 years.

[2] Respondents selected (1) "I alone make the tax-filing decisions" or (2) "I make the tax-filing decisions jointly with others in my household" to question S70 "[w]hich of the below best describes your involvement in tax filing in your household?"

[3] Respondents were able to select multiple options for TAT255 and TAT265.

[4] Applying stipulations outlined in 2.1, 2.2, and 2.3 to a single analysis. Includes respondents who indicated that they alone make the tax-filing decisions or they make the tax-filing decisions jointly with others in their household, chose 4 or fewer options for TAT255 or TAT265, and survey completion time did not exceed the 95 percentile of duration distribution.

Respondents Who Cited TurboTax Advertisements as Having Played a Role in Forming Their Impression That They Can File Their 2021 Income Taxes for Free Using TurboTax Online Software

	Group A (No TurboTax) ^[1]			Group B (Paid TurboTax) ^[1]			
	N	Total Respondents ^[2]	Percent	N	Total Respondents ^[2]	Percent	
1. Baseline Results	98	213	46.0%	23	49	46.9%	
2. Tests of Robustness							
2.1	Using the subset of respondents who make tax-filing decisions alone or jointly ^[3]	93	199	46.7%	23	49	46.9%
2.2	Using the subset of respondents whose survey completion time did not exceed the 95 percentile of duration distribution	96	201	47.8%	21	46	45.7%
2.3	Using the subset of respondents who selected four or fewer options in question TAT255 and TAT265 ^[4]	93	208	44.7%	23	49	46.9%
3.	Applying all Robustness Tests concurrently ^[5]	87	183	47.5%	21	46	45.7%

Source: TurboTax Perception Survey Results

Note:

[1] Group A (No TurboTax) consists of respondents who did not use TurboTax when filing income taxes in the past 3 years. Group B (Paid TurboTax) consists of respondents who used TurboTax but did not use a free TurboTax product when filing income taxes in the past 3 years.

[2] Total respondents consist of respondents who selected "I think I can file my 2021 income taxes for free using TurboTax online software" for TAT240.

[3] Respondents selected (1) "I alone make the tax-filing decisions" or (2) "I make the tax-filing decisions jointly with others in my household" to question S70 "[w]hich of the below best describes your involvement in tax filing in your household?"

[4] Respondents were able to select multiple options for TAT255 and TAT265.

[5] Applying stipulations outlined in 2.1, 2.2, and 2.3 to a single analysis. Includes respondents who indicated that they alone make the tax-filing decisions or they make the tax-filing decisions jointly with others in their household, chose 4 or fewer options for TAT255 or TAT265, and survey completion time did not exceed the 95 percentile of duration distribution.

Respondents Who Cited the TurboTax Website as Having Played a Role in Forming Their Impression That They Can File Their 2021 Income Taxes for Free Using TurboTax Online Software

	Group A (No TurboTax) ^[1]			Group B (Paid TurboTax) ^[1]		
	N	Total Respondents ^[2]	Percent	N	Total Respondents ^[2]	Percent
1. Baseline Results	100	213	46.9%	30	49	61.2%
2. Tests of Robustness						
2.1 Using the subset of respondents who make tax-filing decisions alone or jointly ^[3]	90	199	45.2%	30	49	61.2%
2.2 Using the subset of respondents whose survey completion time did not exceed the 95 percentile of duration distribution	94	201	46.8%	28	46	60.9%
2.3 Using the subset of respondents who selected four or fewer options in question TAT255 and TAT265 ^[4]	95	208	45.7%	30	49	61.2%
3. Applying all Robustness Tests concurrently ^[5]	80	183	43.7%	28	46	60.9%

Source: TurboTax Perception Survey Results

Note:

[1] Group A (No TurboTax) consists of respondents who did not use TurboTax when filing income taxes in the past 3 years. Group B (Paid TurboTax) consists of respondents who used TurboTax but did not use a free TurboTax product when filing income taxes in the past 3 years.

[2] Total respondents consist of respondents who selected "I think I can file my 2021 income taxes for free using TurboTax online software" for TAT240.

[3] Respondents selected (1) "I alone make the tax-filing decisions" or (2) "I make the tax-filing decisions jointly with others in my household" to question S70 "[w]hich of the below best describes your involvement in tax filing in your household?"

[4] Respondents were able to select multiple options for TAT255 and TAT265.

[5] Applying stipulations outlined in 2.1, 2.2, and 2.3 to a single analysis. Includes respondents who indicated that they alone make the tax-filing decisions or they make the tax-filing decisions jointly with others in their household, chose 4 or fewer options for TAT255 or TAT265, and survey completion time did not exceed the 95 percentile of duration distribution.

Respondents Who Indicate Think That Their 2021 Income Tax Return Meets TurboTax's Definition of a "Simple U.S. Return"

	Group A (No TurboTax) ^[1]			Group B (Paid TurboTax) ^[1]			
	N	Total Respondents	Percent	N	Total Respondents	Percent	
1. Baseline Results	222	404	55.0%	58	203	28.6%	
2. Tests of Robustness							
2.1	Using the subset of respondents who make tax-filing decisions alone or jointly ^[2]	202	380	53.2%	56	196	28.6%
2.2	Using the subset of respondents whose survey completion time did not exceed the 95 percentile of duration distribution	212	382	55.5%	55	194	28.4%
2.3	Using the subset of respondents who selected four or fewer options in question TAT255 and TAT265 ^[3]	218	399	54.6%	58	203	28.6%
3. Applying all Robustness Tests concurrently ^[4]	189	354	53.4%	53	188	28.2%	

Source: TurboTax Perception Survey Results

Note:

[1] Group A (No TurboTax) consists of respondents who did not use TurboTax when filing income taxes in the past 3 years. Group B (Paid TurboTax) consists of respondents who used TurboTax but did not use a free TurboTax product when filing income taxes in the past 3 years.

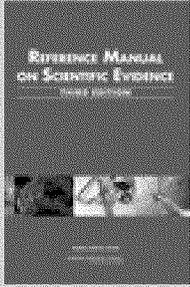
[2] Respondents selected (1) "I alone make the tax-filing decisions" or (2) "I make the tax-filing decisions jointly with others in my household" to question S70 "[w]hich of the below best describes your involvement in tax filing in your household?"

[3] Respondents were able to select multiple options for TAT255 and TAT265.

[4] Applying stipulations outlined in 2.1, 2.2, and 2.3 to a single analysis. Includes respondents who indicated that they alone make the tax-filing decisions or they make the tax-filing decisions jointly with others in their household, chose 4 or fewer options for TAT255 or TAT265, and survey completion time did not exceed the 95 percentile of duration distribution.

RX709

This PDF is available from The National Academies Press at http://www.nap.edu/catalog.php?record_id=13163



Reference Manual on Scientific Evidence: Third Edition

ISBN
978-0-309-21421-6

1038 pages
6 x 9
PAPERBACK (2011)

Committee on the Development of the Third Edition of the Reference Manual on Scientific Evidence; Federal Judicial Center; National Research Council

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RX 709

Reference Manual on Scientific Evidence

Third Edition

Committee on the Development of the Third Edition of the
Reference Manual on Scientific Evidence

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Policy and Global Affairs

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NATIONAL RESEARCH COUNCIL
OF THE NATIONAL ACADEMIES

THE NATIONAL ACADEMIES PRESS
Washington, D.C.
www.nap.edu

THE NATIONAL ACADEMIES PRESS 500 Fifth Street, N.W. Washington, DC 20001

The Federal Judicial Center contributed to this publication in furtherance of the Center's statutory mission to develop and conduct educational programs for judicial branch employees. The views expressed are those of the authors and not necessarily those of the Federal Judicial Center.

NOTICE: The project that is the subject of this report was approved by the Governing Board of the National Research Council, whose members are drawn from the councils of the National Academy of Sciences, the National Academy of Engineering, and the Institute of Medicine. The members of the committee responsible for the report were chosen for their special competences and with regard for appropriate balance.

The development of the third edition of the *Reference Manual on Scientific Evidence* was supported by Contract No. B5727.R02 between the National Academy of Sciences and the Carnegie Corporation of New York and a grant from the Starr Foundation. The views expressed in this publication are those of the authors and do not necessarily reflect those of the National Academies or the organizations that provided support for the project.

International Standard Book Number-13: 978-0-309-21421-6

International Standard Book Number-10: 0-309-21421-1

Library of Congress Cataloging-in-Publication Data

Reference manual on scientific evidence. — 3rd ed.

p. cm.

Includes bibliographical references and index.

ISBN-13: 978-0-309-21421-6 (pbk.)

ISBN-10: 0-309-21421-1 (pbk.)

1. Evidence, Expert—United States. I. Federal Judicial Center.

KF8961.R44 2011

347.73'67—dc23

2011031458

Additional copies of this report are available from the National Academies Press, 500 Fifth Street, N.W., Lockbox 285, Washington, DC 20055; (800) 624-6242 or (202) 334-3313 (in the Washington metropolitan area); Internet, <http://www.nap.edu>.

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Printed in the United States of America

Reference Guide on Survey Research

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I. Introduction

Sample surveys are used to describe or enumerate the beliefs, attitudes, or behavior of persons or other social units.¹ Surveys typically are offered in legal proceedings to establish or refute claims about the characteristics of those individuals or social units (e.g., whether consumers are likely to be misled by the claims contained in an allegedly deceptive advertisement;² which qualities purchasers focus on in making decisions about buying new computer systems).³ In a broader sense, a *survey* can describe or enumerate the attributes of any units, including animals and objects.⁴ We focus here primarily on sample surveys, which must deal not only with issues of population definition, sampling, and measurement common to all surveys, but also with the specialized issues that arise in obtaining information from human respondents.

In principle, surveys may count or measure every member of the relevant population (e.g., all plaintiffs eligible to join in a suit, all employees currently working for a corporation, all trees in a forest). In practice, surveys typically count or measure only a portion of the individuals or other units that the survey is intended to describe (e.g., a sample of jury-eligible citizens, a sample of potential job applicants). In either case, the goal is to provide information on the relevant population from which the sample was drawn. Sample surveys can be carried out using probability or nonprobability sampling techniques. Although probability sampling offers important advantages over nonprobability sampling,⁵ experts in some fields (e.g., marketing) regularly rely on various forms of nonprobability sampling when conducting surveys. Consistent with Federal Rule of Evidence 703, courts generally have accepted such evidence.⁶ Thus, in this reference guide, both the probability sample and the nonprobability sample are discussed. The strengths of probability sampling and the weaknesses of various types of non-probability sampling are described.

1. Sample surveys conducted by social scientists “consist of (relatively) systematic, (mostly) standardized approaches to collecting information on individuals, households, organizations, or larger organized entities through questioning systematically identified samples.” James D. Wright & Peter V. Marsden, *Survey Research and Social Science: History, Current Practice, and Future Prospects*, in *Handbook of Survey Research* 1, 3 (James D. Wright & Peter V. Marsden eds., 2d ed. 2010).

2. See *Sanderson Farms v. Tyson Foods*, 547 F. Supp. 2d 491 (D. Md. 2008).

3. See *SMS Sys. Maint. Servs. v. Digital Equip. Corp.*, 118 F.3d 11, 30 (1st Cir. 1999). For other examples, see notes 19–32 and accompanying text.

4. In *J.H. Miles & Co. v. Brown*, 910 F. Supp. 1138 (E.D. Va. 1995), clam processors and fishing vessel owners sued the Secretary of Commerce for failing to use the unexpectedly high results from 1994 survey data on the size of the clam population to determine clam fishing quotas for 1995. The estimate of clam abundance is obtained from surveys of the amount of fishing time the research survey vessels require to collect a specified yield of clams in major fishing areas over a period of several weeks. *Id.* at 1144–45.

5. See *infra* Section III.C.

6. Fed. R. Evid. 703 recognizes facts or data “of a type reasonably relied upon by experts in the particular field. . . .”

As a method of data collection, surveys have several crucial potential advantages over less systematic approaches.⁷ When properly designed, executed, and described, surveys (1) economically present the characteristics of a large group of respondents or other units and (2) permit an assessment of the extent to which the measured respondents or other units are likely to adequately represent a relevant group of individuals or other units.⁸ All questions asked of respondents and all other measuring devices used (e.g., criteria for selecting eligible respondents) can be examined by the court and the opposing party for objectivity, clarity, and relevance, and all answers or other measures obtained can be analyzed for completeness and consistency. The survey questions should not be the only focus of attention. To make it possible for the court and the opposing party to closely scrutinize the survey so that its relevance, objectivity, and representativeness can be evaluated, the party proposing to offer the survey as evidence should also describe in detail the design, execution, and analysis of the survey. This should include (1) a description of the population from which the sample was selected, demonstrating that it was the relevant population for the question at hand; (2) a description of how the sample was drawn and an explanation for why that sample design was appropriate; (3) a report on response rate and the ability of the sample to represent the target population; and (4) an evaluation of any sources of potential bias in respondents' answers.

The questions listed in this reference guide are intended to assist judges in identifying, narrowing, and addressing issues bearing on the adequacy of surveys either offered as evidence or proposed as a method for developing information.⁹ These questions can be (1) raised from the bench during a pretrial proceeding to determine the admissibility of the survey evidence; (2) presented to the contending experts before trial for their joint identification of disputed and undisputed issues; (3) presented to counsel with the expectation that the issues will be addressed during the examination of the experts at trial; or (4) raised in bench trials when a motion for a preliminary injunction is made to help the judge evaluate

7. This does not mean that surveys can be relied on to address all questions. For example, if survey respondents had been asked in the days before the attacks of 9/11 to predict whether they would volunteer for military service if Washington, D.C., were to be bombed, their answers may not have provided accurate predictions. Although respondents might have willingly answered the question, their assessment of what they would actually do in response to an attack simply may have been inaccurate. Even the option of a "do not know" choice would not have prevented an error in prediction if they believed they could accurately predict what they would do. Thus, although such a survey would have been suitable for assessing the *predictions* of respondents, it might have provided a very inaccurate estimate of what an actual response to the attack would be.

8. The ability to quantitatively assess the limits of the likely margin of error is unique to probability sample surveys, but an expert testifying about any survey should provide enough information to allow the judge to evaluate how potential error, including coverage, measurement, nonresponse, and sampling error, may have affected the obtained pattern of responses.

9. See *infra* text accompanying note 31.

what weight, if any, the survey should be given.¹⁰ These questions are intended to improve the utility of cross-examination by counsel, where appropriate, not to replace it.

All sample surveys, whether they measure individuals or other units, should address the issues concerning purpose and design (Section II), population definition and sampling (Section III), accuracy of data entry (Section VI), and disclosure and reporting (Section VII). Questionnaire and interview surveys, whether conducted in-person, on the telephone, or online, raise methodological issues involving survey questions and structure (Section IV) and confidentiality (Section VII.C). Interview surveys introduce additional issues (e.g., interviewer training and qualifications) (Section V), and online surveys raise some new issues and questions that are currently under study (Section VI). The sections of this reference guide are labeled to direct the reader to those topics that are relevant to the type of survey being considered. The scope of this reference guide is necessarily limited, and additional issues might arise in particular cases.

A. Use of Surveys in Court

Fifty years ago the question of whether surveys constituted acceptable evidence still was unsettled.¹¹ Early doubts about the admissibility of surveys centered on their use of sampling¹² and their status as hearsay evidence.¹³ Federal Rule of Evidence

10. Lanham Act cases involving trademark infringement or deceptive advertising frequently require expedited hearings that request injunctive relief, so judges may need to be more familiar with survey methodology when considering the weight to accord a survey in these cases than when presiding over cases being submitted to a jury. Even in a case being decided by a jury, however, the court must be prepared to evaluate the methodology of the survey evidence in order to rule on admissibility. See *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 589 (1993).

11. Hans Zeisel, *The Uniqueness of Survey Evidence*, 45 Cornell L.Q. 322, 345 (1960).

12. In an early use of sampling, *Sears, Roebuck & Co.* claimed a tax refund based on sales made to individuals living outside city limits. Sears randomly sampled 33 of the 826 working days in the relevant working period, computed the proportion of sales to out-of-city individuals during those days, and projected the sample result to the entire period. The court refused to accept the estimate based on the sample. When a complete audit was made, the result was almost identical to that obtained from the sample. *Sears, Roebuck & Co. v. City of Inglewood*, tried in Los Angeles Superior Court in 1955, is described in R. Clay Sprows, *The Admissibility of Sample Data into a Court of Law: A Case History*, 4 UCLA L. Rev. 222, 226–29 (1956–1957).

13. Judge Wilfred Feinberg's thoughtful analysis in *Zippo Manufacturing Co. v. Rogers Imports, Inc.*, 216 F. Supp. 670, 682–83 (S.D.N.Y. 1963), provides two alternative grounds for admitting opinion surveys: (1) Surveys are not hearsay because they are not offered in evidence to prove the truth of the matter asserted; and (2) even if they are hearsay, they fall under one of the exceptions as a "present sense impression." In *Schering Corp. v. Pfizer Inc.*, 189 F.3d 218 (2d Cir. 1999), the Second Circuit distinguished between perception surveys designed to reflect the present sense impressions of respondents and "memory" surveys designed to collect information about a past occurrence based on the recollections of the survey respondents. The court in *Schering* suggested that if a survey is offered to prove the existence of a specific idea in the public mind, then the survey does constitute hearsay

703 settled both matters for surveys by redirecting attention to the “validity of the techniques employed.”¹⁴ The inquiry under Rule 703 focuses on whether facts or data are “of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject.”¹⁵ For a survey, the question becomes, “Was the poll or survey conducted in accordance with generally accepted survey principles, and were the results used in a statistically correct way?”¹⁶ This focus on the adequacy of the methodology used in conducting and analyzing results from a survey is also consistent with the Supreme Court’s discussion of admissible scientific evidence in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*¹⁷

Because the survey method provides an economical and systematic way to gather information and draw inferences about a large number of individuals or other units, surveys are used widely in business, government, and, increasingly,

evidence. As the court observed, Federal Rule of Evidence 803(3), creating “an exception to the hearsay rule for such statements [i.e., state-of-mind expressions] rather than excluding the statements from the definition of hearsay, makes sense only in this light.” *Id.* at 230 n.3. *See also* Playtex Prods. v. Procter & Gamble Co., 2003 U.S. Dist. LEXIS 8913 (S.D.N.Y. May 28, 2003), *aff’d*, 126 Fed. Appx. 32 (2d Cir. 2005). Note, however, that when survey respondents are shown a stimulus (e.g., a commercial) and then respond to a series of questions about their impressions of what they viewed, those impressions reflect both respondents’ initial perceptions and their memory for what they saw and heard. Concerns about the impact of memory on the trustworthiness of survey responses appropriately depend on the passage of time between exposure and testing and on the likelihood that distorting events occurred during that interval.

Two additional exceptions to the hearsay exclusion can be applied to surveys. First, surveys may constitute a hearsay exception if the survey data were collected in the normal course of a regularly conducted business activity, unless “the source of information or the method or circumstances of preparation indicate lack of trustworthiness.” Fed. R. Evid. 803(6); *see also* Ortho Pharm. Corp. v. Cosprophar, Inc., 828 F. Supp. 1114, 1119–20 (S.D.N.Y. 1993) (marketing surveys prepared in the course of business were properly excluded because they lacked foundation from a person who saw the original data or knew what steps were taken in preparing the report), *aff’d*, 32 F.3d 690 (2d Cir. 1994). In addition, if a survey shows guarantees of trustworthiness equivalent to those in other hearsay exceptions, it can be admitted if the court determines that the statement is offered as evidence of a material fact, it is more probative on the point for which it is offered than any other evidence that the proponent can procure through reasonable efforts, and admissibility serves the interests of justice. Fed. R. Evid. 807; *e.g.*, *Schering*, 189 F.3d at 232. Admissibility as an exception to the hearsay exclusion thus depends on the trustworthiness of the survey. *New Colt Holding v. RJG Holdings of Fla.*, 312 F. Supp. 2d 195, 223 (D. Conn. 2004).

14. Fed. R. Evid. 703 Advisory Committee Note.

15. Fed. R. Evid. 703.

16. Manual for Complex Litigation § 2.712 (1982). Survey research also is addressed in the Manual for Complex Litigation, Second § 21.484 (1985) [hereinafter MCL 2d]; the Manual for Complex Litigation, Third § 21.493 (1995) [hereinafter MCL 3d]; and the Manual for Complex Litigation, Fourth § 11.493 (2004) [hereinafter MCL 4th]. Note, however, that experts who collect survey data, along with the professions that rely on those surveys, may differ in some of their methodological standards and principles. An assessment of the precision of sample estimates and an evaluation of the sources and magnitude of likely bias are required to distinguish methods that are acceptable from methods that are not.

17. 509 U.S. 579 (1993); *see also* *General Elec. Co. v. Joiner*, 522 U.S. 136, 147 (1997).

administrative settings and judicial proceedings.¹⁸ Both federal and state courts have accepted survey evidence on a variety of issues. In a case involving allegations of discrimination in jury panel composition, the defense team surveyed prospective jurors to obtain their age, race, education, ethnicity, and income distribution.¹⁹ Surveys of employees or prospective employees are used to support or refute claims of employment discrimination.²⁰ Surveys provide information on the nature and similarity of claims to support motions for or against class certification.²¹ In ruling on the admissibility of scientific claims, courts have examined surveys of scientific experts to assess the extent to which the theory or technique has received widespread acceptance.²² Some courts have admitted surveys in obscenity cases to provide evidence about community standards.²³ Requests for a change of venue on grounds of jury pool bias often are backed by evidence from a survey of jury-eligible respondents in the area of the original venue.²⁴ The plaintiff in an antitrust suit conducted a survey to assess what characteristics, including price, affected consumers' preferences. The survey was offered as one way to estimate damages.²⁵ In a Title IX suit based on allegedly discriminatory scheduling of girls'

18. Some sample surveys are so well accepted that they even may not be recognized as surveys. For example, some U.S. Census Bureau data are based on sample surveys. Similarly, the Standard Table of Mortality, which is accepted as proof of the average life expectancy of an individual of a particular age and gender, is based on survey data.

19. *United States v. Green*, 389 F. Supp. 2d 29 (D. Mass. 2005), *rev'd on other grounds*, 426 F.3d 1 (1st Cir. 2005) (evaluating minority underrepresentation in the jury pool by comparing racial composition of the voting-age population in the district with the racial breakdown indicated in juror questionnaires returned to court); *see also* *People v. Harris*, 36 Cal. 3d 36, 679 P.2d 433 (Cal. 1984).

20. *John Johnson v. Big Lots Stores, Inc.*, No. 04-321, 2008 U.S. Dist. LEXIS 35316, at *20 (E.D. La. Apr. 29, 2008); *Stender v. Lucky Stores, Inc.*, 803 F. Supp. 259, 326 (N.D. Cal. 1992); *EEOC v. Sears, Roebuck & Co.*, 628 F. Supp. 1264, 1308 (N.D. Ill. 1986), *aff'd*, 839 F.2d 302 (7th Cir. 1988).

21. *John Johnson v. Big Lots Stores, Inc.*, 561 F. Supp. 2d 567 (E.D. La. 2008); *Marlo v. United Parcel Service, Inc.*, 251 F.R.D. 476 (C.D. Cal. 2008).

22. *United States v. Scheffer*, 523 U.S. 303, 309 (1998); *United States v. Bishop*, 64 F. Supp. 2d 1149 (D. Utah 1999); *United States v. Varoudakis*, No. 97-10158, 1998 WL 151238 (D. Mass. Mar. 27, 1998); *State v. Shively*, 268 Kan. 573 (2000), *aff'd*, 268 Kan. 589 (2000) (all cases in which courts determined, based on the inconsistent reactions revealed in several surveys, that the polygraph test has failed to achieve general acceptance in the scientific community). *Contra*, *see* *Lee v. Martinez*, 136 N.M. 166, 179-81, 96 P.3d 291, 304-06 (N.M. 2004). *People v. Williams*, 830 N.Y.S.2d 452 (2006) (expert permitted to testify regarding scientific studies of factors affecting the perceptual ability and memory of eyewitnesses to make identifications based in part on general acceptance demonstrated in survey of experts who study eyewitness identification).

23. *E.g.*, *People v. Page Books, Inc.*, 601 N.E.2d 273, 279-80 (Ill. App. Ct. 1992); *State v. Williams*, 598 N.E.2d 1250, 1256-58 (Ohio Ct. App. 1991).

24. *E.g.*, *United States v. Eagle*, 586 F.2d 1193, 1195 (8th Cir. 1978); *United States v. Tokars*, 839 F. Supp. 1578, 1583 (D. Ga. 1993), *aff'd*, 95 F.3d 1520 (11th Cir. 1996); *State v. Baumruk*, 85 S.W.3d 644 (Mo. 2002); *People v. Boss*, 701 N.Y.S.2d 342 (App. Div. 1999).

25. *Dolphin Tours, Inc. v. Pacifico Creative Servs., Inc.*, 773 F.2d 1506, 1508 (9th Cir. 1985). *See also* *SMS Sys. Maint. Servs., Inc. v. Digital Equip. Corp.*, 188 F.3d 11 (1st Cir. 1999); *Benjamin F. King, Statistics in Antitrust Litigation*, in *Statistics and the Law* 49 (Morris H. DeGroot et al. eds.,

sports, a survey was offered for the purpose of establishing how girls felt about the scheduling of girls' and boys' sports.²⁶ A routine use of surveys in federal courts occurs in Lanham Act²⁷ cases, when the plaintiff alleges trademark infringement²⁸ or claims that false advertising²⁹ has confused or deceived consumers. The pivotal legal question in such cases virtually demands survey research because it centers on consumer perception and memory (i.e., is the consumer likely to be confused about the source of a product, or does the advertisement imply a false or misleading message?).³⁰ In addition, survey methodology has been used creatively to assist federal courts in managing mass torts litigation. Faced with the prospect of conducting discovery concerning 10,000 plaintiffs, the plaintiffs and defendants in *Wilhoite v. Olin Corp.*³¹ jointly drafted a discovery survey that was administered

1986). Surveys have long been used in antitrust litigation to help define relevant markets. In *United States v. E.I. du Pont de Nemours & Co.*, 118 F. Supp. 41, 60 (D. Del. 1953), *aff'd*, 351 U.S. 377 (1956), a survey was used to develop the "market setting" for the sale of cellophane. In *Mukand, Ltd. v. United States*, 937 F. Supp. 910 (Ct. Int'l Trade 1996), a survey of purchasers of stainless steel wire rods was conducted to support a determination of competition and fungibility between domestic and Indian wire rod.

26. *Alston v. Virginia High Sch. League, Inc.*, 144 F. Supp. 2d 526, 539–40 (W.D. Va. 1999).

27. Lanham Act § 43(a), 15 U.S.C. § 1125(a) (1946) (amended 2006).

28. *E.g.*, *Herman Miller v. Palazzetti Imports & Exports*, 270 F.3d 298, 312 (6th Cir. 2001) ("Because the determination of whether a mark has acquired secondary meaning is primarily an empirical inquiry, survey evidence is the most direct and persuasive evidence."); *Simon Property Group v. MySimon*, 104 F. Supp. 2d 1033, 1038 (S.D. Ind. 2000) ("Consumer surveys are generally accepted by courts as one means of showing the likelihood of consumer confusion."). *See also* *Qualitex Co. v. Jacobson Prods. Co.*, No. CIV-90-1183HLH, 1991 U.S. Dist. LEXIS 21172 (C.D. Cal. Sept. 3, 1991), *aff'd in part & rev'd in part on other grounds*, 13 F.3d 1297 (9th Cir. 1994), *rev'd on other grounds*, 514 U.S. 159 (1995); *Union Carbide Corp. v. Ever-Ready, Inc.*, 531 F.2d 366 (7th Cir.), *cert. denied*, 429 U.S. 830 (1976). According to Neal Miller, *Facts, Expert Facts, and Statistics: Descriptive and Experimental Research Methods in Litigation*, 40 Rutgers L. Rev. 101, 137 (1987), trademark law has relied on the institutionalized use of statistical evidence more than any other area of the law.

29. *E.g.*, *Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1142–43 (9th Cir. 1997); *American Home Prods. Corp. v. Johnson & Johnson*, 577 F.2d 160 (2d Cir. 1978); *Rexall Sundown, Inc. v. Perrigo Co.*, 651 F. Supp. 2d 9 (E.D.N.Y. 2009); *Mutual Pharm. Co. v. Ivax Pharms. Inc.*, 459 F. Supp. 2d 925 (C.D. Cal. 2006); *Novartis Consumer Health v. Johnson & Johnson-Merck Consumer Pharms.*, 129 F. Supp. 2d 351 (D.N.J. 2000).

30. Courts have observed that "the court's reaction is at best not determinative and at worst irrelevant. The question in such cases is, what does the person to whom the advertisement is addressed find to be the message?" *American Brands, Inc. v. R.J. Reynolds Tobacco Co.*, 413 F. Supp. 1352, 1357 (S.D.N.Y. 1976). The wide use of surveys in recent years was foreshadowed in *Triangle Publications, Inc. v. Rohrlich*, 167 F.2d 969, 974 (2d Cir. 1948) (Frank, J., dissenting). Called on to determine whether a manufacturer of girdles labeled "Miss Seventeen" infringed the trademark of the magazine *Seventeen*, Judge Frank suggested that, in the absence of a test of the reactions of "numerous girls and women," the trial court judge's finding as to what was likely to confuse was "nothing but a surmise, a conjecture, a guess," noting that "neither the trial judge nor any member of this court is (or resembles) a teen-age girl or the mother or sister of such a girl." *Id.* at 976–77.

31. No. CV-83-C-5021-NE (N.D. Ala. filed Jan. 11, 1983). The case ultimately settled before trial. *See* Francis E. McGovern & E. Allan Lind, *The Discovery Survey*, Law & Contemp. Probs., Autumn 1988, at 41.

in person by neutral third parties, thus replacing interrogatories and depositions. It resulted in substantial savings in both time and cost.

B. Surveys Used to Help Assess Expert Acceptance in the Wake of Daubert

Scientists who offer expert testimony at trial typically present their own opinions. These opinions may or may not be representative of the opinions of the scientific community at large. In deciding whether to admit such testimony, courts applying the *Frye* test must determine whether the science being offered is generally accepted by the relevant scientific community. Under *Daubert* as well, a relevant factor used to decide admissibility is the extent to which the theory or technique has received widespread acceptance. Properly conducted surveys can provide a useful way to gauge acceptance, and courts recently have been offered assistance from surveys that allegedly gauge relevant scientific opinion. As with any scientific research, the usefulness of the information obtained from a survey depends on the quality of research design. Several critical factors have emerged that have limited the value of some of these surveys: problems in defining the relevant target population and identifying an appropriate sampling frame, response rates that raise questions about the representativeness of the results, and a failure to ask questions that assess opinions on the relevant issue.

Courts deciding on the admissibility of polygraph tests have considered results from several surveys of purported experts. Surveys offered as providing evidence of relevant scientific opinion have tested respondents from several populations: (1) professional polygraph examiners,³² (2) psychophysicists (members of the Society for Psychophysiological Research),³³ and (3) distinguished psychologists (Fellows of the Division of General Psychology of the American Psychological Association).³⁴ Respondents in the first group expressed substantial confidence in the scientific accuracy of polygraph testing, and those in the third group expressed substantial doubts about it. Respondents in the second group were asked the same question across three surveys that differed in other aspects of their methodology (e.g., when testing occurred and what the response rate was). Although over 60% of those questioned in two of the three surveys characterized the polygraph as a useful diagnostic tool, one of the surveys was conducted in 1982 and the more recent survey, published in 1984, achieved only a 30% response rate. The third

32. See plaintiff's survey described in *Meyers v. Arcudi*, 947 F. Supp. 581, 588 (D. Conn. 1996).

33. Susan L. Amato & Charles R. Honts, *What Do Psychophysicists Think About Polygraph Tests? A Survey of the Membership of SPR*, 31 *Psychophysiology* S22 [abstract]; Gallup Organization, *Survey of Members of the Society for Psychological Research Concerning Their Opinions of Polygraph Test Interpretation*, 13 *Polygraph* 153 (1984); William G. Iacono & David T. Lykken, *The Validity of the Lie Detector: Two Surveys of Scientific Opinion*, 82 *J. Applied Psychol.* 426 (1997).

34. Iacono & Lykken, *supra* note 33.

survey, also conducted in 1984, achieved a response rate of 90% and found that only 44% of respondents viewed the polygraph as a useful diagnostic tool. On the basis of these inconsistent reactions from the several surveys, courts have determined that the polygraph has failed to achieve general acceptance in the scientific community.³⁵ In addition, however, courts have criticized the relevance of the population surveyed by proponents of the polygraph. For example, in *Meyers v. Arcudi* the court noted that the survey offered by proponents of the polygraph was a survey of “practitioners who estimated the accuracy of the control question technique [of polygraph testing] to be between 86% and 100%.”³⁶ The court rejected the conclusions from this survey on the basis of a determination that the population surveyed was not the relevant scientific community, noting that “many of them . . . do not even possess advanced degrees and are not trained in the scientific method.”³⁷

The link between specialized expertise and self-interest poses a dilemma in defining the relevant scientific population. As the court in *United States v. Orians* recognized, “The acceptance in the scientific community depends in large part on how the relevant scientific community is defined.”³⁸ In rejecting the defendants’ urging that the court consider as relevant only psychophysicologists whose work is dedicated in large part to polygraph research, the court noted that *Daubert* “does not require the court to limit its inquiry to those individuals that base their livelihood on the acceptance of the relevant scientific theory. These individuals are often too close to the science and have a stake in its acceptance; i.e., their livelihood depends in part on the acceptance of the method.”³⁹

To be relevant to a *Frye* or *Daubert* inquiry on general acceptance, the questions asked in a survey of experts should assess opinions on the quality of the scientific theory and methodology, rather than asking whether or not the instrument should be used in a legal setting. Thus, a survey in which 60% of respondents agreed that the polygraph is “a useful diagnostic tool when considered with other available information,” 1% viewed it as sufficiently reliable to be the sole determinant, and the remainder thought it entitled to little or no weight, failed to assess the relevant issue. As the court in *United States v. Cordoba* noted, because “useful” and “other available information” could have many meanings, “there is little wonder why [the response chosen by the majority of respondents] was most frequently selected.”⁴⁰

35. *United States v. Scheffer*, 523 U.S. 303, 309 (1998); *United States v. Bishop*, 64 F. Supp. 2d 1149 (D. Utah 1999); *Meyers v. Arcudi*, 947 F. Supp. 581, 588 (D. Conn. 1996); *United States v. Varoudakis*, 48 Fed. R. Evid. Serv. 1187 (D. Mass. 1998).

36. *Meyers v. Arcudi*, 947 F. Supp. at 588.

37. *Id.*

38. 9 F. Supp. 2d 1168, 1173 (D. Ariz. 1998).

39. *Id.*

40. 991 F. Supp. 1199 (C.D. Cal. 1998), *aff'd*, 194 F.3d 1053 (9th Cir. 1999).

A similar flaw occurred in a survey conducted by experts opposed to the use of the polygraph in trial proceedings. Survey respondents were asked whether they would advocate that courts admit into evidence the outcome of a polygraph test.⁴¹ That question calls for more than an assessment of the accuracy of the polygraph, and thus does not appropriately limit expert opinion to issues within the expert's competence, that is, to the accuracy of the information provided by the test results. The survey also asked whether respondents agreed that the control question technique, the most common form of polygraph test, is accurate at least 85% of the time in real-life applications for guilty and innocent subjects.⁴² Although polygraph proponents frequently claim an accuracy level of 85%, it is up to the courts to decide what accuracy level would be required to justify admissibility. A better approach would be to ask survey respondents to estimate the level of accuracy they believe the test is likely to produce.⁴³

Surveys of experts are no substitute for an evaluation of whether the testimony an expert witness is offering will assist the trier of fact. Nonetheless, courts can use an assessment of opinion in the relevant scientific community to aid in determining whether a particular expert is proposing to use methods that would be rejected by a representative group of experts to arrive at the opinion the expert will offer. Properly conducted surveys can provide an economical way to collect and present information on scientific consensus and dissensus.

C. Surveys Used to Help Assess Community Standards: Atkins v. Virginia

In *Atkins v. Virginia*,⁴⁴ the U.S. Supreme Court determined that the Eighth Amendment's prohibition of "cruel and unusual punishment" forbids the execution of mentally retarded persons.⁴⁵ Following the interpretation advanced in *Trop v. Dulles*⁴⁶ that "The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society,"⁴⁷ the Court examined a variety of sources, including legislative judgments and public opinion polls, to find that a national consensus had developed barring such executions.⁴⁸

41. See Iacono & Lykken, *supra* note 33, at 430, tbl. 2 (1997).

42. *Id.*

43. At least two assessments should be made: an estimate of the accuracy for guilty subjects and an estimate of the accuracy for innocent subjects.

44. 536 U.S. 304, 322 (2002).

45. Although some groups have recently moved away from the term "mental retardation" in response to concerns that the term may have pejorative connotations, mental retardation was the name used for the condition at issue in *Atkins* and it continues to be employed in federal laws, in cases determining eligibility for the death penalty, and as a diagnosis by the medical profession.

46. 356 U.S. 86 (1958).

47. *Id.* at 101.

48. *Atkins*, 536 U.S. at 313–16.

In a vigorous dissent, Chief Justice Rehnquist objected to the use of the polls, arguing that legislative judgments and jury decisions should be the sole indicators of national opinion. He also objected to the particular polls cited in the majority opinion, identifying what he viewed as serious methodological weaknesses.

The Court has struggled since *Furman v. Georgia*⁴⁹ to develop an adequate way to measure public standards regarding the application of the death penalty to specific categories of cases. In relying primarily on surveys of state legislative actions, the Court has ignored the forces that influence whether an issue emerges on a legislative agenda, and the strong influence of powerful minorities on legislative actions.⁵⁰ Moreover, the various members of the Court have disagreed about whether states without any death penalty should be included in the count of states that bar the execution of a particular category of defendant.

The Court has sometimes considered jury verdicts in assessing public standards. In *Coker v. Georgia*,⁵¹ the Court forbade the imposition of the death penalty for rape. Citing *Gregg v. Georgia*⁵² for the proposition that “[t]he jury . . . is a significant and reliable objective index of contemporary values because it is so directly involved,” the Court noted that “in the vast majority of cases [of rape in Georgia], at least 9 out of 10, juries have not imposed the death sentence.”⁵³ In *Atkins*, Chief Justice Rehnquist complained about the absence of jury verdict data.⁵⁴ Had such data been available, however, they would have been irrelevant because a “survey” of the jurors who have served in such cases would constitute a biased sample of the public. A potential juror unwilling to impose the death penalty on a mentally retarded person would have been ineligible to serve in a capital case involving a mentally retarded defendant because the juror would not have been able to promise during voir dire that he or she would be willing to listen to the evidence and impose the death penalty if the evidence warranted it. Thus, the death-qualified jury in such a case would be composed only of representatives from that subset of citizens willing to execute a mentally retarded defendant, an unrepresentative and systematically biased sample.

Public opinion surveys can provide an important supplementary source of information about contemporary values.⁵⁵ The Court in *Atkins* was presented with data from 27 different polls and surveys,⁵⁶ 8 of them national and 19 statewide.

49. 408 U.S. 238 (1972).

50. See *Stanford v. Kentucky*, 492 U.S. 361 (1989), *abrogated by Roper v. Simmons*, 543 U.S. 551 (2005).

51. 433 U.S. 584, 596 (1977).

52. 428 U.S. 153, 181 (1976).

53. *Coker v. Georgia*, 433 U.S. at 596.

54. See *Atkins*, 536 U.S. at 323 (Rehnquist, C.J., dissenting).

55. See *id.* at 316 n.21 (“[T]heir consistency with the legislative evidence lends further support to our conclusion that there is a consensus”).

56. The quality of any poll or survey depends on the methodology used, which should be fully visible to the court and the opposing party. See Section VII, *infra*.

The information on the polling data appeared in an amicus brief filed by the American Association on Mental Retardation.⁵⁷ Respondents were asked in various ways how they felt about imposing the death penalty on a mentally retarded defendant. In each poll, a majority of respondents expressed opposition to executing the mentally retarded. Chief Justice Rehnquist noted two weaknesses reflected in the data presented to the Court. First, almost no information was provided about the target populations from which the samples were drawn or the methodology of sample selection and data collection. Although further information was available on at least some of the surveys (e.g., the nationwide telephone survey of 1000 voters conducted in 1993 by the Tarrance Group used a sample based on voter turnout in the last three presidential elections), that information apparently was not part of the court record. This omission violates accepted reporting standards in survey research, and the information is needed if the decisionmaker is to intelligently evaluate the quality of the survey. Its absence in this instance occurred because the survey information was obtained from secondary sources.

A second objection raised by Chief Justice Rehnquist was that the wording of some of the questions required respondents to say merely whether they favored or were opposed to the use of the death penalty when the defendant is mentally retarded. It is unclear how a respondent who favors execution of a mentally retarded defendant only in a rare case would respond to that question. Some of the questions, however, did ask whether the respondent felt that it was never appropriate to execute the mentally retarded or whether it was appropriate in some circumstances.⁵⁸ In responses to these questions as well, a majority of respondents said that they found the execution of mentally retarded persons unacceptable under any circumstances. The critical point is that despite variations in wording of questions, the year in which the poll was conducted, who conducted it, where it was conducted, and how it was carried out, a majority of respondents (between 56% and 83%) expressed opposition to executing mentally retarded defendants. The Court thus was presented with a consistent set of findings, providing striking reinforcement for the *Atkins* majority's legislative analysis. Opinion poll data and legislative decisions have different strengths and weaknesses as indicators of contemporary values. The value of a multiple-measure approach is that it avoids a potentially misleading reliance on a single source or measure.

57. The data appear as an appendix to the Opinion of Chief Justice Rehnquist in *Atkins*.

58. Appendix to the Opinion of Chief Justice Rehnquist in *Atkins*. "Some people feel that there is nothing wrong with imposing the death penalty on persons who are mentally retarded, depending on the circumstances. Others feel that the death penalty should never be imposed on persons who are mentally retarded under any circumstances. Which of these views comes closest to your own?" The Tarrance Group, Death Penalty Poll, Q. 9 (Mar. 1993), citing Samuel R. Gross, *Update: American Public Opinion on the Death Penalty—It's Getting Personal*, 83 *Cornell L. Rev.* 1448, 1467 (1998).

D. A Comparison of Survey Evidence and Individual Testimony

To illustrate the value of a survey, it is useful to compare the information that can be obtained from a competently done survey with the information obtained by other means. A survey is presented by a survey expert who testifies about the responses of a substantial number of individuals who have been selected according to an explicit sampling plan and asked the same set of questions by interviewers who were not told who sponsored the survey or what answers were predicted or preferred. Although parties presumably are not obliged to present a survey conducted in anticipation of litigation by a nontestifying expert if it produced unfavorable results,⁵⁹ the court can and should scrutinize the method of respondent selection for any survey that is presented.

A party using a nonsurvey method generally identifies several witnesses who testify about their own characteristics, experiences, or impressions. Although the party has no obligation to select these witnesses in any particular way or to report on how they were chosen, the party is not likely to select witnesses whose attributes conflict with the party's interests. The witnesses who testify are aware of the parties involved in the case and have discussed the case before testifying.

Although surveys are not the only means of demonstrating particular facts, presenting the results of a well-done survey through the testimony of an expert is an efficient way to inform the trier of fact about a large and representative group of potential witnesses. In some cases, courts have described surveys as the most direct form of evidence that can be offered.⁶⁰ Indeed, several courts have drawn negative inferences from the absence of a survey, taking the position that failure to undertake a survey may strongly suggest that a properly done survey would not support the plaintiff's position.⁶¹

59. *In re FedEx Ground Package System*, 2007 U.S. Dist. LEXIS 27086 (N.D. Ind. April 10, 2007); *Loctite Corp. v. National Starch & Chem. Corp.*, 516 F. Supp. 190, 205 (S.D.N.Y. 1981) (distinguishing between surveys conducted in anticipation of litigation and surveys conducted for non-litigation purposes which cannot be reproduced because of the passage of time, concluding that parties should not be compelled to introduce the former at trial, but may be required to provide the latter).

60. *See, e.g., Morrison Entm't Group v. Nintendo of Am.*, 56 Fed. App'x. 782, 785 (9th Cir. Cal. 2003).

61. *Ortho Pharm. Corp. v. Cosprophar, Inc.*, 32 F.3d 690, 695 (2d Cir. 1994); *Henri's Food Prods. Co. v. Kraft, Inc.*, 717 F.2d 352, 357 (7th Cir. 1983); *Medici Classics Productions LLC v. Medici Group LLC*, 590 F. Supp. 2d 548, 556 (S.D.N.Y. 2008); *Citigroup v. City Holding Co.*, 2003 U.S. Dist. LEXIS 1845 (S.D.N.Y. Feb. 10, 2003); *Chum Ltd. v. Lisowski*, 198 F. Supp. 2d 530 (S.D.N.Y. 2002).

II. Purpose and Design of the Survey

A. Was the Survey Designed to Address Relevant Questions?

The report describing the results of a survey should include a statement describing the purpose or purposes of the survey. One indication that a survey offers probative evidence is that it was designed to collect information relevant to the legal controversy (e.g., to estimate damages in an antitrust suit or to assess consumer confusion in a trademark case). Surveys not conducted specifically in preparation for, or in response to, litigation may provide important information,⁶² but they frequently ask irrelevant questions⁶³ or select inappropriate samples of respondents for study.⁶⁴ Nonetheless, surveys do not always achieve their stated goals. Thus, the content and execution of a survey must be scrutinized whether or not the survey was designed to provide relevant data on the issue before the court.⁶⁵ Moreover, if a survey was not designed for purposes of litigation, one source of bias is less likely: The party presenting the survey is less likely to have designed and constructed the survey to provide evidence supporting its side of the issue in controversy.

62. See, e.g., *Wright v. Jeep Corp.*, 547 F. Supp. 871, 874 (E.D. Mich. 1982). Indeed, as courts increasingly have been faced with scientific issues, parties have requested in a number of recent cases that the courts compel production of research data and testimony by unretained experts. The circumstances under which an unretained expert can be compelled to testify or to disclose research data and opinions, as well as the extent of disclosure that can be required when the research conducted by the expert has a bearing on the issues in the case, are the subject of considerable current debate. See, e.g., Joe S. Cecil, *Judicially Compelled Disclosure of Research Data*, 1 Cts. Health Sci. & L. 434 (1991); Richard L. Marcus, *Discovery Along the Litigation/Science Interface*, 57 Brook. L. Rev. 381, 393–428 (1991); see also *Court-Ordered Disclosure of Academic Research: A Clash of Values of Science and Law*, Law & Contemp. Probs., Summer 1996, at 1.

63. See *Loctite Corp. v. National Starch & Chem. Corp.*, 516 F. Supp. 190, 206 (S.D.N.Y. 1981) (marketing surveys conducted before litigation were designed to test for brand awareness, while the “single issue at hand . . . [was] whether consumers understood the term ‘Super Glue’ to designate glue from a single source”).

64. In *Craig v. Boren*, 429 U.S. 190 (1976), the state unsuccessfully attempted to use its annual roadside survey of the blood alcohol level, drinking habits, and preferences of drivers to justify prohibiting the sale of 3.2% beer to males under the age of 21 and to females under the age of 18. The data were biased because it was likely that the male would be driving if both the male and female occupants of the car had been drinking. As pointed out in 2 Joseph L. Gastwirth, *Statistical Reasoning in Law and Public Policy: Tort Law, Evidence, and Health* 527 (1988), the roadside survey would have provided more relevant data if all occupants of the cars had been included in the survey (and if the type and amount of alcohol most recently consumed had been requested so that the consumption of 3.2% beer could have been isolated).

65. See *Merisant Co. v. McNeil Nutritionals, LLC*, 242 F.R.D. 315 (E.D. Pa. 2007).

B. Was Participation in the Design, Administration, and Interpretation of the Survey Appropriately Controlled to Ensure the Objectivity of the Survey?

An early handbook for judges recommended that survey interviews be “conducted independently of the attorneys in the case.”⁶⁶ Some courts interpreted this to mean that any evidence of attorney participation is objectionable.⁶⁷ A better interpretation is that the attorney should have no part in carrying out the survey.⁶⁸ However, some attorney involvement in the survey design is necessary to ensure that relevant questions are directed to a relevant population.⁶⁹ The 2009 amendments to Federal Rule of Civil Procedure 26(a)(2)⁷⁰ no longer allow an inquiry into the nature of communications between attorneys and experts, and so the role of attorneys in constructing surveys may become less apparent. The key issues for the trier of fact concerning the design of the survey are the objectivity and relevance of the questions on the survey and the appropriateness of the definition of the population used to guide sample selection. These aspects of the survey are visible to the trier of fact and can be judged on their quality, irrespective of who suggested them. In contrast, the interviews themselves are not directly visible, and any potential bias is minimized by having interviewers and respondents blind to the purpose and sponsorship of the survey and by excluding attorneys from any part in conducting interviews and tabulating results.⁷¹

66. Judicial Conference of the United States, *Handbook of Recommended Procedures for the Trial of Protracted Cases* 75 (1960).

67. See, e.g., *Boehringer Ingelheim G.m.b.H. v. Pharmadyne Lab.*, 532 F. Supp. 1040, 1058 (D.N.J. 1980).

68. *Upjohn Co. v. American Home Prods. Corp.*, No. 1-95-CV-237, 1996 U.S. Dist. LEXIS 8049, at *42 (W.D. Mich. Apr. 5, 1996) (objection that “counsel reviewed the design of the survey carries little force with this Court because [opposing party] has not identified any flaw in the survey that might be attributed to counsel’s assistance”). For cases in which attorney participation was linked to significant flaws in the survey design, see *Johnson v. Big Lots Stores, Inc.*, No. 04-321, 2008 U.S. Dist. LEXIS 35316, at *20 (E.D. La. April 29, 2008); *United States v. Southern Indiana Gas & Elec. Co.*, 258 F. Supp. 2d 884, 894 (S.D. Ind. 2003); *Gibson v. County of Riverside*, 181 F. Supp. 2d 1057, 1069 (C.D. Cal. 2002).

69. See 6 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 32:166 (4th ed. 2003).

70. www.uscourts.gov/News/TheThirdBranch/10-11-01/Rules_Recommendations_Take_Effect_December_1_2010.aspx.

71. *Gibson*, 181 F. Supp. 2d at 1068.

C. Are the Experts Who Designed, Conducted, or Analyzed the Survey Appropriately Skilled and Experienced?

Experts prepared to design, conduct, and analyze a survey generally should have graduate training in psychology (especially social, cognitive, or consumer psychology), sociology, political science, marketing, communication sciences, statistics, or a related discipline; that training should include courses in survey research methods, sampling, measurement, interviewing, and statistics. In some cases, professional experience in teaching or conducting and publishing survey research may provide the requisite background. In all cases, the expert must demonstrate an understanding of foundational, current, and best practices in survey methodology, including sampling,⁷² instrument design (questionnaire and interview construction), and statistical analysis.⁷³ Publication in peer-reviewed journals, authored books, fellowship status in professional organizations, faculty appointments, consulting experience, research grants, and membership on scientific advisory panels for government agencies or private foundations are indications of a professional's area and level of expertise. In addition, some surveys involving highly technical subject matter (e.g., the particular preferences of electrical engineers for various pieces of electrical equipment and the bases for those preferences) or special populations (e.g., developmentally disabled adults with limited cognitive skills) may require experts to have some further specialized knowledge. Under these conditions, the survey expert also should be able to demonstrate sufficient familiarity with the topic or population (or assistance from an individual on the research team with suitable expertise) to design a survey instrument that will communicate clearly with relevant respondents.

D. Are the Experts Who Will Testify About Surveys Conducted by Others Appropriately Skilled and Experienced?

Parties often call on an expert to testify about a survey conducted by someone else. The secondary expert's role is to offer support for a survey commissioned by the party who calls the expert, to critique a survey presented by the opposing party, or to introduce findings or conclusions from a survey not conducted in preparation for litigation or by any of the parties to the litigation. The trial court should take into account the exact issue that the expert seeks to testify about and the nature of the expert's field of expertise.⁷⁴ The secondary expert who gives an opinion

72. The one exception is that sampling expertise would be unnecessary if the survey were administered to all members of the relevant population. See, e.g., McGovern & Lind, *supra* note 31.

73. If survey expertise is being provided by several experts, a single expert may have general familiarity but not special expertise in all these areas.

74. See Margaret A. Berger, *The Admissibility of Expert Testimony*, Section III.A, in this manual.

about the adequacy and interpretation of a survey not only should have general skills and experience with surveys and be familiar with all of the issues addressed in this reference guide, but also should demonstrate familiarity with the following properties of the survey being discussed:

1. Purpose of the survey;
2. Survey methodology,⁷⁵ including
 - a. the target population,
 - b. the sampling design used in conducting the survey,
 - c. the survey instrument (questionnaire or interview schedule), and
 - d. (for interview surveys) interviewer training and instruction;
3. Results, including rates and patterns of missing data; and
4. Statistical analyses used to interpret the results.

III. Population Definition and Sampling

A. Was an Appropriate Universe or Population Identified?

One of the first steps in designing a survey or in deciding whether an existing survey is relevant is to identify the target population (or universe).⁷⁶ The target population consists of all elements (i.e., individuals or other units) whose characteristics or perceptions the survey is intended to represent. Thus, in trademark litigation, the relevant population in some disputes may include all prospective and past purchasers of the plaintiff's goods or services and all prospective and past purchasers of the defendant's goods or services. Similarly, the population for a discovery survey may include all potential plaintiffs or all employees who worked for Company A between two specific dates. In a community survey designed to provide evidence for a motion for a change of venue, the relevant population consists of all jury-eligible citizens in the community in which the trial is to take place.⁷⁷

75. See *A & M Records, Inc. v. Napster, Inc.*, 2000 U.S. Dist. LEXIS 20668 (N.D. Cal. Aug. 10, 2000) (holding that expert could not attest credibly that the surveys upon which he relied conformed to accepted survey principles because of his minimal role in overseeing the administration of the survey and limited expert report).

76. Identification of the proper target population or universe is recognized uniformly as a key element in the development of a survey. See, e.g., Judicial Conference of the U.S., *supra* note 66; MCL 4th, *supra* note 16, § 11.493; see also 3 McCarthy, *supra* note 69, § 32:166; Council of Am. Survey Res. Orgs., Code of Standards and Ethics for Survey Research § III.A.3 (2010).

77. A second relevant population may consist of jury-eligible citizens in the community where the party would like to see the trial moved. By questioning citizens in both communities, the survey can test whether moving the trial is likely to reduce the level of animosity toward the party requesting the change of venue. See *United States v. Haldeman*, 559 F.2d 31, 140, 151, app. A at 176–79 (D.C. Cir. 1976) (court denied change of venue over the strong objection of Judge MacKinnon, who cited survey evidence that Washington, D.C., residents were substantially more likely to conclude, before

The definition of the relevant population is crucial because there may be systematic differences in the responses of members of the population and nonmembers. For example, consumers who are prospective purchasers may know more about the product category than consumers who are not considering making a purchase.

The universe must be defined carefully. For example, a commercial for a toy or breakfast cereal may be aimed at children, who in turn influence their parents' purchases. If a survey assessing the commercial's tendency to mislead were conducted based on a sample from the target population of prospective and actual adult purchasers, it would exclude a crucial relevant population. The appropriate population in this instance would include children as well as parents.⁷⁸

B. Did the Sampling Frame Approximate the Population?

The target population consists of all the individuals or units that the researcher would like to study. The sampling frame is the source (or sources) from which the sample actually is drawn. The surveyor's job generally is easier if a complete list of every eligible member of the population is available (e.g., all plaintiffs in a discovery survey), so that the sampling frame lists the identity of all members of the target population. Frequently, however, the target population includes members who are inaccessible or who cannot be identified in advance. As a result, reasonable compromises are sometimes required in developing the sampling frame. The survey report should contain (1) a description of the target population, (2) a description of the sampling frame from which the sample is to be drawn, (3) a discussion of the difference between the target population and the sampling frame, and, importantly, (4) an evaluation of the likely consequences of that difference.

A survey that provides information about a wholly irrelevant population is itself irrelevant.⁷⁹ Courts are likely to exclude the survey or accord it little

trial, that the defendants were guilty); *see also* *People v. Venegas*, 31 Cal. Rptr. 2d 114, 117 (Cal. Ct. App. 1994) (change of venue denied because defendant failed to show that the defendant would face a less hostile jury in a different court).

78. *See, e.g., Warner Bros., Inc. v. Gay Toys, Inc.*, 658 F.2d 76 (2d Cir. 1981) (surveying children users of the product rather than parent purchasers). Children and some other populations create special challenges for researchers. For example, very young children should not be asked about sponsorship or licensing, concepts that are foreign to them. Concepts, as well as wording, should be age appropriate.

79. A survey aimed at assessing how persons in the trade respond to an advertisement should be conducted on a sample of persons in the trade and not on a sample of consumers. *See Home Box Office v. Showtime/The Movie Channel*, 665 F. Supp. 1079, 1083 (S.D.N.Y.), *aff'd in part and vacated in part*, 832 F.2d 1311 (2d Cir. 1987); *J & J Snack Food Corp. v. Earthgrains Co.*, 220 F. Supp. 2d 358, 371–72 (N.J. 2002). *But see Lon Tai Shing Co. v. Koch + Lowy*, No. 90-C4464, 1990 U.S. Dist. LEXIS 19123, at *50 (S.D.N.Y. Dec. 14, 1990), in which the judge was willing to find likelihood of consumer confusion from a survey of lighting store salespersons questioned by a survey researcher posing as a customer. The court was persuaded that the salespersons who were misstating the source

weight.⁸⁰ Thus, when the plaintiff submitted the results of a survey to prove that the green color of its fishing rod had acquired a secondary meaning, the court gave the survey little weight in part because the survey solicited the views of fishing rod dealers rather than consumers.⁸¹ More commonly, however, the sampling frame and the target population have some overlap, but the overlap is imperfect: The sampling frame excludes part of the target population, that is, it is underinclusive, or the sampling frame includes individuals who are not members of the target population, that is, it is overinclusive relative to the target population. Coverage error is the term used to describe inconsistencies between a sampling frame and a target population. If the coverage is underinclusive, the survey's value depends on the proportion of the target population that has been excluded from the sampling frame and the extent to which the excluded population is likely to respond differently from the included population. Thus, a survey of spectators and participants at running events would be sampling a sophisticated subset of those likely to purchase running shoes. Because this subset probably would consist of the consumers most knowledgeable about the trade dress used by companies that sell running shoes, a survey based on this sampling frame would be likely to substantially overrepresent the strength of a particular design as a trademark, and the extent of that overrepresentation would be unknown and not susceptible to any reasonable estimation.⁸²

Similarly, in a survey designed to project demand for cellular phones, the assumption that businesses would be the primary users of cellular service led surveyors to exclude potential nonbusiness users from the survey. The Federal Communications Commission (FCC) found the assumption unwarranted and concluded that the research was flawed, in part because of this underinclusive coverage.⁸³ With the growth in individual cell phone use over time, noncoverage error would be an even greater problem for this survey today.

of the lamp, whether consciously or not, must have believed reasonably that the consuming public would be likely to rely on the salespersons' inaccurate statements about the name of the company that manufactured the lamp they were selling.

80. See *Wells Fargo & Co. v. WhenU.com, Inc.*, 293 F. Supp. 2d 734 (E.D. Mich. 2003).

81. See *R.L. Winston Rod Co. v. Sage Mfg. Co.*, 838 F. Supp. 1396, 1401–02 (D. Mont. 1993).

82. See *Brooks Shoe Mfg. Co. v. Suave Shoe Corp.*, 533 F. Supp. 75, 80 (S.D. Fla. 1981), *aff'd*, 716 F.2d 854 (11th Cir. 1983); see also *Hodgdon Power Co. v. Alliant Techsystems, Inc.*, 512 F. Supp. 2d 1178 (D. Kan. 2007) (excluding survey on gunpowder brands distributed at plaintiff's promotional booth at a shooting tournament); *Winning Ways, Inc. v. Holloway Sportswear, Inc.*, 913 F. Supp. 1454, 1467 (D. Kan. 1996) (survey flawed in failing to include sporting goods customers who constituted a major portion of customers). *But see* *Thomas & Betts Corp. v. Panduit Corp.*, 138 F.3d 277, 294–95 (7th Cir. 1998) (survey of store personnel admissible because relevant market included both distributors and ultimate purchasers).

83. See *Gencom, Inc.*, 56 Rad. Reg. 2d (P&F) 1597, 1604 (1984). This position was affirmed on appeal. See *Gencom, Inc. v. FCC*, 832 F.2d 171, 186 (D.C. Cir. 1987); see also *Beacon Mut. Ins. Co. v. Onebeacon Ins. Corp.*, 376 F. Supp. 2d 251, 261 (D.R.I. 2005) (sample included only defendant's insurance agents and lack of confusion among those agents was “nonstartling”).

In some cases, it is difficult to determine whether a sampling frame that omits some members of the population distorts the results of the survey and, if so, the extent and likely direction of the bias. For example, a trademark survey was designed to test the likelihood of confusing an analgesic currently on the market with a new product that was similar in appearance.⁸⁴ The plaintiff's survey included only respondents who had used the plaintiff's analgesic, and the court found that the target population should have included users of other analgesics, "so that the full range of potential customers for whom plaintiff and defendants would compete could be studied."⁸⁵ In this instance, it is unclear whether users of the plaintiff's product would be more or less likely to be confused than users of the defendants' product or users of a third analgesic.⁸⁶

An overinclusive sampling frame generally presents less of a problem for interpretation than does an underinclusive sampling frame.⁸⁷ If the survey expert can demonstrate that a sufficiently large (and representative) subset of respondents in the survey was drawn from the appropriate sampling frame, the responses obtained from that subset can be examined, and inferences about the relevant population can be drawn based on that subset.⁸⁸ If the relevant subset cannot be identified, however, an overbroad sampling frame will reduce the value of the survey.⁸⁹ If the sampling frame does not include important groups in the target population, there is generally no way to know how the unrepresented members of the target population would have responded.⁹⁰

84. See *American Home Prods. Corp. v. Barr Lab., Inc.*, 656 F. Supp. 1058 (D.N.J.), *aff'd*, 834 F.2d 368 (3d Cir. 1987).

85. *Id.* at 1070.

86. See also *Craig v. Boren*, 429 U.S. 190 (1976).

87. See *Schwab v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 992, 1134–35 (E.D.N.Y. 2006) ("Studies evaluating broadly the beliefs of low tar smokers generally are relevant to the beliefs of "light" smokers more specifically.").

88. See *National Football League Props. Inc. v. Wichita Falls Sportswear, Inc.* 532 F. Supp. 651, 657–58 (W.D. Wash. 1982).

89. See *Leelanau Wine Cellars, Ltd. v. Black & Red, Inc.*, 502 F.3d 504, 518 (6th Cir. 2007) (lower court was correct in giving little weight to survey with overbroad universe); *Big Dog Motorcycles, L.L.C. v. Big Dog Holdings, Inc.*, 402 F. Supp. 2d 1312, 1334 (D. Kan. 2005) (universe composed of prospective purchasers of all t-shirts and caps overinclusive for evaluating reactions of buyers likely to purchase merchandise at motorcycle dealerships). See also *Schieffelin & Co. v. Jack Co.* of Boca, 850 F. Supp. 232, 246 (S.D.N.Y. 1994).

90. See, e.g., *Amstar Corp. v. Domino's Pizza, Inc.*, 615 F.2d 252, 263–64 (5th Cir. 1980) (court found both plaintiff's and defendant's surveys substantially defective for a systematic failure to include parts of the relevant population); *Scott Fetzer Co. v. House of Vacuums, Inc.*, 381 F.3d 477 (5th Cir. 2004) (universe drawn from plaintiff's customer list underinclusive and likely to differ in their familiarity with plaintiff's marketing and distribution techniques).

C. Does the Sample Approximate the Relevant Characteristics of the Population?

Identification of a survey population must be followed by selection of a sample that accurately represents that population.⁹¹ The use of probability sampling techniques maximizes both the representativeness of the survey results and the ability to assess the accuracy of estimates obtained from the survey.

Probability samples range from simple random samples to complex multistage sampling designs that use stratification, clustering of population elements into various groupings, or both. In all forms of probability sampling, each element in the relevant population has a known, nonzero probability of being included in the sample.⁹² In simple random sampling, the most basic type of probability sampling, every element in the population has a known, equal probability of being included in the sample, and all possible samples of a given size are equally likely to be selected.⁹³ Other probability sampling techniques include (1) stratified random sampling, in which the researcher subdivides the population into mutually exclusive and exhaustive subpopulations, or strata, and then randomly selects samples from within these strata; and (2) cluster sampling, in which elements are sampled in groups or clusters, rather than on an individual basis.⁹⁴ Note that selection probabilities do not need to be the same for all population elements; however, if the probabilities are unequal, compensatory adjustments should be made in the analysis.

Probability sampling offers two important advantages over other types of sampling. First, the sample can provide an unbiased estimate that summarizes the responses of all persons in the population from which the sample was drawn; that is, the expected value of the sample estimate is the population value being estimated. Second, the researcher can calculate a confidence interval that describes explicitly how reliable the sample estimate of the population is likely to be. If the sample is unbiased, the difference between the estimate and the exact value is called the sampling error.⁹⁵ Thus, suppose a survey collected responses from a simple random sample of 400 dentists selected from the population of all dentists

91. MCL 4th, *supra* note 16, § 11.493. See also David H. Kaye & David A. Freedman, Reference Guide on Statistics, Section II.B, in this manual.

92. The exception is that population elements omitted from the sampling frame have a zero probability of being sampled.

93. Systematic sampling, in which every n th unit in the population is sampled and the starting point is selected randomly, fulfills the first of these conditions. It does not fulfill the second, because no systematic sample can include elements adjacent to one another on the list of population members from which the sample is drawn. Except in unusual situations when periodicities occur, systematic samples and simple random samples generally produce the same results. Thomas Piazza, *Fundamentals of Applied Sampling*, in Handbook of Survey Research, *supra* note 1, at 139, 145.

94. *Id.* at 139, 150–63.

95. See David H. Kaye & David A. Freedman, *supra* note 91, Glossary, for a definition of sampling error.

licensed to practice in the United States and found that 80, or 20%, of them mistakenly believed that a new toothpaste, Goldgate, was manufactured by the makers of Colgate. A survey expert could properly compute a confidence interval around the 20% estimate obtained from this sample. If the survey were repeated a large number of times, and a 95% confidence interval was computed each time, 95% of the confidence intervals would include the actual percentage of dentists in the entire population who would believe that Goldgate was manufactured by the makers of Colgate.⁹⁶ In this example, the margin of error is $\pm 4\%$, and so the confidence interval is the range between 16% and 24%, that is, the estimate (20%) plus or minus 4%.

All sample surveys produce estimates of population values, not exact measures of those values. Strictly speaking, the margin of error associated with the sample estimate assumes probability sampling. Assuming a probability sample, a confidence interval describes how stable the mean response in the sample is likely to be. The width of the confidence interval depends on three primary characteristics:

1. Size of the sample (the larger the sample, the narrower the interval);
2. Variability of the response being measured; and
3. Confidence level the researcher wants to have.⁹⁷

Traditionally, scientists adopt the 95% level of confidence, which means that if 100 samples of the same size were drawn, the confidence interval expected for at least 95 of the samples would be expected to include the true population value.⁹⁸

Stratified probability sampling can be used to obtain more precise response estimates by using what is known about characteristics of the population that are likely to be associated with the response being measured. Suppose, for example, we anticipated that more-experienced and less-experienced dentists might respond differently to Goldgate toothpaste, and we had information on the year in which each dentist in the population began practicing. By dividing the population of dentists into more- and less-experienced strata (e.g., in practice 15 years or more versus in practice less than 15 years) and then randomly sampling within experience stratum, we would be able to ensure that the sample contained precisely

96. Actually, because survey interviewers would be unable to locate some dentists and some dentists would be unwilling to participate in the survey, technically the population to which this sample would be projectable would be all dentists with current addresses who would be willing to participate in the survey if they were asked. The expert should be prepared to discuss possible sources of bias due to, for example, an address list that is not current.

97. When the sample design does not use a simple random sample, the confidence interval will be affected.

98. To increase the likelihood that the confidence interval contains the actual population value (e.g., from 95% to 99%) without increasing the sample size, the width of the confidence interval can be expanded. An increase in the confidence interval brings an increase in the confidence level. For further discussion of confidence intervals, see David H. Kaye & David A. Freedman, *Reference Guide on Statistics*, Section IV.A, in this manual.

proportionate representation from each stratum, in this case, more- and less-experienced dentists. That is, if 60% of dentists were in practice 15 years or more, we could select 60% of the sample from the more-experienced stratum and 40% from the less-experienced stratum and be sure that the sample would have proportionate representation from each stratum, reducing the likely sampling error.⁹⁹

In proportionate stratified probability sampling, as in simple random sampling, each individual member of the population has an equal chance of being selected. Stratified probability sampling can also disproportionately sample from different strata, a procedure that will produce more precise estimates if some strata are more heterogeneous than others on the measure of interest.¹⁰⁰ Disproportionate sampling may also be used to enable the survey to provide separate estimates for particular subgroups. With disproportionate sampling, sampling weights must be used in the analysis to accurately describe the characteristics of the population as a whole.

Although probability sample surveys often are conducted in organizational settings and are the recommended sampling approach in academic and government publications on surveys, probability sample surveys can be expensive when in-person interviews are required, the target population is dispersed widely, or members of the target population are rare. A majority of the consumer surveys conducted for Lanham Act litigation present results from nonprobability convenience samples.¹⁰¹ They are admitted into evidence based on the argument that nonprobability sampling is used widely in marketing research and that “results of these studies are used by major American companies in making decisions of considerable consequence.”¹⁰² Nonetheless, when respondents are not selected randomly from the relevant population, the expert should be prepared to justify the method used to select respondents. Special precautions are required to reduce the likelihood of biased samples.¹⁰³ In addition, quantitative values computed from such samples (e.g., percentage of respondents indicating confusion) should be viewed as rough

99. See *Pharmacia Corp. v. Alcon Lab.*, 201 F. Supp. 2d 335, 365 (D.N.J. 2002).

100. Robert M. Groves et al., *Survey Methodology, Stratification and Stratified Sampling*, 106–18 (2004).

101. Jacob Jacoby & Amy H. Handlin, *Non-Probability Sampling Designs for Litigation Surveys*, 81 Trademark Rep. 169, 173 (1991). For probability surveys conducted in trademark cases, see *James Burrough, Ltd. v. Sign of Beefeater, Inc.*, 540 F.2d 266 (7th Cir. 1976); *Nightlight Systems, Inc., v. Nite Lights Franchise Sys.*, 2007 U.S. Dist. LEXIS 95565 (N.C. Ga. July 17, 2007); *National Football League Props., Inc. v. Wichita Falls Sportswear, Inc.*, 532 F. Supp. 651 (W.D. Wash. 1982).

102. *National Football League Props., Inc. v. New Jersey Giants, Inc.*, 637 F. Supp. 507, 515 (D.N.J. 1986). A survey of members of the Council of American Survey Research Organizations, the national trade association for commercial survey research firms in the United States, revealed that 95% of the in-person independent contacts in studies done in 1985 took place in malls or shopping centers. Jacoby & Handlin, *supra* note 101, at 172–73, 176. More recently, surveys conducted over the Internet have been administered to samples of respondents drawn from panels of volunteers; see *infra* Section IV.G.4 for a discussion of online surveys. Although panel members may be randomly selected from the panel population to complete the survey, the panel population itself is not usually the product of a random selection process.

103. See *infra* Sections III.D–E.

indicators rather than as precise quantitative estimates.¹⁰⁴ Confidence intervals technically should not be computed, although if the calculation shows a wide interval, that may be a useful indication of the limited value of the estimate.

D. What Is the Evidence That Nonresponse Did Not Bias the Results of the Survey?

Even when a sample is drawn randomly from a complete list of elements in the target population, responses or measures may be obtained on only part of the selected sample. If this lack of response is distributed randomly, valid inferences about the population can be drawn with assurance using the measures obtained from the available elements in the sample. The difficulty is that nonresponse often is not random, so that, for example, persons who are single typically have three times the “not at home” rate in U.S. Census Bureau surveys as do family members.¹⁰⁵ Efforts to increase response rates include making several attempts to contact potential respondents, sending advance letters,¹⁰⁶ and providing financial or nonmonetary incentives for participating in the survey.¹⁰⁷

The key to evaluating the effect of nonresponse in a survey is to determine as much as possible the extent to which nonrespondents differ from the respondents in the nature of the responses they would provide if they were present in the sample. That is, the difficult question to address is the extent to which nonresponse has biased the pattern of responses by undermining the representativeness of the sample and, if it has, the direction of that bias. It is incumbent on the expert presenting the survey results to analyze the level and sources of nonresponse, and to assess how that nonresponse is likely to have affected the results. On some occasions, it may be possible to anticipate systematic patterns of nonresponse. For example, a survey that targets a population of professionals may encounter difficulty in obtaining the same level of participation from individuals with high-volume practices that can be obtained from those with lower-volume practices. To enable the researcher to assess whether response rate varies with the volume of practice, it may be possible to identify in advance potential respondents

104. The court in *Kinetic Concept, Inc. v. Bluesky Medical Corp.*, 2006 U.S. Dist. LEXIS 60187, *14 (W.D. Tex. Aug. 11, 2006), found the plaintiff’s survey using a nonprobability sample to be admissible and permitted the plaintiff’s expert to present results from a survey using a convenience sample. The court then assisted the jury by providing an instruction on the differences between probability and convenience samples and the estimates obtained from each.

105. 2 Gastwirth, *supra* note 64, at 501. This volume contains a useful discussion of sampling, along with a set of examples. *Id.* at 467.

106. Edith De Leeuw et al., *The Influence of Advance Letters on Response in Telephone Surveys: A Meta-analysis*, 71 *Pub. Op. Q.* 413 (2007) (advance letters effective in increasing response rates in telephone as well as mail and face-to-face surveys).

107. Erica Ryu et al., *Survey Incentives: Cash vs. In-kind; Face-to-Face vs. Mail; Response Rate vs. Nonresponse Error*, 18 *Int’l J. Pub. Op. Res.* 89 (2005).

with varying years of experience. Even if it is not possible to know in advance the level of experience of each potential member in the target population and to design a sampling plan that will produce representative samples at each level of experience, the survey itself can include questions about volume of practice that will permit the expert to assess how experience level may have affected the pattern of results.¹⁰⁸

Although high response rates (i.e., 80% or higher)¹⁰⁹ are desirable because they generally eliminate the need to address the issue of potential bias from nonresponse,¹¹⁰ such high response rates are increasingly difficult to achieve. Survey nonresponse rates have risen substantially in recent years, along with the costs of obtaining responses, and so the issue of nonresponse has attracted substantial attention from survey researchers.¹¹¹ Researchers have developed a variety of approaches to adjust for nonresponse, including weighting obtained responses in proportion to known demographic characteristics of the target population, comparing the pattern of responses from early and late responders to mail surveys, or the pattern of responses from easy-to-reach and hard-to-reach responders in telephone surveys, and imputing estimated responses to nonrespondents based on known characteristics of those who have responded. All of these techniques can only approximate the response patterns that would have been obtained if nonrespondents had responded. Nonetheless, they are useful for testing the robustness of the findings based on estimates obtained from the simple aggregation of answers to questions given by responders.

To assess the general impact of the lower response rates, researchers have conducted comparison studies evaluating the results obtained from surveys with

108. In *People v. Williams*, *supra* note 22, a published survey of experts in eyewitness research was used to show general acceptance of various eyewitness phenomena. See Saul Kassin et al., *On the "General Acceptance" of Eyewitness Testimony Research: A New Survey of the Experts*, 56 *Am. Psychologist* 405 (2001). The survey included questions on the publication activity of respondents and compared the responses of those with high and low research productivity. Productivity levels in the respondent sample suggested that respondents constituted a blue ribbon group of leading researchers. *Williams*, 830 N.Y.S.2d at 457 n.16. See also *Pharmacia Corp. v. Alcon Lab., Inc.*, 201 F. Supp. 2d 335 (D.N.J. 2002).

109. Note that methods of computing response rates vary. For example, although response rate can be generally defined as the number of complete interviews with reporting units divided by the number of eligible reporting units in the sample, decisions on how to treat partial completions and how to estimate the eligibility of nonrespondents can produce differences in measures of response rate. E.g., American Association of Public Opinion Research, *Standard Definitions: Final Dispositions of Case Codes and Outcome Rates for Surveys* (rev. 2008), available at www.Aapor.org/uploads/Standard_Definitions_07-08_Final.pdf.

110. Office of Management and Budget, *Standards and Guidelines for Statistical Surveys* (Sept. 2006), Guideline 1.3.4: Plan for a nonresponse bias analysis if the expected unit response rate is below 80%. See *Albert v. Zabin*, 2009 Mass. App. Unpub. LEXIS 572 (July 14, 2009) reversing summary judgment that had excluded surveys with response rates of 27% and 31% based on a thoughtful analysis of measures taken to assess potential nonresponse bias.

111. E.g., Richard Curtin et al., *Changes in Telephone Survey Nonresponse Over the Past Quarter Century*, 69 *Pub. Op. Q.* 87 (2005); *Survey Nonresponse* (Robert M. Groves et al. eds., 2002).

varying response rates.¹¹² Contrary to earlier assumptions, surprisingly comparable results have been obtained in many surveys with varying response rates, suggesting that surveys may achieve reasonable estimates even with relatively low response rates. The key is whether nonresponse is associated with systematic differences in response that cannot be adequately modeled or assessed.

Determining whether the level of nonresponse in a survey seriously impairs inferences drawn from the results of a survey generally requires an analysis of the determinants of nonresponse. For example, even a survey with a high response rate may seriously underrepresent some portions of the population, such as the unemployed or the poor. If a general population sample is used to chart changes in the proportion of the population that knows someone with HIV, the survey would underestimate the population value if some groups more likely to know someone with HIV (e.g., intravenous drug users) are underrepresented in the sample. The survey expert should be prepared to provide evidence on the potential impact of nonresponse on the survey results.

In surveys that include sensitive or difficult questions, particularly surveys that are self-administered, some respondents may refuse to provide answers or may provide incomplete answers (i.e., item rather than unit nonresponse).¹¹³ To assess the impact of nonresponse to a particular question, the survey expert should analyze the differences between those who answered and those who did not answer. Procedures to address the problem of missing data include recontacting respondents to obtain the missing answers and using the respondent's other answers to predict the missing response (i.e., imputation).¹¹⁴

E. What Procedures Were Used to Reduce the Likelihood of a Biased Sample?

If it is impractical for a survey researcher to sample randomly from the entire target population, the researcher still can apply probability sampling to some aspects of respondent selection to reduce the likelihood of biased selection. For example, in many studies the target population consists of all consumers or purchasers of a product. Because it is impractical to randomly sample from that population, research is often conducted in shopping malls where some members of the target population may not shop. Mall locations, however, can be sampled randomly from a list of possible mall sites. By administering the survey at several different

112. E.g., Daniel M. Merkle & Murray Edelman, *Nonresponse in Exit Polls: A Comprehensive Analysis*, in *Survey Nonresponse*, *supra* note 111, at 243–57 (finding minimal nonresponse error associated with refusals to participate in in-person exit polls); see also Jon A. Krosnick, *Survey Research*, 50 *Ann. Rev. Psychol.* 537 (1999).

113. See Roger Tourangeau et al., *The Psychology of Survey Response* (2000).

114. See Paul D. Allison, *Missing Data*, in *Handbook of Survey Research*, *supra* note 1, at 630; see also *Survey Nonresponse*, *supra* note 111.

malls, the expert can test for and report on any differences observed across sites. To the extent that similar results are obtained in different locations using different onsite interview operations, it is less likely that idiosyncrasies of sample selection or administration can account for the results.¹¹⁵ Similarly, because the characteristics of persons visiting a shopping center vary by day of the week and time of day, bias in sampling can be reduced if the survey design calls for sampling time segments as well as mall locations.¹¹⁶

In mall intercept surveys, the organization that manages the onsite interview facility generally employs recruiters who approach potential survey respondents in the mall and ascertain if they are qualified and willing to participate in the survey. If a potential respondent agrees to answer the questions and meets the specified criteria, he or she is escorted to the facility where the survey interview takes place. If recruiters are free to approach potential respondents without controls on how an individual is to be selected for screening, shoppers who spend more time in the mall are more likely to be approached than shoppers who visit the mall only briefly. Moreover, recruiters naturally prefer to approach friendly looking potential respondents, so that it is more likely that certain types of individuals will be selected. These potential biases in selection can be reduced by providing appropriate selection instructions and training recruiters effectively. Training that reduces the interviewer's discretion in selecting a potential respondent is likely to reduce bias in selection, as are instructions to approach every n th person entering the facility through a particular door.¹¹⁷

F. What Precautions Were Taken to Ensure That Only Qualified Respondents Were Included in the Survey?

In a carefully executed survey, each potential respondent is questioned or measured on the attributes that determine his or her eligibility to participate in the survey. Thus, the initial questions screen potential respondents to determine if they are members of the target population of the survey (e.g., Is she at least 14 years old? Does she own a dog? Does she live within 10 miles?). The screening questions must be drafted so that they do not appeal to or deter specific groups within the target population, or convey information that will influence the respondent's

115. Note, however, that differences in results across sites may arise from genuine differences in respondents across geographic locations or from a failure to administer the survey consistently across sites.

116. Seymour Sudman, *Improving the Quality of Shopping Center Sampling*, 17 *J. Marketing Res.* 423 (1980).

117. In the end, even if malls are randomly sampled and shoppers are randomly selected within malls, results from mall surveys technically can be used to generalize only to the population of mall shoppers. The ability of the mall sample to describe the likely response pattern of the broader relevant population will depend on the extent to which a substantial segment of the relevant population (1) is not found in malls and (2) would respond differently to the interview.

answers on the main survey. For example, if respondents must be prospective and recent purchasers of Sunshine orange juice in a trademark survey designed to assess consumer confusion with Sun Time orange juice, potential respondents might be asked to name the brands of orange juice they have purchased recently or expect to purchase in the next 6 months. They should not be asked specifically if they recently have purchased, or expect to purchase, Sunshine orange juice, because this may affect their responses on the survey either by implying who is conducting the survey or by supplying them with a brand name that otherwise would not occur to them.

The content of a screening questionnaire (or screener) can also set the context for the questions that follow. In *Pfizer, Inc. v. Astra Pharmaceutical Products, Inc.*,¹¹⁸ physicians were asked a screening question to determine whether they prescribed particular drugs. The survey question that followed the screener asked “Thinking of the practice of cardiovascular medicine, what first comes to mind when you hear the letters XL?” The court found that the screener conditioned the physicians to respond with the name of a drug rather than a condition (long-acting).¹¹⁹

The criteria for determining whether to include a potential respondent in the survey should be objective and clearly conveyed, preferably using written instructions addressed to those who administer the screening questions. These instructions and the completed screening questionnaire should be made available to the court and the opposing party along with the interview form for each respondent.

IV. Survey Questions and Structure

A. Were Questions on the Survey Framed to Be Clear, Precise, and Unbiased?

Although it seems obvious that questions on a survey should be clear and precise, phrasing questions to reach that goal is often difficult. Even questions that appear clear can convey unexpected meanings and ambiguities to potential respondents. For example, the question “What is the average number of days each week you have butter?” appears to be straightforward. Yet some respondents wondered whether margarine counted as butter, and when the question was revised to include the introductory phrase “not including margarine,” the reported frequency of butter use dropped dramatically.¹²⁰

118. 858 F. Supp. 1305, 1321 & n.13 (S.D.N.Y. 1994).

119. *Id.* at 1321.

120. Floyd J. Fowler, Jr., *How Unclear Terms Affect Survey Data*, 56 *Pub. Op. Q.* 218, 225–26 (1992).

When unclear questions are included in a survey, they may threaten the validity of the survey by systematically distorting responses if respondents are misled in a particular direction, or by inflating random error if respondents guess because they do not understand the question.¹²¹ If the crucial question is sufficiently ambiguous or unclear, it may be the basis for rejecting the survey. For example, a survey was designed to assess community sentiment that would warrant a change of venue in trying a case for damages sustained when a hotel skywalk collapsed.¹²² The court found that the question “Based on what you have heard, read or seen, do you believe that in the current compensatory damage trials, the defendants, such as the contractors, designers, owners, and operators of the Hyatt Hotel, should be punished?” could neither be correctly understood nor easily answered.¹²³ The court noted that the phrase “compensatory damages,” although well-defined for attorneys, was unlikely to be meaningful for laypersons.¹²⁴

A variety of pretest activities may be used to improve the clarity of communication with respondents. Focus groups can be used to find out how the survey population thinks about an issue, facilitating the construction of clear and understandable questions. Cognitive interviewing, which includes a combination of think-aloud and verbal probing techniques, may be used for questionnaire evaluation.¹²⁵ Pilot studies involving a dress rehearsal for the main survey can also detect potential problems.

Texts on survey research generally recommend pretests as a way to increase the likelihood that questions are clear and unambiguous,¹²⁶ and some courts have recognized the value of pretests.¹²⁷ In many pretests or pilot tests,¹²⁸ the proposed survey is administered to a small sample (usually between 25 and 75)¹²⁹ of the

121. *See id.* at 219.

122. *Firestone v. Crown Ctr. Redevelopment Corp.*, 693 S.W.2d 99 (Mo. 1985) (en banc).

123. *See id.* at 102, 103.

124. *See id.* at 103. When there is any question about whether some respondents will understand a particular term or phrase, the term or phrase should be defined explicitly.

125. Gordon B. Willis et al., *Is the Bandwagon Headed to the Methodological Promised Land? Evaluating the Validity of Cognitive Interviewing Techniques*, in *Cognitive and Survey Research* 136 (Monroe G. Sirken et al. eds., 1999). *See also* Tourangeau et al., *supra* note 113, at 326–27.

126. *See* Jon A. Krosnick & Stanley Presser, *Questions and Questionnaire Design*, in *Handbook of Survey Research*, *supra* note 1, at 294 (“No matter how closely a questionnaire follows recommendations based on best practices, it is likely to benefit from pretesting. . .”). *See also* Jean M. Converse & Stanley Presser, *Survey Questions: Handcrafting the Standardized Questionnaire* 51 (1986); Fred W. Morgan, *Judicial Standards for Survey Research: An Update and Guidelines*, 54 *J. Marketing* 59, 64 (1990).

127. *See e.g.*, *Zippo Mfg. Co. v. Rogers Imports, Inc.*, 216 F. Supp. 670 (S.D.N.Y. 1963); *Scott v. City of New York*, 591 F. Supp. 2d 554, 560 (S.D.N.Y. 2008) (“[s]urvey went through multiple pretests in order to insure its usefulness and statistical validity.”).

128. The terms *pretest* and *pilot test* are sometimes used interchangeably to describe pilot work done in the planning stages of research. When they are distinguished, the difference is that a pretest tests the questionnaire, whereas a pilot test generally tests proposed collection procedures as well.

129. Converse & Presser, *supra* note 126, at 69. Converse and Presser suggest that a pretest with 25 respondents is appropriate when the survey uses professional interviewers.

same type of respondents who would be eligible to participate in the full-scale survey. The interviewers observe the respondents for any difficulties they may have with the questions and probe for the source of any such difficulties so that the questions can be rephrased if confusion or other difficulties arise.¹³⁰ Attorneys who commission surveys for litigation sometimes are reluctant to approve pilot work or to reveal that pilot work has taken place because they are concerned that if a pretest leads to revised wording of the questions, the trier of fact may believe that the survey has been manipulated and is biased or unfair. A more appropriate reaction is to recognize that pilot work is a standard and valuable way to improve the quality of a survey¹³¹ and to anticipate that it often results in word changes that increase clarity and correct misunderstandings. Thus, changes may indicate informed survey construction rather than flawed survey design.¹³²

B. Were Some Respondents Likely to Have No Opinion? If So, What Steps Were Taken to Reduce Guessing?

Some survey respondents may have no opinion on an issue under investigation, either because they have never thought about it before or because the question mistakenly assumes a familiarity with the issue. For example, survey respondents may not have noticed that the commercial they are being questioned about guaranteed the quality of the product being advertised and thus they may have no opinion on the kind of guarantee it indicated. Likewise, in an employee survey, respondents may not be familiar with the parental leave policy at their company and thus may have no opinion on whether they would consider taking advantage of the parental leave policy if they became parents. The following three alternative question structures will affect how those respondents answer and how their responses are counted.

First, the survey can ask all respondents to answer the question (e.g., “Did you understand the guarantee offered by Clover to be a 1-year guarantee, a 60-day guarantee, or a 30-day guarantee?”). Faced with a direct question, particularly one that provides response alternatives, the respondent obligingly may supply an

130. Methods for testing respondent understanding include concurrent and retrospective think-alouds, in which respondents describe their thinking as they arrive at, or after they have arrived at, an answer, and paraphrasing (asking respondents to restate the question in their own words). Tourangeau et al., *supra* note 113, at 326–27; *see also* Methods for Testing and Evaluating Survey Questionnaires (Stanley Presser et al. eds., 2004).

131. *See* OMB Standards and Guidelines for Statistical Survey, *supra* note 110, Standard 1.4, Pre-testing Survey Systems (specifying that to ensure that all components of a survey function as intended, pretests of survey components should be conducted unless those components have previously been successfully fielded); American Association for Public Opinion Research, Best Practices (2011) (“Because it is rarely possible to foresee all the potential misunderstandings or biasing effects of different questions or procedures, it is vital for a well-designed survey operation to include provision for a pretest.”).

132. *See infra* Section VII.B for a discussion of obligations to disclose pilot work.

answer even if (in this example) the respondent did not notice the guarantee (or is unfamiliar with the parental leave policy). Such answers will reflect only what the respondent can glean from the question, or they may reflect pure guessing. The imprecision introduced by this approach will increase with the proportion of respondents who are unfamiliar with the topic at issue.

Second, the survey can use a quasi-filter question to reduce guessing by providing “don’t know” or “no opinion” options as part of the question (e.g., “Did you understand the guarantee offered by Clover to be for more than a year, a year, or less than a year, or don’t you have an opinion?”).¹³³ By signaling to the respondent that it is appropriate not to have an opinion, the question reduces the demand for an answer and, as a result, the inclination to hazard a guess just to comply. Respondents are more likely to choose a “no opinion” option if it is mentioned explicitly by the interviewer than if it is merely accepted when the respondent spontaneously offers it as a response. The consequence of this change in format is substantial. Studies indicate that, although the relative distribution of the respondents selecting the *listed* choices is unlikely to change dramatically, presentation of an explicit “don’t know” or “no opinion” alternative commonly leads to a 20% to 25% increase in the proportion of respondents selecting that response.¹³⁴

Finally, the survey can include full-filter questions, that is, questions that lay the groundwork for the substantive question by first asking the respondent if he or she has an opinion about the issue or happened to notice the feature that the interviewer is preparing to ask about (e.g., “Based on the commercial you just saw, do you have an opinion about how long Clover stated or implied that its guarantee lasts?”).¹³⁵ The interviewer then asks the substantive question only of those respondents who have indicated that they have an opinion on the issue.

Which of these three approaches is used and the way it is used can affect the rate of “no opinion” responses that the substantive question will evoke.¹³⁶ Respondents are more likely to say that they do not have an opinion on an issue if a full filter is used than if a quasi-filter is used.¹³⁷ However, in maximizing respondent expressions of “no opinion,” full filters may produce an underreporting of opinions. There is some evidence that full-filter questions discourage respondents who actually have opinions from offering them by conveying the implicit suggestion that respondents can avoid difficult followup questions by saying that they have no opinion.¹³⁸

133. Norbert Schwarz & Hans-Jürgen Hippler, *Response Alternatives: The Impact of Their Choice and Presentation Order*, in *Measurement Errors in Surveys* 41, 45–46 (Paul P. Biemer et al. eds., 1991).

134. Howard Schuman & Stanley Presser, *Questions and Answers in Attitude Surveys: Experiments on Question Form, Wording and Context* 113–46 (1981).

135. See, e.g., *Johnson & Johnson–Merck Consumer Pharmas. Co. v. SmithKline Beecham Corp.*, 960 F.2d 294, 299 (2d Cir. 1992).

136. Considerable research has been conducted on the effects of filters. For a review, see George F. Bishop et al., *Effects of Filter Questions in Public Opinion Surveys*, 47 *Pub. Op. Q.* 528 (1983).

137. Schwarz & Hippler, *supra* note 133, at 45–46.

138. *Id.* at 46.

In general, then, a survey that uses full filters provides a conservative estimate of the number of respondents holding an opinion, while a survey that uses neither full filters nor quasi-filters may overestimate the number of respondents with opinions, if some respondents offering opinions are guessing. The strategy of including a “no opinion” or “don’t know” response as a quasi-filter avoids both of these extremes. Thus, rather than asking, “Based on the commercial, do you believe that the two products are made in the same way, or are they made differently?”¹³⁹ or prefacing the question with a preliminary, “Do you have an opinion, based on the commercial, concerning the way that the two products are made?” the question could be phrased, “Based on the commercial, do you believe that the two products are made in the same way, or that they are made differently, or don’t you have an opinion about the way they are made?”

Recent research on the effects of including a “don’t know” option shows that quasi-filters as well as full filters may discourage a respondent who would be able to provide a meaningful answer from expressing it.¹⁴⁰ The “don’t know” option provides a cue that it is acceptable to avoid the work of trying to provide a more substantive response. Respondents are particularly likely to be attracted to a “don’t know” option when the question is difficult to understand or the respondent is not strongly motivated to carefully report an opinion.¹⁴¹ One solution that some survey researchers use is to provide respondents with a general instruction not to guess at the beginning of an interview, rather than supplying a “don’t know” or “no opinion” option as part of the options attached to each question.¹⁴² Another approach is to eliminate the “don’t know” option and to add followup questions that measure the strength of the respondent’s opinion.¹⁴³

C. Did the Survey Use Open-Ended or Closed-Ended Questions? How Was the Choice in Each Instance Justified?

The questions that make up a survey instrument may be open-ended, closed-ended, or a combination of both. Open-ended questions require the respondent to formulate and express an answer in his or her own words (e.g., “What was the main point of the commercial?” “Where did you catch the fish you caught

139. The question in the example without the “no opinion” alternative was based on a question rejected by the court in *Coors Brewing Co. v. Anheuser-Busch Cos.*, 802 F. Supp. 965, 972–73 (S.D.N.Y. 1992). See also *Procter & Gamble Pharms., Inc. v. Hoffmann-La Roche, Inc.*, 2006 U.S. Dist. LEXIS 64363 (S.D.N.Y. Sept. 6, 2006).

140. Jon A. Krosnick et al., *The Impact of “No Opinion” Response Options on Data Quality: Non-Attitude Reduction or Invitation to Satisfice?* 66 *Pub. Op. Q.* 371 (2002).

141. Krosnick & Presser, *supra* note 126, at 284.

142. *Anheuser-Busch, Inc. v. VIP Prods, LLC*, No. 4:08cv0358, 2008 U.S. Dist. LEXIS 82258, at *6 (E.D. Mo. Oct. 16, 2008).

143. Krosnick & Presser, *supra* note 126, at 285.

in these waters?”¹⁴⁴). Closed-ended questions provide the respondent with an explicit set of responses from which to choose; the choices may be as simple as *yes* or *no* (e.g., “Is Colby College coeducational?”¹⁴⁵) or as complex as a range of alternatives (e.g., “The two pain relievers have (1) the same likelihood of causing gastric ulcers; (2) about the same likelihood of causing gastric ulcers; (3) a somewhat different likelihood of causing gastric ulcers; (4) a very different likelihood of causing gastric ulcers; or (5) none of the above.”¹⁴⁶). When a survey involves in-person interviews, the interviewer may show the respondent these choices on a showcard that lists them.

Open-ended and closed-ended questions may elicit very different responses.¹⁴⁷ Most responses are less likely to be volunteered by respondents who are asked an open-ended question than they are to be chosen by respondents who are presented with a closed-ended question. The response alternatives in a closed-ended question may remind respondents of options that they would not otherwise consider or which simply do not come to mind as easily.¹⁴⁸

The advantage of open-ended questions is that they give the respondent fewer hints about expected or preferred answers. Precoded responses on a closed-ended question, in addition to reminding respondents of options that they might not otherwise consider,¹⁴⁹ may direct the respondent away from or toward a particular response. For example, a commercial reported that in shampoo tests with more than 900 women, the sponsor’s product received higher ratings than

144. A relevant example from *Wilhoite v. Olin Corp.* is described in McGovern & Lind, *supra* note 31, at 76.

145. *Presidents & Trustees of Colby College v. Colby College*—N.H., 508 F.2d 804, 809 (1st Cir. 1975).

146. This question is based on one asked in *American Home Products Corp. v. Johnson & Johnson*, 654 F. Supp. 568, 581 (S.D.N.Y. 1987), that was found to be a leading question by the court, primarily because the choices suggested that the respondent had learned about aspirin’s and ibuprofen’s relative likelihood of causing gastric ulcers. In contrast, in *McNeilab, Inc. v. American Home Products Corp.*, 501 F. Supp. 517, 525 (S.D.N.Y. 1980), the court accepted as nonleading the question, “Based only on what the commercial said, would Maximum Strength Anacin contain more pain reliever, the same amount of pain reliever, or less pain reliever than the brand you, yourself, currently use most often?”

147. Howard Schuman & Stanley Presser, *Question Wording as an Independent Variable in Survey Analysis*, 6 Soc. Methods & Res. 151 (1977); Schuman & Presser, *supra* note 134, at 79–112; Converse & Presser, *supra* note 126, at 33.

148. For example, when respondents in one survey were asked, “What is the most important thing for children to learn to prepare them for life?”, 62% picked “to think for themselves” from a list of five options, but only 5% spontaneously offered that answer when the question was open-ended. Schuman & Presser, *supra* note 134, at 104–07. An open-ended question presents the respondent with a free-recall task, whereas a closed-ended question is a recognition task. Recognition tasks in general reveal higher performance levels than recall tasks. Mary M. Smyth et al., *Cognition in Action* 25 (1987). In addition, there is evidence that respondents answering open-ended questions may be less likely to report some information that they would reveal in response to a closed-ended question when that information seems self-evident or irrelevant.

149. Schwarz & Hippler, *supra* note 133, at 43.

other brands.¹⁵⁰ According to a competitor, the commercial deceptively implied that each woman in the test rated more than one shampoo, when in fact each woman rated only one. To test consumer impressions, a survey might have shown the commercial and asked an open-ended question: “How many different brands mentioned in the commercial did each of the 900 women try?”¹⁵¹ Instead, the survey asked a closed-ended question; respondents were given the choice of “one,” “two,” “three,” “four,” or “five or more.” The fact that four of the five choices in the closed-ended question provided a response that was greater than one implied that the correct answer was probably more than one.¹⁵² Note, however, that the open-ended question also may suggest that the answer is more than one.

By asking “how many different brands,” the question suggests (1) that the viewer should have received some message from the commercial about the number of brands each woman tried and (2) that different brands were tried. Similarly, an open-ended question that asks, “[W]hich company or store do you think puts out this shirt?” indicates to the respondent that the appropriate answer is the name of a company or store. The question would be leading if the respondent would have considered other possibilities (e.g., an individual or Webstore) if the question had not provided the frame of a company or store.¹⁵³ Thus, the wording of a question, open-ended or closed-ended, can be leading or non-leading, and the degree of suggestiveness of each question must be considered in evaluating the objectivity of a survey.

Closed-ended questions have some additional potential weaknesses that arise if the choices are not constructed properly. If the respondent is asked to choose one response from among several choices, the response chosen will be meaningful only if the list of choices is exhaustive—that is, if the choices cover all possible answers a respondent might give to the question. If the list of possible choices is incomplete, a respondent may be forced to choose one that does not express his or her opinion.¹⁵⁴ Moreover, if respondents are told explicitly that they are

150. See *Vidal Sassoon, Inc. v. Bristol-Myers Co.*, 661 F.2d 272, 273 (2d Cir. 1981).

151. This was the wording of the closed-ended question in the survey discussed in *Vidal Sassoon*, 661 F.2d at 275–76, without the closed-ended options that were supplied in that survey.

152. Ninety-five percent of the respondents who answered the closed-ended question in the plaintiff’s survey said that each woman had tried two or more brands. The open-ended question was never asked. *Vidal Sassoon*, 661 F.2d at 276. Norbert Schwarz, *Assessing Frequency Reports of Mundane Behaviors: Contributions of Cognitive Psychology to Questionnaire Construction*, in *Research Methods in Personality and Social Psychology* 98 (Clyde Hendrick & Margaret S. Clark eds., 1990), suggests that respondents often rely on the range of response alternatives as a frame of reference when they are asked for frequency judgments. See, e.g., Roger Tourangeau & Tom W. Smith, *Asking Sensitive Questions: The Impact of Data Collection Mode, Question Format, and Question Context*, 60 *Pub. Op. Q.* 275, 292 (1996).

153. *Smith v. Wal-Mart Stores, Inc.*, 537 F. Supp. 2d 1302, 1331–32 (N.D. Ga. 2008).

154. See, e.g., *American Home Prods. Corp. v. Johnson & Johnson*, 654 F. Supp. 568, 581 (S.D.N.Y. 1987).

not limited to the choices presented, most respondents nevertheless will select an answer from among the listed ones.¹⁵⁵

One form of closed-ended question format that typically produces some distortion is the popular agree/disagree, true/false, or yes/no question. Although this format is appealing because it is easy to write and score these questions and their responses, the format is also seriously problematic. With its simplicity comes acquiescence, “[T]he tendency to endorse any assertion made in a question, regardless of its content,” is a systematic source of bias that has produced an inflation effect of 10% across a number of studies.¹⁵⁶ Only when control groups or control questions are added to the survey design can this question format provide reasonable response estimates.¹⁵⁷

Although many courts prefer open-ended questions on the ground that they tend to be less leading, the value of any open-ended or closed-ended question depends on the information it conveys in the question and, in the case of closed-ended questions, in the choices provided. Open-ended questions are more appropriate when the survey is attempting to gauge what comes first to a respondent’s mind, but closed-ended questions are more suitable for assessing choices between well-identified options or obtaining ratings on a clear set of alternatives.

D. If Probes Were Used to Clarify Ambiguous or Incomplete Answers, What Steps Were Taken to Ensure That the Probes Were Not Leading and Were Administered in a Consistent Fashion?

When questions allow respondents to express their opinions in their own words, some of the respondents may give ambiguous or incomplete answers, or may ask for clarification. In such instances, interviewers may be instructed to record any answer that the respondent gives and move on to the next question, or they may be instructed to probe to obtain a more complete response or clarify the meaning of the ambiguous response. They may also be instructed what clarification they can provide. In all of these situations, interviewers should record verbatim both what the respondent says and what the interviewer says in the attempt to get or provide clarification. Failure to record every part of the exchange in the order in which it occurs raises questions about the reliability of the survey, because neither the court nor the opposing party can evaluate whether the probe affected the views expressed by the respondent.

155. See Howard Schuman, *Ordinary Questions, Survey Questions, and Policy Questions*, 50 Pub. Opinion Q. 432, 435–36 (1986).

156. Jon A. Krosnick, *Survey Research*, 50 Ann. Rev. Psychol. 537, 552 (1999).

157. See *infra* Section IV.F.

If the survey is designed to allow for probes, interviewers must be given explicit instructions on when they should probe and what they should say in probing.¹⁵⁸ Standard probes used to draw out all that the respondent has to say (e.g., “Any further thoughts?” “Anything else?” “Can you explain that a little more?” Or “Could you say that another way?”) are relatively innocuous and non-controversial in content, but persistent continued requests for further responses to the same or nearly identical questions may convey the idea to the respondent that he or she has not yet produced the “right” answer.¹⁵⁹ Interviewers should be trained in delivering probes to maintain a professional and neutral relationship with the respondent (as they should during the rest of the interview), which minimizes any sense of passing judgment on the content of the answers offered. Moreover, interviewers should be given explicit instructions on when to probe, so that probes are administered consistently.

A more difficult type of probe to construct and deliver reliably is one that requires a substantive question tailored to the answer given by the respondent. The survey designer must provide sufficient instruction to interviewers so that they avoid giving directive probes that suggest one answer over another. Those instructions, along with all other aspects of interviewer training, should be made available for evaluation by the court and the opposing party.

E. What Approach Was Used to Avoid or Measure Potential Order or Context Effects?

The order in which questions are asked on a survey and the order in which response alternatives are provided in a closed-ended question can influence the answers.¹⁶⁰ For example, although asking a general question before a more specific question on the same topic is unlikely to affect the response to the specific question, reversing the order of the questions may influence responses to the general question. As a rule, then, surveys are less likely to be subject to order effects if the questions move from the general (e.g., “What do you recall being discussed

158. Floyd J. Fowler, Jr. & Thomas W. Mangione, *Standardized Survey Interviewing: Minimizing Interviewer-Related Error* 41–42 (1990).

159. *See, e.g., Johnson & Johnson–Merck Consumer Pharms. Co. v. Rhone-Poulenc Rorer Pharms., Inc.*, 19 F.3d 125, 135 (3d Cir. 1994); *American Home Prods. Corp. v. Procter & Gamble Co.*, 871 F. Supp. 739, 748 (D.N.J. 1994).

160. *See Schuman & Presser, supra* note 134, at 23, 56–74. Krosnick & Presser, *supra* note 126, at 278–81. In *R.J. Reynolds Tobacco Co. v. Loew's Theatres, Inc.*, 511 F. Supp. 867, 875 (S.D.N.Y. 1980), the court recognized the biased structure of a survey that disclosed the tar content of the cigarettes being compared before questioning respondents about their cigarette preferences. Not surprisingly, respondents expressed a preference for the lower tar product. *See also E. & J. Gallo Winery v. Pasatiempos Gallo, S.A.*, 905 F. Supp. 1403, 1409–10 (E.D. Cal. 1994) (court recognized that earlier questions referring to playing cards, board or table games, or party supplies, such as confetti, increased the likelihood that respondents would include these items in answers to the questions that followed).

in the advertisement?”) to the specific (e.g., “Based on your reading of the advertisement, what companies do you think the ad is referring to when it talks about rental trucks that average five miles per gallon?”).¹⁶¹

The mode of questioning can influence the form that an order effect takes. When respondents are shown response alternatives visually, as in mail surveys and other self-administered questionnaires or in face-to-face interviews when respondents are shown a card containing response alternatives, they are more likely to select the first choice offered (a primacy effect).¹⁶² In contrast, when response alternatives are presented orally, as in telephone surveys, respondents are more likely to choose the last choice offered (a recency effect).¹⁶³ Although these effects are typically small, no general formula is available that can adjust values to correct for order effects, because the size and even the direction of the order effects may depend on the nature of the question being asked and the choices being offered. Moreover, it may be unclear which order is most appropriate. For example, if the respondent is asked to choose between two different products, and there is a tendency for respondents to choose the first product mentioned,¹⁶⁴ which order of presentation will produce the more accurate response?¹⁶⁵ To control for order effects, the order of the questions and the order of the response choices in a survey should be rotated,¹⁶⁶ so that, for example, one-third of the respondents have Product A listed first, one-third of the respondents have Product B listed first, and one-third of the respondents have Product C listed first. If the three different orders¹⁶⁷ are distributed randomly among respondents, no response alternative will have an inflated chance of being selected because of its position, and the average of the three will provide a reasonable estimate of response level.¹⁶⁸

161. This question was accepted by the court in *U-Haul Int'l, Inc. v. Jartran, Inc.*, 522 F. Supp. 1238, 1249 (D. Ariz. 1981), *aff'd*, 681 F.2d 1159 (9th Cir. 1982).

162. Krosnick & Presser, *supra* note 126, at 280.

163. *Id.*

164. Similarly, candidates in the first position on the ballot tend to attract extra votes. J.M. Miller & Jon A. Krosnick, *The Impact of Candidate Name Order on Election Outcomes*, 62 Pub. Op. Q. 291 (1998).

165. See *Rust Env't & Infrastructure, Inc. v. Teunissen*, 131 F.3d 1210, 1218 (7th Cir. 1997) (survey did not pass muster in part because of failure to incorporate random rotation of corporate names that were the subject of a trademark dispute).

166. See, e.g. *Winning Ways, Inc. v. Holloway Sportswear, Inc.*, 913 F. Supp. 1454, 1465–67 (D. Kan. 1996) (failure to rotate the order in which the jackets were shown to the consumers led to reduced weight for the survey); *Procter & Gamble Pharms., Inc. v. Hoffmann-La Roche, Inc.*, 2006 U.S. Dist. LEXIS 64363, 2006–2 Trade Cas. (CCH) P75465 (S.D.N.Y. Sept. 6, 2006).

167. Actually, there are six possible orders of the three alternatives: ABC, ACB, BAC, BCA, CAB, and CBA. Thus, the optimal survey design would allocate equal numbers of respondents to each of the six possible orders.

168. Although rotation is desirable, many surveys are conducted with no attention to this potential bias. Because it is impossible to know in the abstract whether a particular question suffers much, little, or not at all from an order bias, lack of rotation should not preclude reliance on the answer to the question, but it should reduce the weight given to that answer.

F. If the Survey Was Designed to Test a Causal Proposition, Did the Survey Include an Appropriate Control Group or Question?

Many surveys are designed not simply to describe attitudes or beliefs or reported behaviors, but to determine the source of those attitudes or beliefs or behaviors. That is, the purpose of the survey is to test a causal proposition. For example, how does a trademark or the content of a commercial affect respondents' perceptions or understanding of a product or commercial? Thus, the question is not merely whether consumers hold inaccurate beliefs about Product A, but whether exposure to the commercial misleads the consumer into thinking that Product A is a superior pain reliever. Yet if consumers already believe, before viewing the commercial, that Product A is a superior pain reliever, a survey that simply records consumers' impressions after they view the commercial may reflect those preexisting beliefs rather than impressions produced by the commercial.

Surveys that merely record consumer impressions have a limited ability to answer questions about the origins of those impressions. The difficulty is that the consumer's response to any question on the survey may be the result of information or misinformation from sources other than the trademark the respondent is being shown or the commercial he or she has just watched.¹⁶⁹ In a trademark survey attempting to show secondary meaning, for example, respondents were shown a picture of the stripes used on Mennen stick deodorant and asked, "[W]hich [brand] would you say uses these stripes on their package?"¹⁷⁰ The court recognized that the high percentage of respondents selecting "Mennen" from an array of brand names may have represented "merely a playback of brand share";¹⁷¹ that is, respondents asked to give a brand name may guess the one that is most familiar, generally the brand with the largest market share.¹⁷²

Some surveys attempt to reduce the impact of preexisting impressions on respondents' answers by instructing respondents to focus solely on the stimulus as a basis for their answers. Thus, the survey includes a preface (e.g., "based on the commercial you just saw") or directs the respondent's attention to the mark at issue (e.g., "these stripes on the package"). Such efforts are likely to be only partially successful. It is often difficult for respondents to identify accurately the

169. See, e.g., *Procter & Gamble Co. v. Ultreo, Inc.*, 574 F. Supp. 2d 339, 351–52 (S.D.N.Y. 2008) (survey was unreliable because it failed to control for the effect of preexisting beliefs).

170. *Mennen Co. v. Gillette Co.*, 565 F. Supp. 648, 652 (S.D.N.Y. 1983), *aff'd*, 742 F.2d 1437 (2d Cir. 1984). To demonstrate secondary meaning, "the [c]ourt must determine whether the mark has been so associated in the mind of consumers with the entity that it identifies that the goods sold by that entity are distinguished by the mark or symbol from goods sold by others." *Id.*

171. *Id.*

172. See also *Upjohn Co. v. American Home Prods. Corp.*, No. 1-95-CV-237, 1996 U.S. Dist. LEXIS 8049, at *42–44 (W.D. Mich. Apr. 5, 1996).

source of their impressions.¹⁷³ The more routine the idea being examined in the survey (e.g., that the advertised pain reliever is more effective than others on the market; that the mark belongs to the brand with the largest market share), the more likely it is that the respondent's answer is influenced by (1) preexisting impressions; (2) general expectations about what commercials typically say (e.g., the product being advertised is better than its competitors); or (3) guessing, rather than by the actual content of the commercial message or trademark being evaluated.

It is possible to adjust many survey designs so that causal inferences about the effect of a trademark or an allegedly deceptive commercial become clear and unambiguous. By adding one or more appropriate control groups, the survey expert can test directly the influence of the stimulus.¹⁷⁴ In the simplest version of such a survey experiment, respondents are assigned randomly to one of two conditions.¹⁷⁵ For example, respondents assigned to the experimental condition view an allegedly deceptive commercial, and respondents assigned to the control condition either view a commercial that does not contain the allegedly deceptive material or do not view any commercial.¹⁷⁶ Respondents in both the experimental and control groups answer the same set of questions about the allegedly deceptive message. The effect of the commercial's allegedly deceptive message is evaluated by comparing the responses made by the experimental group members with those of the control group members. If 40% of the respondents in the experimental group responded indicating that they received the deceptive message (e.g., the advertised product has fewer calories than its competitor), whereas only 8% of the respondents in the control group gave that response, the difference between 40% and 8% (within the limits of sampling error¹⁷⁷) can be attributed only to the allegedly deceptive message. Without the control group, it is not possible to determine how much of the 40% is attributable to respondents' preexisting beliefs

173. See Richard E. Nisbett & Timothy D. Wilson, *Telling More Than We Can Know: Verbal Reports on Mental Processes*, 84 *Psychol. Rev.* 231 (1977).

174. See Shari S. Diamond, *Using Psychology to Control Law: From Deceptive Advertising to Criminal Sentencing*, 13 *Law & Hum. Behav.* 239, 244–46 (1989); Jacob Jacoby & Constance Small, *Applied Marketing: The FDA Approach to Defining Misleading Advertising*, 39 *J. Marketing* 65, 68 (1975). See also David H. Kaye & David A. Freedman, Reference Guide on Statistics, Section II.A, in this manual.

175. Random assignment should not be confused with random selection. When respondents are assigned randomly to different treatment groups (e.g., respondents in each group watch a different commercial), the procedure ensures that within the limits of sampling error the two groups of respondents will be equivalent except for the different treatments they receive. Respondents selected for a mall intercept study, and not from a probability sample, may be assigned randomly to different treatment groups. Random selection, in contrast, describes the method of selecting a sample of respondents in a probability sample. See *supra* Section III.C.

176. This alternative commercial could be a “tombstone” advertisement that includes only the name of the product or a more elaborate commercial that does not include the claim at issue.

177. For a discussion of sampling error, see David H. Kaye & David A. Freedman, Reference Guide on Statistics, Section IV.A, in this manual.

or other background noise (e.g., respondents who misunderstand the question or misstate their responses). Both preexisting beliefs and other background noise should have produced similar response levels in the experimental and control groups. In addition, if respondents who viewed the allegedly deceptive commercial respond differently than respondents who viewed the control commercial, the difference cannot be merely the result of a leading question, because both groups answered the same question. The ability to evaluate the effect of the wording of a particular question makes the control group design particularly useful in assessing responses to closed-ended questions,¹⁷⁸ which may encourage guessing or particular responses. Thus, the focus on the response level in a control group design is not on the absolute response level, but on the difference between the response level of the experimental group and that of the control group.¹⁷⁹

In designing a survey-experiment, the expert should select a stimulus for the control group that shares as many characteristics with the experimental stimulus as possible, with the key exception of the characteristic whose influence is being assessed.¹⁸⁰ Although a survey with an imperfect control group may provide better information than a survey with no control group at all, the choice of an appropriate control group requires some care and should influence the weight that the survey receives. For example, a control stimulus should not be less attractive than the experimental stimulus if the survey is designed to measure how familiar the experimental stimulus is to respondents, because attractiveness may affect perceived familiarity.¹⁸¹ Nor should the control stimulus share with the experimental stimulus the feature whose impact is being assessed. If, for example, the control stimulus in a case of alleged trademark infringement is itself a likely source of consumer confusion, reactions to the experimental and control stimuli may not

178. The Federal Trade Commission has long recognized the need for some kind of control for closed-ended questions, although it has not specified the type of control that is necessary. See *Stouffer Foods Corp.*, 118 F.T.C. 746, No. 9250, 1994 FTC LEXIS 196, at *31 (Sept. 26, 1994).

179. See, e.g., *Cytosport, Inc. v. Vital Pharms., Inc.*, 617 F. Supp. 2d 1051, 1075–76 (E.D. Cal. 2009) (net confusion level of 25.4% obtained by subtracting 26.5% in the control group from 51.9% in the test group).

180. See, e.g., *Skechers USA, Inc. v. Vans, Inc.*, No. CV-07-01703, 2007 WL 4181677, at *8–9 (C.D. Cal. Nov. 20, 2007) (in trade dress infringement case, control stimulus should have retained design elements not at issue); *Procter & Gamble Pharms., Inc. v. Hoffman-LaRoche, Inc.*, No. 06-Civ-0034, 2006 U.S. Dist. LEXIS 64363, at *87 (S.D.N.Y. Sept. 6, 2006) (in false advertising action, disclaimer was inadequate substitute for appropriate control group).

181. See, e.g., *Indianapolis Colts, Inc. v. Metropolitan Baltimore Football Club L.P.*, 34 F.3d 410, 415–16 (7th Cir. 1994) (court recognized that the name “Baltimore Horses” was less attractive for a sports team than the name “Baltimore Colts.”); see also *Reed-Union Corp. v. Turtle Wax, Inc.*, 77 F.3d 909, 912 (7th Cir. 1996) (court noted that one expert’s choice of a control brand with a well-known corporate source was less appropriate than the opposing expert’s choice of a control brand whose name did not indicate a specific corporate source); *Louis Vuitton Malletier v. Dooney & Bourke, Inc.*, 525 F. Supp. 2d 576, 595 (S.D.N.Y. 2007) (underreporting of background “noise” likely occurred because handbag used as control was quite dissimilar in shape and pattern to both plaintiff and defendant’s bags).

differ because both cause respondents to express the same level of confusion.¹⁸² In an extreme case, an inappropriate control may do nothing more than control for the effect of the nature or wording of the survey questions (e.g., acquiescence).¹⁸³ That may not be enough to rule out other explanations for different or similar responses to the experimental and control stimuli. Finally, it may sometimes be appropriate to have more than one control group to assess precisely what is causing the response to the experimental stimulus (e.g., in the case of an allegedly deceptive ad, whether it is a misleading graph or a misleading claim by the announcer; or in the case of allegedly infringing trade dress, whether it is the style of the font used or the coloring of the packaging).

Explicit attention to the value of control groups in trademark and deceptive-advertising litigation is a relatively recent phenomenon, but courts have increasingly come to recognize the central role the control group can play in evaluating claims.¹⁸⁴ A LEXIS search using *Lanham Act* and *control group* revealed only 4 federal district court cases before 1991 in which surveys with control groups were discussed, 16 in the 9 years from 1991 to 1999, and 46 in the 9 years between 2000 and 2008, a rate of growth that far exceeds the growth in Lanham Act litigation. In addition, courts in other cases have described or considered surveys using control group designs without labeling the comparison group a control group.¹⁸⁵ Indeed, one reason why cases involving surveys with control groups may be underrepresented in reported cases is that a survey with a control group produces

182. See, e.g., *Western Publ'g Co. v. Publications Int'l, Ltd.*, No. 94-C-6803, 1995 U.S. Dist. LEXIS 5917, at *45 (N.D. Ill. May 2, 1995) (court noted that the control product was “arguably more infringing than” the defendant’s product) (emphasis omitted). See also *Classic Foods Int'l Corp. v. Kettle Foods, Inc.*, 2006 U.S. Dist. LEXIS 97200 (C.D. Cal. Mar. 2, 2006); *McNeil-PPC, Inc. v. Merisant Co.*, 2004 U.S. Dist. LEXIS 27733 (D.P.R. July 29, 2004).

183. See text accompanying note 156, *supra*.

184. See, e.g., *SmithKline Beecham Consumer Healthcare, L.P. v. Johnson & Johnson-Merck*, 2001 U.S. Dist. LEXIS 7061, at *37 (S.D.N.Y. June 1, 2001) (survey to assess implied falsity of a commercial not probative in the absence of a control group); *Consumer American Home Prods. Corp. v. Procter & Gamble Co.*, 871 F. Supp. 739, 749 (D.N.J. 1994) (discounting survey results based on failure to control for participants’ preconceived notions); *ConAgra, Inc. v. Geo. A. Hormel & Co.*, 784 F. Supp. 700, 728 (D. Neb. 1992) (“Since no control was used, the . . . study, standing alone, must be significantly discounted.”), *aff’d*, 990 F.2d 368 (8th Cir. 1993).

185. *Indianapolis Colts, Inc. v. Metropolitan Baltimore Football Club L.P.*, No. 94727-C, 1994 U.S. Dist. LEXIS 19277, at *10–11 (S.D. Ind. June 27, 1994), *aff’d*, 34 F.3d 410 (7th Cir. 1994). In *Indianapolis Colts*, the district court described a survey conducted by the plaintiff’s expert in which half of the interviewees were shown a shirt with the name “Baltimore CFL Colts” on it and half were shown a shirt on which the word “Horses” had been substituted for the word “Colts.” *Id.* The court noted that the comparison of reactions to the horse and colt versions of the shirt made it possible “to determine the impact from the use of the word ‘Colts.’” *Id.* at *11. See also *Quality Inns Int'l, Inc. v. McDonald's Corp.*, 695 F. Supp. 198, 218 (D. Md. 1988) (survey revealed confusion between McDonald’s and McSleep, but control survey revealed no confusion between McDonald’s and McTavish). See also *Simon Prop. Group L.P. v. MySimon, Inc.*, 104 F. Supp. 2d 1033 (S.D. Ind. 2000) (court criticized the survey design based on the absence of a control that could show that results were produced by legally relevant confusion).

less ambiguous findings, which may lead to a resolution before a preliminary injunction hearing or trial occurs.

A less common use of control methodology is a control question. Rather than administering a control stimulus to a separate group of respondents, the survey asks all respondents one or more control questions along with the question about the product or service at issue. In a trademark dispute, for example, a survey indicated that 7.2% of respondents believed that “The Mart” and “K-Mart” were owned by the same individuals. The court found no likelihood of confusion based on survey evidence that 5.7% of the respondents also thought that “The Mart” and “King’s Department Store” were owned by the same source.¹⁸⁶

Similarly, a standard technique used to evaluate whether a brand name is generic is to present survey respondents with a series of product or service names and ask them to indicate in each instance whether they believe the name is a brand name or a common name. By showing that 68% of respondents considered Teflon a brand name (a proportion similar to the 75% of respondents who recognized the acknowledged trademark Jell-O as a brand name, and markedly different from the 13% who thought aspirin was a brand name), the makers of Teflon retained their trademark.¹⁸⁷

Every measure of opinion or belief in a survey reflects some degree of error. Control groups and, as a second choice, control questions are the most reliable means for assessing response levels against the baseline level of error associated with a particular question.

G. What Limitations Are Associated with the Mode of Data Collection Used in the Survey?

Three primary methods have traditionally been used to collect survey data: (1) in-person interviews, (2) telephone interviews, and (3) mail questionnaires.¹⁸⁸ Recently, in the wake of increasing use of the Internet, researchers have added Web-based surveys to their arsenal of tools. Surveys using in-person and telephone interviews, too, now regularly rely on computerized data collection.¹⁸⁹

186. *S.S. Kresge Co. v. United Factory Outlet, Inc.*, 598 F.2d 694, 697 (1st Cir. 1979). Note that the aggregate percentages reported here do not reveal how many of the same respondents were confused by both names, an issue that may be relevant in some situations. See Joseph L. Gastwirth, *Reference Guide on Survey Research*, 36 *Jurimetrics J.* 181, 187–88 (1996) (review essay).

187. *E.I. du Pont de Nemours & Co. v. Yoshida Int’l, Inc.*, 393 F. Supp. 502, 526–27 & n.54 (E.D.N.Y. 1975); see also *Donchez v. Coors Brewing Co.*, 392 F.3d 1211, 1218 (10th Cir. 2004) (respondents evaluated eight brand and generic names in addition to the disputed name). A similar approach is used in assessing secondary meaning.

188. Methods also may be combined, as when the telephone is used to “screen” for eligible respondents, who then are invited to participate in an in-person interview.

189. Wright & Marsden, *supra* note 1, at 13–14.

The interviewer conducting a computer-assisted interview (CAI), whether by telephone (CATI) or face-to-face (CAPI), follows the computer-generated script for the interview and enters the respondent's answers as the interview proceeds. A primary advantage of CATI and other CAI procedures is that skip patterns can be built into the program. If, for example, the respondent answers *yes* when asked whether she has ever been the victim of a burglary, the computer will generate further questions about the burglary; if she answers *no*, the program will automatically skip the followup burglary questions. Interviewer errors in following the skip patterns are therefore avoided, making CAI procedures particularly valuable when the survey involves complex branching and skip patterns.¹⁹⁰ CAI procedures also can be used to control for order effects by having the program rotate the order in which the questions or choices are presented.¹⁹¹

Recent innovations in CAI procedures include audio computer-assisted self-interviewing (ACASI) in which the respondent listens to recorded questions over the telephone or reads questions from a computer screen while listening to recorded versions of them through headphones. The respondent then answers verbally or on a keypad. ACASI procedures are particularly useful for collecting sensitive information (e.g., illegal drug use and other HIV risk behavior).¹⁹²

All CAI procedures require additional planning to take advantage of the potential for improvements in data quality. When a CAI protocol is used in a survey presented in litigation, the party offering the survey should supply for inspection the computer program that was used to generate the interviews. Moreover, CAI procedures do not eliminate the need for close monitoring of interviews to ensure that interviewers are accurately reading the questions in the interview protocol and accurately entering the respondent's answers.

The choice of any data collection method for a survey should be justified by its strengths and weaknesses.

1. *In-person interviews*

Although costly, in-person interviews generally are the preferred method of data collection, especially when visual materials must be shown to the respondent under controlled conditions.¹⁹³ When the questions are complex and the interviewers are skilled, in-person interviewing provides the maximum opportunity to

190. Willem E. Saris, *Computer-Assisted Interviewing* 20, 27 (1991).

191. *See, e.g., Intel Corp. v. Advanced Micro Devices, Inc.*, 756 F. Supp. 1292, 1296–97 (N.D. Cal. 1991) (survey designed to test whether the term *386* as applied to a microprocessor was generic used a CATI protocol that tested reactions to five terms presented in rotated order).

192. *See, e.g., N. Galai et al., ACASI Versus Interviewer-Administered Questionnaires for Sensitive Risk Behaviors: Results of a Cross-Over Randomized Trial Among Injection Drug Users* (abstract, 2004), available at <http://gateway.nlm.nih.gov/MeetingAbstracts/ma?f=102280272.html>.

193. A mail survey also can include limited visual materials but cannot exercise control over when and how the respondent views them.

clarify or probe. Unlike a mail survey, both in-person and telephone interviews have the capability to implement complex skip sequences (in which the respondent's answer determines which question will be asked next) and the power to control the order in which the respondent answers the questions. Interviewers also can directly verify who is completing the survey, a check that is unavailable in mail and Web-based surveys. As described *infra* Section V.A, appropriate interviewer training, as well as monitoring of the implementation of interviewing, is necessary if these potential benefits are to be realized. Objections to the use of in-person interviews arise primarily from their high cost or, on occasion, from evidence of inept or biased interviewers. In-person interview quality in recent years has been assisted by technology. Using computer-assisted personal interviewing (CAPI), the interviewer reads the questions off the screen of a laptop computer and then enters responses directly.¹⁹⁴ This support makes it easier to follow complex skip patterns and to promptly submit results via the Internet to the survey center.

2. Telephone interviews

Telephone surveys offer a comparatively fast and lower-cost alternative to in-person surveys and are particularly useful when the population is large and geographically dispersed. Telephone interviews (unless supplemented with mailed or e-mailed materials) can be used only when it is unnecessary to show the respondent any visual materials. Thus, an attorney may present the results of a telephone survey of jury-eligible citizens in a motion for a change of venue in order to provide evidence that community prejudice raises a reasonable suspicion of potential jury bias.¹⁹⁵ Similarly, potential confusion between a restaurant called McBagel's and the McDonald's fast-food chain was established in a telephone survey. Over objections from defendant McBagel's that the survey did not show respondents the defendant's print advertisements, the court found likelihood of confusion based on the survey, noting that "by soliciting audio responses[, the telephone survey] was closely related to the radio advertising involved in the case."¹⁹⁶ In contrast, when words are not sufficient because, for example, the survey is assessing reactions to the trade

194. Wright & Marsden, *supra* note 1, at 13.

195. See, e.g., State v. Baumruk, 85 S.W.3d 644 (Mo. 2002). (overturning the trial court's decision to ignore a survey that found about 70% of county residents remembered the shooting that led to the trial and that of those who had heard about the shooting, 98% believed that the defendant was either definitely guilty or probably guilty); State v. Erickstad, 620 N.W.2d 136, 140 (N.D. 2000) (denying change of venue motion based on media coverage, concluding that "defendants [need to] submit qualified public opinion surveys, other opinion testimony, or any other evidence demonstrating community bias caused by the media coverage"). For a discussion of surveys used in motions for change of venue, see Neal Miller, *Facts, Expert Facts, and Statistics: Descriptive and Experimental Research Methods in Litigation, Part II*, 40 Rutgers L. Rev. 467, 470-74 (1988); National Jury Project, *Jurywork: Systematic Techniques* (2d ed. 2008).

196. McDonald's Corp. v. McBagel's, Inc., 649 F. Supp. 1268, 1278 (S.D.N.Y. 1986).

dress or packaging of a product that is alleged to promote confusion, a telephone survey alone does not offer a suitable vehicle for questioning respondents.¹⁹⁷

In evaluating the sampling used in a telephone survey, the trier of fact should consider:

1. Whether (when prospective respondents are not business personnel) some form of random-digit dialing¹⁹⁸ was used instead of or to supplement telephone numbers obtained from telephone directories, because a high percentage of all residential telephone numbers in some areas may be unlisted;¹⁹⁹
2. Whether any attempt was made to include cell phone users, particularly the growing subpopulation of individuals who rely solely on cell phones for telephone services;²⁰⁰
3. Whether the sampling procedures required the interviewer to sample within the household or business, instead of allowing the interviewer to administer the survey to any qualified individual who answered the telephone;²⁰¹ and
4. Whether interviewers were required to call back multiple times at several different times of the day and on different days to increase the likelihood of contacting individuals or businesses with different schedules.²⁰²

197. See *Thompson Med. Co. v. Pfizer Inc.*, 753 F.2d 208 (2d Cir. 1985); *Incorporated Publ'g Corp. v. Manhattan Magazine, Inc.*, 616 F. Supp. 370 (S.D.N.Y. 1985), *aff'd without op.*, 788 F.2d 3 (2d Cir. 1986).

198. Random-digit dialing provides coverage of households with both listed and unlisted telephone numbers by generating numbers at random from the sampling frame of all possible telephone numbers. James M. Lepkowski, *Telephone Sampling Methods in the United States*, in *Telephone Survey Methodology* 81–91 (Robert M. Groves et al. eds., 1988).

199. Studies comparing listed and unlisted household characteristics show some important differences. *Id.* at 76.

200. According to a 2009 study, an estimated 26.5% of households cannot be reached by landline surveys, because 2.0% have no phone service and 24.5% have only a cell phone. Stephen J. Blumberg & Julian V. Luke, *Wireless Substitution: Early Release of Estimates Based on the National Health Interview Survey, July–December 2009* (2010), available at <http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201005.pdf>. People who can be reached only by cell phone tend to be younger and are more likely to be African American or Hispanic and less likely to be married or to own their home than individuals reachable on a landline. Although at this point, the effect on estimates from landline-only telephone surveys appears to be minimal on most topics, on some issues (e.g., voter registration) and within the population of young adults, the gap may warrant consideration. Scott Keeter et al., *What's Missing from National RDD Surveys? The Impact of the Growing Cell-Only Population*, Paper presented at the 2007 Conference of AAPOR, May 2007.

201. This is a consideration only if the survey is sampling individuals. If the survey is seeking information on the household, more than one individual may be able to answer questions on behalf of the household.

202. This applied equally to in-person interviews.

Telephone surveys that do not include these procedures may not provide precise measures of the characteristics of a representative sample of respondents, but may be adequate for providing rough approximations. The vulnerability of the survey depends on the information being gathered. More elaborate procedures are advisable for achieving a representative sample of respondents if the survey instrument requests information that is likely to differ for individuals with listed telephone numbers versus individuals with unlisted telephone numbers, individuals rarely at home versus those usually at home, or groups who are more versus less likely to rely exclusively on cell phones.

The report submitted by a survey expert who conducts a telephone survey should specify:

1. The procedures that were used to identify potential respondents, including both the procedures used to select the telephone numbers that were called and the procedures used to identify the qualified individual to question),
2. The number of telephone numbers for which no contact was made; and
3. The number of contacted potential respondents who refused to participate in the survey.²⁰³

Like CAPI interviewing,²⁰⁴ computer-assisted telephone interviewing (CATI) facilitates the administration and data entry of large-scale surveys.²⁰⁵ A computer protocol may be used to generate and dial telephone numbers as well as to guide the interviewer.

3. Mail questionnaires

In general, mail surveys tend to be substantially less costly than both in-person and telephone surveys.²⁰⁶ Response rates tend to be lower for self-administered mail surveys than for telephone or face-to-face surveys, but higher than for their Web-based equivalents.²⁰⁷ Procedures that raise response rates include multiple mailings, highly personalized communications, prepaid return envelopes, incentives or gratuities, assurances of confidentiality, first-class outgoing postage, and followup reminders.²⁰⁸

203. Additional disclosure and reporting features applicable to surveys in general are described in Section VII.B, *infra*.

204. See text accompanying note 194, *supra*.

205. See Roger Tourangeau et al., *The Psychology of Survey Response* 289 (2000); Saris, *supra* note 190.

206. See Chase H. Harrison, *Mail Surveys and Paper Questionnaires*, in *Handbook of Survey Research*, *supra* note 1, at 498, 499.

207. See Mick Couper et al., *A Comparison of Mail and E-Mail for a Survey of Employees in Federal Statistical Agencies*, 15 *J. Official Stat.* 39 (1999); Mick Couper, *Web Surveys: A Review of Issues and Approaches* 464, 473 (2001).

208. See, e.g., Richard J. Fox et al., *Mail Survey Response Rate: A Meta-Analysis of Selected Techniques for Inducing Response*, 52 *Pub. Op. Q.* 467, 482 (1988); Kenneth D. Hopkins & Arlen R.

A mail survey will not produce a high rate of return unless it begins with an accurate and up-to-date list of names and addresses for the target population. Even if the sampling frame is adequate, the sample may be unrepresentative if some individuals are more likely to respond than others. For example, if a survey targets a population that includes individuals with literacy problems, these individuals will tend to be underrepresented. Open-ended questions are generally of limited value on a mail survey because they depend entirely on the respondent to answer fully and do not provide the opportunity to probe or clarify unclear answers. Similarly, if eligibility to answer some questions depends on the respondent's answers to previous questions, such skip sequences may be difficult for some respondents to follow. Finally, because respondents complete mail surveys without supervision, survey personnel are unable to prevent respondents from discussing the questions and answers with others before completing the survey and to control the order in which respondents answer the questions. Although skilled design of questionnaire format, question order, and the appearance of the individual pages of a survey can minimize these problems,²⁰⁹ if it is crucial to have respondents answer questions in a particular order, a mail survey cannot be depended on to provide adequate data.

4. *Internet surveys*

A more recent innovation in survey technology is the Internet survey in which potential respondents are contacted and their responses are collected over the Internet. Internet surveys in principle can reduce substantially the cost of reaching potential respondents. Moreover, they offer some of the advantages of in-person interviews by enabling the respondent to view pictures, videos, and lists of response choices on the computer screen during the survey. A further advantage is that whenever a respondent answers questions presented on a computer screen, whether over the Internet or in a dedicated facility, the survey can build in a variety of controls. In contrast to a mail survey in which the respondent can examine and/or answer questions out of order and may mistakenly skip questions, a computer-administered survey can control the order in which the questions are displayed so that the respondent does not see a later question before answering an earlier one and so that the respondent cannot go back to change an answer previously given to an earlier question in light of the questions that follow it. The order of the questions or response options can be rotated easily to control for order effects. In addition, the structure permits the survey to remind, or even require, the respondent to answer a question before the next question is presented. One advantage of computer-administered surveys over interviewer-administered

Gullickson, *Response Rates in Survey Research: A Meta-Analysis of the Effects of Monetary Gratuities*, 61 J. Experimental Educ. 52, 54–57, 59 (1992); Eleanor Singer et al., *Confidentiality Assurances and Response: A Quantitative Review of the Experimental Literature*, 59 Pub. Op. Q. 66, 71 (1995); see generally Don A. Dillman, *Internet Mail and Mixed-Mode Surveys: The Tailored Design Method* (3d ed. 2009).

209. Dillman, *supra* note 208, at 151–94.

surveys is that they eliminate interviewer error because the computer presents the questions and the respondent records her own answers.

Internet surveys do have limitations, and many questions remain about the extent to which those limitations impair the quality of the data they provide. A key potential limitation is that respondents accessible over the Internet may not fairly represent the relevant population whose responses the survey was designed to measure. Although Internet access has not approached the 95% penetration achieved by the telephone, the proportion of individuals with Internet access has grown at a remarkable rate, as has the proportion of individuals who regularly use a computer. For example, according to one estimate, use of the Internet among adults jumped from 22% in 1997 to 60% in 2003.²¹⁰ Despite this rapid expansion, a digital divide still exists, so that the “have-nots” are less likely to be represented in surveys that depend on Internet access. The effect of this divide on survey results will depend on the population the survey is attempting to capture. For example, if the target population consists of computer users, any bias from systematic underrepresentation is likely to be minimal. In contrast, if the target population consists of owners of television sets, a proportion of whom may not have Internet access, significant bias is more likely. The trend toward greater access to the Internet is likely to continue, and the issue of underrepresentation may disappear in time. At this point, a party presenting the results of a Web-based survey should be prepared to provide evidence on how coverage limitations may have affected the pattern of survey results.

Even if noncoverage error is not a significant concern, courts evaluating a Web-based survey must still determine whether the sampling approach is adequate. That evaluation will depend on the type of Internet survey involved, because Web-based surveys vary in fundamental ways.

At one extreme is the list-based Web survey. This Web survey is sent to a closed set of potential respondents drawn from a list that consists of the e-mail addresses of the target individuals (e.g., all students at a university or employees at a company where each student or employee has a known e-mail address).

At the other extreme is the self-selected Web survey in which Web users in general, or those who happen to visit a particular Web site, are invited to express their views on a topic and they participate simply by volunteering. Whereas the list-based survey enables the researcher to evaluate response rates and often to assess the representativeness of respondents on a variety of characteristics, the self-selected Web survey provides no information on who actually participates or how representative the participants are. Thus, it is impossible to evaluate nonresponse error or even participation rates. Moreover, participants are very likely to self-select on the basis of the nature of the topic. These self-selected pseudosurveys resemble reader polls published in magazines and do not meet standard criteria for legitimate surveys

210. Jennifer C. Day et al., *Computer and Internet Use in the United States: 2003*, 8–9 (U.S. Census Bureau 2005).

admissible in court.²¹¹ Occasionally, proponents of such polls tout the large number of respondents as evidence of the weight the results should be given, but the size of the sample cannot cure the likely participation bias in such voluntary polls.²¹²

Between these two extremes is a large category of Web-based survey approaches that researchers have developed to address concerns about sampling bias and nonresponse error. For example, some approaches create a large database of potential participants by soliciting volunteers through appeals on well-traveled sites.²¹³ Based on the demographic data collected from those who respond to the appeals, a sample of these panel members are asked to participate in a particular survey by invitation only. Responses are weighted to reduce selection bias.²¹⁴ An expert presenting the results from such a survey should be prepared to explain why the particular weighting approach can be relied upon to achieve that purpose.²¹⁵

Another approach that is more costly uses probability sampling from the initial contact with a potential respondent. Potential participants are initially contacted by telephone using random-digit dialing procedures. Those who lack Internet access are provided with the technology to participate. Members from the panel are then invited to participate in a particular survey, and the researchers know the characteristics of participants and nonparticipants from the initial telephone contact.²¹⁶ For all surveys that rely on preselected panels, whether nonrandomly or randomly selected, questions have been raised about panel conditioning (i.e., the effect of having participants in earlier surveys respond to later surveys) and the relatively low rate of response to survey invitations. An expert presenting results from a Web-based survey should be prepared to address these issues and to discuss how they may have affected the results.

Finally, the recent proliferation of Internet surveys has stimulated a growing body of research on the influence of formatting choices in Web surveys. Evidence from this research indicates that formatting decisions can significantly affect the quality of survey responses.²¹⁷

211. See, e.g., *Merisant Co. v. McNeil Nutritionals, LLC*, 242 F.R.D. 315 (E.D. Pa. 2007) (report on results from AOL “instant poll” excluded).

212. See, e.g., Couper (2001), *supra* note 207, at 480–81 (a self-selected Web survey conducted by the National Geographic Society through its Web site attracted 50,000 responses; a comparison of the Canadian respondents with data from the Canadian General Social Survey telephone survey conducted using random-digit dialing showed marked differences on a variety of response measures).

213. See, e.g., *Ecce Panis, Inc. v. Maple Leaf Bakery, Inc.* 2007 U.S. Dist. LEXIS 85780 (D. Ariz. Nov. 7, 2007).

214. See, e.g., *Philip Morris USA, Inc. v. Otamedia Limited*, 2005 U.S. Dist. LEXIS 1259 (S.D.N.Y. Jan. 28, 2005).

215. See, e.g., *A&M Records, Inc. v. Napster, Inc.* 2000 WL 1170106 (N.D. Cal. Aug. 10, 2000) (court refused to rely on results from Internet panel survey when expert presenting the results showed lack of familiarity with panel construction and weighting methods).

216. See, e.g., *Price v. Philip Morris, Inc.*, 219 Ill. 2d 182, 848 N.E.2d 1 (2005).

217. See, e.g., Mick P. Couper et al., *What They See Is What We Get: Response Options for Web Surveys*, 22 Soc. Sci. Computer Rev. 111 (2004) (comparing order effects with radio button and

A final approach to data collection does not depend on a single mode, but instead involves a mixed-mode approach. By combining modes, the survey design may increase the likelihood that all sampling members of the target population will be contacted. For example, a person without a landline may be reached by mail or e-mail. Similarly, response rates may be increased if members of the target population are more likely to respond to one mode of contact versus another. For example, a person unwilling to be interviewed by phone may respond to a written or e-mail contact. If a mixed-mode approach is used, the questions and structure of the questionnaires are likely to differ across modes, and the expert should be prepared to address the potential impact of mode on the answers obtained.²¹⁸

V. Surveys Involving Interviewers

A. Were the Interviewers Appropriately Selected and Trained?

A properly defined population or universe, a representative sample, and clear and precise questions can be depended on to produce trustworthy survey results only if “sound interview procedures were followed by competent interviewers.”²¹⁹ Properly trained interviewers receive detailed written instructions on everything they are to say to respondents, any stimulus materials they are to use in the survey, and how they are to complete the interview form. These instructions should be made available to the opposing party and to the trier of fact. Thus, interviewers should be told, and the interview form on which answers are recorded should indicate, which responses, if any, are to be read to the respondent. Moreover, interviewers should be instructed to record verbatim the respondent’s answers, to indicate explicitly whenever they repeat a question to the respondent, and to record any statements they make to or supplementary questions they ask the respondent.

Interviewers require training to ensure that they are able to follow directions in administering the survey questions. Some training in general interviewing techniques is required for most interviews (e.g., practice in pausing to give the respondent enough time to answer and practice in resisting invitations to express the interviewer’s beliefs or opinions). Although procedures vary, there is evidence that interviewer performance suffers with less than a day of training in general interviewing skills and techniques for new interviewers.²²⁰

drop-box formats); Andy Peytchev et al., *Web Survey Design: Paging Versus Scrolling*, 70 Pub. Op. Q. 212 (2006) (comparing the effects of presenting survey questions in a multitude of short pages or in long scrollable pages).

218. Don A. Dillman & Benjamin L. Messer, *Mixed-Mode Surveys*, in Wright & Marsden, *supra* note 1, at 550, 553.

219. Toys “R” Us, Inc. v. Canarsie Kiddie Shop, Inc., 559 F. Supp. 1189, 1205 (E.D.N.Y. 1983).

220. Fowler & Mangione, *supra* note 158, at 117; Nora Cate Schaeffer et al., *Interviewers and Interviewing*, in *Handbook of Survey Research*, *supra* note 1, at 437, 460.

The more complicated the survey instrument is, the more training and experience the interviewers require. Thus, if the interview includes a skip pattern (where, e.g., Questions 4–6 are asked only if the respondent says *yes* to Question 3, and Questions 8–10 are asked only if the respondent says *no* to Question 3), interviewers must be trained to follow the pattern. Note, however, that in surveys conducted using CAPI or CATI procedures, the interviewer will be guided by the computer used to administer the questionnaire.

If the questions require specific probes to clarify ambiguous responses, interviewers must receive instruction on when to use the probes and what to say. In some surveys, the interviewer is responsible for last-stage sampling (i.e., selecting the particular respondents to be interviewed), and training is especially crucial to avoid interviewer bias in selecting respondents who are easiest to approach or easiest to find.

Training and instruction of interviewers should include directions on the circumstances under which interviews are to take place (e.g., question only one respondent at a time outside the hearing of any other respondent). The trustworthiness of a survey is questionable if there is evidence that some interviews were conducted in a setting in which respondents were likely to have been distracted or in which others could overhear. Such evidence of careless administration of the survey was one ground used by a court to reject as inadmissible a survey that purported to demonstrate consumer confusion.²²¹

Some compromises may be accepted when surveys must be conducted swiftly. In trademark and deceptive advertising cases, the plaintiff's usual request is for a preliminary injunction, because a delay means irreparable harm. Nonetheless, careful instruction and training of interviewers who administer the survey, as well as monitoring and validation to ensure quality control,²²² and complete disclosure of the methods used for all of the procedures followed are crucial elements that, if compromised, seriously undermine the trustworthiness of any survey.

B. What Did the Interviewers Know About the Survey and Its Sponsorship?

One way to protect the objectivity of survey administration is to avoid telling interviewers who is sponsoring the survey. Interviewers who know the identity of the survey's sponsor may affect results inadvertently by communicating to respondents their expectations or what they believe are the preferred responses of the survey's sponsor. To ensure objectivity in the administration of the survey, it is standard interview practice in surveys conducted for litigation to do double-blind

221. *Toys "R" Us*, 559 F. Supp. at 1204 (some interviews apparently were conducted in a bowling alley; some interviewees waiting to be interviewed overheard the substance of the interview while they were waiting).

222. See Section V.C, *infra*.

research whenever possible: Both the interviewer and the respondent are blind to the sponsor of the survey and its purpose. Thus, the survey instrument should provide no explicit or implicit clues about the sponsorship of the survey or the expected responses. Explicit clues could include a sponsor's letterhead appearing on the survey; implicit clues could include reversing the usual order of the *yes* and *no* response boxes on the interviewer's form next to a crucial question, thereby potentially increasing the likelihood that *no* will be checked.²²³

Nonetheless, in some surveys (e.g., some government surveys), disclosure of the survey's sponsor to respondents (and thus to interviewers) is required. Such surveys call for an evaluation of the likely biases introduced by interviewer or respondent awareness of the survey's sponsorship. In evaluating the consequences of sponsorship awareness, it is important to consider (1) whether the sponsor has views and expectations that are apparent and (2) whether awareness is confined to the interviewers or involves the respondents. For example, if a survey concerning attitudes toward gun control is sponsored by the National Rifle Association, it is clear that responses opposing gun control are likely to be preferred. In contrast, if the survey on gun control attitudes is sponsored by the Department of Justice, the identity of the sponsor may not suggest the kinds of responses the sponsor expects or would find acceptable.²²⁴ When interviewers are well trained, their awareness of sponsorship may be a less serious threat than respondents' awareness. The empirical evidence for the effects of interviewers' prior expectations on respondents' answers generally reveals modest effects when the interviewers are well trained.²²⁵

C. What Procedures Were Used to Ensure and Determine That the Survey Was Administered to Minimize Error and Bias?

Three methods are used to ensure that the survey instrument was implemented in an unbiased fashion and according to instructions. The first, monitoring the interviews as they occur, is done most easily when telephone surveys are used. A supervisor listens to a sample of interviews for each interviewer. Field settings make monitoring more difficult, but evidence that monitoring has occurred provides an additional indication that the survey has been reliably implemented. Some

223. See *Centaur Communications, Ltd. v. A/S/M Communications, Inc.*, 652 F. Supp. 1105, 1111 n.3 (S.D.N.Y. 1987) (pointing out that reversing the usual order of response choices, yes or no, to no or yes may confuse interviewers as well as introduce bias), *aff'd*, 830 F.2d 1217 (2d Cir. 1987).

224. See, e.g., Stanley Presser et al., *Survey Sponsorship, Response Rates, and Response Effects*, 73 Soc. Sci. Q. 699, 701 (1992) (different responses to a university-sponsored telephone survey and a newspaper-sponsored survey for questions concerning attitudes toward the mayoral primary, an issue on which the newspaper had taken a position).

225. See, e.g., Seymour Sudman et al., *Modest Expectations: The Effects of Interviewers' Prior Expectations on Responses*, 6 Soc. Methods & Res. 171, 181 (1977).

monitoring systems, both telephone and field, now use recordings, procedures that may require permission from respondents.

Second, validation of interviews occurs when respondents in a sample are recontacted to ask whether the initial interviews took place and to determine whether the respondents were qualified to participate in the survey. Validation callbacks may also collect data on a few key variables to confirm that the correct respondent has been interviewed. The standard procedure for validation of in-person interviews is to telephone a random sample of about 10% to 15% of the respondents.²²⁶ Some attempts to reach the respondent will be unsuccessful, and occasionally a respondent will deny that the interview took place even though it did. Because the information checked is typically limited to whether the interview took place and whether the respondent was qualified, this validation procedure does not determine whether the initial interview as a whole was conducted properly. Nonetheless, this standard validation technique warns interviewers that their work is being checked and can detect gross failures in the administration of the survey. In computer-assisted interviews, further validation information can be obtained from the timings that can be automatically recorded when an interview occurs.

A third way to verify that the interviews were conducted properly is to examine the work done by each individual interviewer. By reviewing the interviews and individual responses recorded by each interviewer and comparing patterns of response across interviewers, researchers can identify any response patterns or inconsistencies that warrant further investigation.

When a survey is conducted at the request of a party for litigation rather than in the normal course of business, a heightened standard for validation checks may be appropriate. Thus, independent validation of a random sample of interviews by a third party rather than by the field service that conducted the interviews increases the trustworthiness of the survey results.²²⁷

VI. Data Entry and Grouping of Responses

A. What Was Done to Ensure That the Data Were Recorded Accurately?

Analyzing the results of a survey requires that the data obtained on each sampled element be recorded, edited, and often coded before the results can be tabulated

226. See, e.g., *Davis v. Southern Bell Tel. & Tel. Co.*, No. 89-2839, 1994 U.S. Dist. LEXIS 13257, at *16 (S.D. Fla. Feb. 1, 1994); *National Football League Properties, Inc. v. New Jersey Giants, Inc.*, 637 F. Supp. 507, 515 (D.N.J. 1986).

227. In *Rust Environment & Infrastructure, Inc. v. Teunissen*, 131 F.3d 1210, 1218 (7th Cir. 1997), the court criticized a survey in part because it “did not comport with accepted practice for independent validation of the results.”

and processed. Procedures for data entry should include checks for completeness, checks for reliability and accuracy, and rules for resolving inconsistencies. Accurate data entry is maximized when responses are verified by duplicate entry and comparison, and when data-entry personnel are unaware of the purposes of the survey.

B. What Was Done to Ensure That the Grouped Data Were Classified Consistently and Accurately?

Coding of answers to open-ended questions requires a detailed set of instructions so that decision standards are clear and responses can be scored consistently and accurately. Two trained coders should independently score the same responses to check for the level of consistency in classifying responses. When the criteria used to categorize verbatim responses are controversial or allegedly inappropriate, those criteria should be sufficiently clear to reveal the source of disagreements. In all cases, the verbatim responses should be available so that they can be recoded using alternative criteria.²²⁸

VII. Disclosure and Reporting

A. When Was Information About the Survey Methodology and Results Disclosed?

Objections to the definition of the relevant population, the method of selecting the sample, and the wording of questions generally are raised for the first time when the results of the survey are presented. By that time it is often too late to correct methodological deficiencies that could have been addressed in the planning stages of the survey. The plaintiff in a trademark case²²⁹ submitted a set of proposed survey questions to the trial judge, who ruled that the survey results

228. See, e.g., *Revlon Consumer Prods. Corp. v. Jennifer Leather Broadway, Inc.*, 858 F. Supp. 1268, 1276 (S.D.N.Y. 1994) (inconsistent scoring and subjective coding led court to find survey so unreliable that it was entitled to no weight), *aff'd*, 57 F.3d 1062 (2d Cir. 1995); *Rock v. Zimmerman*, 959 F.2d 1237, 1253 n.9 (3d Cir. 1992) (court found that responses on a change-of-venue survey incorrectly categorized respondents who believed the defendant was insane as believing he was guilty); *Coca-Cola Co. v. Tropicana Prods., Inc.*, 538 F. Supp. 1091, 1094–96 (S.D.N.Y.) (plaintiff's expert stated that respondents' answers to the open-ended questions revealed that 43% of respondents thought Tropicana was portrayed as fresh squeezed; the court's own tabulation found no more than 15% believed this was true), *rev'd on other grounds*, 690 F.2d 312 (2d Cir. 1982); see also *Cumberland Packing Corp. v. Monsanto Co.*, 140 F. Supp. 2d 241 (E.D.N.Y. 2001) (court examined verbatim responses that respondents gave to arrive at a confusion level substantially lower than the level reported by the survey expert).

229. *Union Carbide Corp. v. Ever-Ready, Inc.*, 392 F. Supp. 280 (N.D. Ill. 1975), *rev'd*, 531 F.2d 366 (7th Cir. 1976).

would be admissible at trial while reserving the question of the weight the evidence would be given.²³⁰ The Seventh Circuit called this approach a commendable procedure and suggested that it would have been even more desirable if the parties had “attempt[ed] in good faith to agree upon the questions to be in such a survey.”²³¹

The *Manual for Complex Litigation, Second*, recommended that parties be required, “before conducting any poll, to provide other parties with an outline of the proposed form and methodology, including the particular questions that will be asked, the introductory statements or instructions that will be given, and other controls to be used in the interrogation process.”²³² The parties then were encouraged to attempt to resolve any methodological disagreements before the survey was conducted.²³³ Although this passage in the second edition of the Manual has been cited with apparent approval,²³⁴ the prior agreement that the Manual recommends has occurred rarely, and the *Manual for Complex Litigation, Fourth*, recommends, but does not advocate requiring, prior disclosure and discussion of survey plans.²³⁵ As the Manual suggests, however, early disclosure can enable the parties to raise prompt objections that may permit corrective measures to be taken before a survey is completed.²³⁶

Rule 26 of the Federal Rules of Civil Procedure requires extensive disclosure of the basis of opinions offered by testifying experts. However, Rule 26 does not produce disclosure of all survey materials, because parties are not obligated to disclose information about nontestifying experts. Parties considering whether to commission or use a survey for litigation are not obligated to present a survey that produces unfavorable results. Prior disclosure of a proposed survey instrument places the party that ultimately would prefer not to present the survey in the position of presenting damaging results or leaving the impression that the results are not being presented because they were unfavorable. Anticipating such a situation,

230. Before trial, the presiding judge was appointed to the court of appeals, and so the case was tried by another district court judge.

231. *Union Carbide*, 531 F.2d at 386. More recently, the Seventh Circuit recommended filing a motion in limine, asking the district court to determine the admissibility of a survey based on an examination of the survey questions and the results of a preliminary survey before the party undertakes the expense of conducting the actual survey. *Piper Aircraft Corp. v. Wag-Aero, Inc.*, 741 F.2d 925, 929 (7th Cir. 1984). On one recent occasion, the parties jointly developed a survey administered by a neutral third-party survey firm. *Scott v. City of New York*, 591 F. Supp. 2d 554, 560 (S.D.N.Y. 2008) (survey design, including multiple pretests, negotiated with the help of the magistrate judge).

232. MCL 2d, *supra* note 16, § 21.484.

233. *See id.*

234. *See, e.g.*, *National Football League Props., Inc. v. New Jersey Giants, Inc.*, 637 F. Supp. 507, 514 n.3 (D.N.J. 1986).

235. MCL 4th, *supra* note 16, § 11.493 (“including the specific questions that will be asked, the introductory statements or instructions that will be given, and other controls to be used in the interrogation process.”).

236. *See id.*

parties do not decide whether an expert will testify until after the results of the survey are available.

Nonetheless, courts are in a position to encourage early disclosure and discussion even if they do not lead to agreement between the parties. In *McNeilab, Inc. v. American Home Products Corp.*,²³⁷ Judge William C. Conner encouraged the parties to submit their survey plans for court approval to ensure their evidentiary value; the plaintiff did so and altered its research plan based on Judge Conner's recommendations. Parties can anticipate that changes consistent with a judicial suggestion are likely to increase the weight given to, or at least the prospects of admissibility of, the survey.²³⁸

B. Does the Survey Report Include Complete and Detailed Information on All Relevant Characteristics?

The completeness of the survey report is one indicator of the trustworthiness of the survey and the professionalism of the expert who is presenting the results of the survey. A survey report generally should provide in detail:

1. The purpose of the survey;
2. A definition of the target population and a description of the sampling frame;
3. A description of the sample design, including the method of selecting respondents, the method of interview, the number of callbacks, respondent eligibility or screening criteria and method, and other pertinent information;
4. A description of the results of sample implementation, including the number of
 - a. potential respondents contacted,
 - b. potential respondents not reached,
 - c. noneligibles,
 - d. refusals,
 - e. incomplete interviews or terminations, and
 - f. completed interviews;
5. The exact wording of the questions used, including a copy of each version of the actual questionnaire, interviewer instructions, and visual exhibits;²³⁹

237. 848 F.2d 34, 36 (2d Cir. 1988) (discussing with approval the actions of the district court). See also *Hubbard v. Midland Credit Mgmt*, 2009 U.S. Dist. LEXIS 13938 (S.D. Ind. Feb. 23, 2009) (court responded to plaintiff's motions to approve survey methodology with a critique of the proposed methodology).

238. Larry C. Jones, *Developing and Using Survey Evidence in Trademark Litigation*, 19 Memphis St. U. L. Rev. 471, 481 (1989).

239. The questionnaire itself can often reveal important sources of bias. See *Marria v. Broadus*, 200 F. Supp. 2d 280, 289 (S.D.N.Y. 2002) (court excluded survey sent to prison administrators based

6. A description of any special scoring (e.g., grouping of verbatim responses into broader categories);
7. A description of any weighting or estimating procedures used;
8. Estimates of the sampling error, where appropriate (i.e., in probability samples);
9. Statistical tables clearly labeled and identified regarding the source of the data, including the number of raw cases forming the base for each table, row, or column; and
10. Copies of interviewer instructions, validation results, and code books.²⁴⁰

Additional information to include in the survey report may depend on the nature of sampling design. For example, reported response rates along with the time each interview occurred may assist in evaluating the likelihood that nonresponse biased the results. In a survey designed to assess the duration of employee preshift activities, workers were approached as they entered the workplace; records were not kept on refusal rates or the timing of participation in the study. Thus, it was impossible to rule out the plausible hypothesis that individuals who arrived early for their shift with more time to spend on preshift activities were more likely to participate in the study.²⁴¹

Survey professionals generally do not describe pilot testing in their survey reports. They would be more likely to do so if courts recognized that surveys are improved by pilot work that maximizes the likelihood that respondents understand the questions they are being asked. Moreover, the Federal Rules of Civil Procedure may require that a testifying expert disclose pilot work that serves as a basis for the expert's opinion. The situation is more complicated when a non-testifying expert conducts the pilot work and the testifying expert learns about the pilot testing only indirectly through the attorney's advice about the relevant issues

on questionnaire that began, "We need your help. We are helping to defend the NYS Department of Correctional Service in a case that involves their policy on intercepting Five-Percenter literature. Your answers to the following questions will be helpful in preparing a defense.")

240. These criteria were adapted from the Council of American Survey Research Organizations, *supra* note 76, § III.B. Failure to supply this information substantially impairs a court's ability to evaluate a survey. *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 962 F. Supp. 450, 532 (D.N.J. 1997) (citing the first edition of this manual). *But see Florida Bar v. Went for It, Inc.*, 515 U.S. 618, 626–28 (1995), in which a majority of the Supreme Court relied on a summary of results prepared by the Florida Bar from a consumer survey purporting to show consumer objections to attorney solicitation by mail. In a strong dissent, Justice Kennedy, joined by three other Justices, found the survey inadequate based on the document available to the court, pointing out that the summary included "no actual surveys, few indications of sample size or selection procedures, no explanations of methodology, and no discussion of excluded results . . . no description of the statistical universe or scientific framework that permits any productive use of the information the so-called Summary of Record contains." *Id.* at 640.

241. *See Chavez v. IBP, Inc.*, 2004 U.S. Dist. LEXIS 28838 (E.D. Wash. Aug. 18, 2004).

in the case. Some commentators suggest that attorneys are obligated to disclose such pilot work.²⁴²

C. In Surveys of Individuals, What Measures Were Taken to Protect the Identities of Individual Respondents?

The respondents questioned in a survey generally do not testify in legal proceedings and are unavailable for cross-examination. Indeed, one of the advantages of a survey is that it avoids a repetitious and unrepresentative parade of witnesses. To verify that interviews occurred with qualified respondents, standard survey practice includes validation procedures,²⁴³ the results of which should be included in the survey report.

Conflicts may arise when an opposing party asks for survey respondents' names and addresses so that they can re-interview some respondents. The party introducing the survey or the survey organization that conducted the research generally resists supplying such information.²⁴⁴ Professional surveyors as a rule promise confidentiality in an effort to increase participation rates and to encourage candid responses, although to the extent that identifying information is collected, such promises may not effectively prevent a lawful inquiry. Because failure to extend confidentiality may bias both the willingness of potential respondents to participate in a survey and their responses, the professional standards for survey researchers generally prohibit disclosure of respondents' identities. "The use of survey results in a legal proceeding does not relieve the Survey Research Organization of its ethical obligation to maintain in confidence all Respondent-identifiable information or lessen the importance of Respondent anonymity."²⁴⁵ Although no surveyor–respondent privilege currently is recognized, the need for surveys and the availability of other means to examine and ensure their trustworthiness argue for deference to legitimate claims for confidentiality in order to avoid seriously compromising the ability of surveys to produce accurate information.²⁴⁶

242. See Yvonne C. Schroeder, *Pretesting Survey Questions*, 11 Am. J. Trial Advoc. 195, 197–201 (1987).

243. See *supra* Section V.C.

244. See, e.g., *Alpo Petfoods, Inc. v. Ralston Purina Co.*, 720 F. Supp. 194 (D.D.C. 1989), *aff'd in part and vacated in part*, 913 F.2d 958 (D.C. Cir. 1990).

245. Council of Am. Survey Res. Orgs., *supra* note 76, § I.A.3.f. Similar provisions are contained in the By-Laws of the American Association for Public Opinion Research.

246. *United States v. Dentsply Int'l, Inc.*, 2000 U.S. Dist. LEXIS 6994, at *23 (D. Del. May 10, 2000) (Fed. R. Civ. P. 26(a)(1) does not require party to produce the identities of individual survey respondents); *Litton Indus., Inc.*, No. 9123, 1979 FTC LEXIS 311, at *13 & n.12 (June 19, 1979) (Order Concerning the Identification of Individual Survey-Respondents with Their Questionnaires) (citing Frederick H. Boness & John F. Cordes, *The Researcher–Subject Relationship: The Need for Protection and a Model Statute*, 62 Geo. L.J. 243, 253 (1973)); see also *Applera Corp. v. MJ Research, Inc.*, 389 F. Supp. 2d 344, 350 (D. Conn. 2005) (denying access to names of survey respondents); *Lampshire*

Copies of all questionnaires should be made available upon request so that the opposing party has an opportunity to evaluate the raw data. All identifying information, such as the respondent's name, address, and telephone number, should be removed to ensure respondent confidentiality.

VIII. Acknowledgment

Thanks are due to Jon Krosnick for his research on surveys and his always sage advice.

v. Procter & Gamble Co., 94 F.R.D. 58, 60 (N.D. Ga. 1982) (defendant denied access to personal identifying information about women involved in studies by the Centers for Disease Control based on Fed. R. Civ. P. 26(c) giving court the authority to enter "any order which justice requires to protect a party or persons from annoyance, embarrassment, oppression, or undue burden or expense.") (citation omitted).

Glossary of Terms

The following terms and definitions were adapted from a variety of sources, including Handbook of Survey Research (Peter H. Rossi et al. eds., 1st ed. 1983; Peter V. Marsden & James D. Wright eds., 2d ed. 2010); Measurement Errors in Surveys (Paul P. Biemer et al. eds., 1991); Willem E. Saris, Computer-Assisted Interviewing (1991); Seymour Sudman, Applied Sampling (1976).

branching. A questionnaire structure that uses the answers to earlier questions to determine which set of additional questions should be asked (e.g., citizens who report having served as jurors on a criminal case are asked different questions about their experiences than citizens who report having served as jurors on a civil case).

CAI (computer-assisted interviewing). A method of conducting interviews in which an interviewer asks questions and records the respondent's answers by following a computer-generated protocol.

CAPI (computer-assisted personal interviewing). A method of conducting face-to-face interviews in which an interviewer asks questions and records the respondent's answers by following a computer-generated protocol.

CATI (computer-assisted telephone interviewing). A method of conducting telephone interviews in which an interviewer asks questions and records the respondent's answers by following a computer-generated protocol.

closed-ended question. A question that provides the respondent with a list of choices and asks the respondent to choose from among them.

cluster sampling. A sampling technique allowing for the selection of sample elements in groups or clusters, rather than on an individual basis; it may significantly reduce field costs and may increase sampling error if elements in the same cluster are more similar to one another than are elements in different clusters.

confidence interval. An indication of the probable range of error associated with a sample value obtained from a probability sample.

context effect. A previous question influences the way the respondent perceives and answers a later question.

convenience sample. A sample of elements selected because they were readily available.

coverage error. Any inconsistencies between the sampling frame and the target population.

double-blind research. Research in which the respondent and the interviewer are not given information that will alert them to the anticipated or preferred pattern of response.

error score. The degree of measurement error in an observed score (see true score).

full-filter question. A question asked of respondents to screen out those who do not have an opinion on the issue under investigation before asking them the question proper.

mall intercept survey. A survey conducted in a mall or shopping center in which potential respondents are approached by a recruiter (intercepted) and invited to participate in the survey.

multistage sampling design. A sampling design in which sampling takes place in several stages, beginning with larger units (e.g., cities) and then proceeding with smaller units (e.g., households or individuals within these units).

noncoverage error. The omission of eligible population units from the sampling frame.

nonprobability sample. Any sample that does not qualify as a probability sample.

open-ended question. A question that requires the respondent to formulate his or her own response.

order effect. A tendency of respondents to choose an item based in part on the order of response alternatives on the questionnaire (see primacy effect and recency effect).

parameter. A summary measure of a characteristic of a population (e.g., average age, proportion of households in an area owning a computer). Statistics are estimates of parameters.

pilot test. A small field test replicating the field procedures planned for the full-scale survey; although the terms *pilot test* and *pretest* are sometimes used interchangeably, a pretest tests the questionnaire, whereas a pilot test generally tests proposed collection procedures as well.

population. The totality of elements (individuals or other units) that have some common property of interest; the target population is the collection of elements that the researcher would like to study. Also, universe.

population value, population parameter. The actual value of some characteristic in the population (e.g., the average age); the population value is estimated by taking a random sample from the population and computing the corresponding sample value.

pretest. A small preliminary test of a survey questionnaire. See pilot test.

primacy effect. A tendency of respondents to choose early items from a list of choices; the opposite of a recency effect.

probability sample. A type of sample selected so that every element in the population has a known nonzero probability of being included in the sample; a simple random sample is a probability sample.

probe. A followup question that an interviewer asks to obtain a more complete answer from a respondent (e.g., “Anything else?” “What kind of medical problem do you mean?”).

quasi-filter question. A question that offers a “don’t know” or “no opinion” option to respondents as part of a set of response alternatives; used to screen out respondents who may not have an opinion on the issue under investigation.

random sample. See probability sample.

recency effect. A tendency of respondents to choose later items from a list of choices; the opposite of a primacy effect.

sample. A subset of a population or universe selected so as to yield information about the population as a whole.

sampling error. The estimated size of the difference between the result obtained from a sample study and the result that would be obtained by attempting a complete study of all units in the sampling frame from which the sample was selected in the same manner and with the same care.

sampling frame. The source or sources from which the individuals or other units in a sample are drawn.

secondary meaning. A descriptive term that becomes protectable as a trademark if it signifies to the purchasing public that the product comes from a single producer or source.

simple random sample. The most basic type of probability sample; each unit in the population has an equal probability of being in the sample, and all possible samples of a given size are equally likely to be selected.

skip pattern, skip sequence. A sequence of questions in which some should not be asked (should be skipped) based on the respondent’s answer to a previous question (e.g., if the respondent indicates that he does not own a car, he should not be asked what brand of car he owns).

stratified sampling. A sampling technique in which the researcher subdivides the population into mutually exclusive and exhaustive subpopulations, or strata; within these strata, separate samples are selected. Results can be combined to form overall population estimates or used to report separate within-stratum estimates.

survey-experiment. A survey with one or more control groups, enabling the researcher to test a causal proposition.

survey population. See population.

systematic sampling. A sampling technique that consists of a random starting point and the selection of every n th member of the population; it is generally analyzed as if it were a simple random sample and generally produces the same results..

target population. See population.

trade dress. A distinctive and nonfunctional design of a package or product protected under state unfair competition law and the federal Lanham Act § 43(a), 15 U.S.C. § 1125(a) (1946) (amended 1992).

true score. The underlying true value, which is unobservable because there is always some error in measurement; the observed score = true score + error score.

universe. See population.

References on Survey Research

- Paul P. Biemer, Robert M. Groves, Lars E. Lyberg, Nancy A. Mathiowetz, & Seymour Sudman (eds.), *Measurement Errors in Surveys* (2004).
- Jean M. Converse & Stanley Presser, *Survey Questions: Handcrafting the Standardized Questionnaire* (1986).
- Mick P. Couper, *Designing Effective Web Surveys* (2008).
- Don A. Dillman, Jolene Smyth, & Leah M. Christian, *Internet, Mail and Mixed-Mode Surveys: The Tailored Design Method* (3d ed. 2009).
- Robert M. Groves, Floyd J. Fowler, Jr., Mick P. Couper, James M. Lepkowski, Eleanor Singer, & Roger Tourangeau, *Survey Methodology* (2004).
- Sharon Lohr, *Sampling: Design and Analysis* (2d ed. 2010).
- Questions About Questions: Inquiries into the Cognitive Bases of Surveys* (Judith M. Tanur ed., 1992).
- Howard Schuman & Stanley Presser, *Questions and Answers in Attitude Surveys: Experiments on Question Form, Wording and Context* (1981).
- Monroe G. Sirken, Douglas J. Herrmann, Susan Schechter, Norbert Schwarz, Judith M. Tanur, & Roger Tourangeau, *Cognition and Survey Research* (1999).
- Seymour Sudman, *Applied Sampling* (1976).
- Survey Nonresponse* (Robert M. Groves, Don A. Dillman, John L. Eltinge, & Roderick J. A. Little eds., 2002).
- Telephone Survey Methodology* (Robert M. Groves, Paul P. Biemer, Lars E. Lyberg, James T. Massey, & William L. Nicholls eds., 1988).
- Roger Tourangeau, Lance J. Rips, & Kenneth Rasinski, *The Psychology of Survey Response* (2000).

RX1017

**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

**EXPERT REPORT OF PROFESSOR JOHN R. HAUSER, SC.D.
JANUARY 13, 2023**

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I. INTRODUCTION

A. Qualifications

1. I am the Kirin Professor of Marketing at the Massachusetts Institute of Technology (“MIT”) Sloan School of Management. The principal areas of my research and teaching at MIT have been in marketing management, new product and service development, consumer satisfaction, marketing research, research methodology (including survey research, experimental design, and field experiments), and competitive marketing strategy. My research includes the evaluation of consumer decision-making, product and service development, customized communications designed around customers’ cognitive styles, and determination of relative feature preferences and implicit product valuations. I have evaluated the factors that influence consumer purchasing decisions, consumer preferences, and consumer impressions in a variety of matters related to pricing, distribution, and advertising.
2. I have testified as an expert for both plaintiffs and defendants on matters related to my research. For example, I have testified about marketing research, sales forecasting, product confusion, and other topics involving consumer behavior. My testimony history includes, but is not limited to, matters on behalf of SiriusXM, Dish Network, Comcast, Tivo, WE Woman’s Entertainment, iHeartRadio, Louis Vuitton, Apple Inc., Microsoft, Johnson & Johnson, MasterCard, and Procter & Gamble. I recently testified on behalf of the United States Department of Justice in its challenge to the proposed merger between AT&T and Time Warner. In addition, I have provided strategic market-research-based consulting to numerous consumer products, technology/software, and durable goods manufacturers, including American Airlines, Johnson & Johnson, IBM, Procter & Gamble, Fidelity Investments, Pacific Gas & Electric Company, Ford Motor Company, General Motors, and Chrysler.
3. I have served as Editor-in-chief of *Marketing Science* and have held senior editorial positions with *Management Science*, the *Journal of Marketing Research*, and the *Journal of Product Innovation Management*. I have received numerous awards for excellence in research and teaching in marketing and was recognized by the American Marketing Association with the Paul D. Converse Award for “outstanding contributions to the development of the science of

marketing.”¹ In 2001, I received the Parlin Award, which is a “preeminent national honor . . . [awarded for] outstanding leadership and sustained impact on advancing the evolving profession of marketing research over an extended period of time,” according to the American Marketing Association.² In 2011, I received the Churchill Lifetime Achievement Award of the American Marketing Association for contributions to marketing research. In 2013, I was awarded the Buck Weaver Award by the Institute for Operations Research and the Management Sciences (“INFORMS”) Society of Marketing Science (“ISMS”), for lifetime contributions to the theory and practice of marketing science.³ In 2016, I received a Doctor Honoris Causa, Erasmus School of Economics, Erasmus University. I am a Fellow of INFORMS and an Inaugural Fellow of ISMS. I have also served as President of ISMS, and earlier, as Secretary, as well as a Trustee of the Marketing Science Institute.

4. I am the co-author of two textbooks, *Design and Marketing of New Products* and *Essentials of New Product Management*, as well as more than 100 articles and papers, including articles on various methods used to determine the importance of product features in consumer decision-making and methods to forecast consumer response under various scenarios. I have developed market research techniques that enable marketing researchers, experts, and business managers to predict the value of individual features in both existing and hypothetical products and to forecast consumer response. These methods have been employed numerous times by academic researchers, as well as major international corporations. Many of these papers have been recognized with national and international awards.⁴

¹ “The Paul D. Converse Awards,” *American Marketing Association*, October 28, 2019, available at <https://www.ama.org/listings/2019/10/28/converse-award/>, INTUIT-FTC-PART3-000607247; Lampe, D., “Two from Sloan win marketing awards,” *MIT News*, April 3, 1996, available at <https://news.mit.edu/1996/converse-0403>, INTUIT-FTC-PART3-000607099.

² “Charles Coolidge Parlin Marketing Research Award,” *American Marketing Association*, available at <https://www.ama.org/AboutAMA/FoundationAwards/Pages/Parlin-Award.aspx>, INTUIT-FTC-PART3-000606950.

³ “Buck Weaver Award,” *INFORMS*, available at <https://www.informs.org/Recognizing-Excellence/Community-Prizes/Marketing-Science-Society/Buck-Weaver-Award/Buck-Weaver-Award-Application-Process>, INTUIT-FTC-PART3-000606947.

⁴ Toubia, O., Hauser, J.R. and Simester, D.I., 2004. “Polyhedral Methods for Adaptive Choice-Based Conjoint Analysis.” *Journal of Marketing Research*, 41(1), 116-131, INTUIT-FTC-PART3-000606203; Yee, M. et al., 2007. “Greedoid-Based Noncompensatory Inference.” *Marketing Science*, 26(4), 532-549, INTUIT-FTC-PART3-000606712; Toubia, O. et al., 2003. “Fast Polyhedral Adaptive Conjoint Estimation.” *Marketing Science*, 22(3), 273-303, INTUIT-FTC-PART3-000606220; Dahan, E. and Hauser, J.R., 2002. “The Virtual Customer.” *Journal of Product Innovation Management*, 19(5), 332-353, INTUIT-FTC-PART3-000603427; Toubia, O., Hauser, J.R. and Garcia, R., 2007. “Probabilistic Polyhedral Methods for Adaptive Choice-Based Conjoint Analysis: Theory and

5. My curriculum vitae and testimony as an expert witness at deposition or trial within the last four years are listed in **Appendix A**.

B. Assignment

6. I have been retained by Counsel for Intuit, Inc. (Intuit) to evaluate Complaint Counsel's allegations regarding the potential for consumer deception in connection with Intuit's advertising, website, and disclosures for its tax preparation products. In particular, I was asked to review and offer my opinion regarding the consumer perception survey conducted by Professor Nathan Novemsky and the opinions offered in the Novemsky Report.⁵ I previously filed declarations on April 4, 2022 and August 30, 2022 in connection with this and a related matter offering my opinions regarding the same consumer survey that Professor Nathan Novemsky describes in his expert report in this matter.⁶
7. Additionally, I was asked to evaluate whether and to what extent certain changes to the disclosures displayed in Intuit's advertisements and website proposed by Complaint Counsel would affect consumer behavior.⁷ To this end, I designed, implemented, and analyzed a consumer survey ("Disclosure Efficacy Survey"). I was also asked to evaluate consumer preferences for various tax preparation solutions, the behaviors consumers exhibit in the buying process, and the factors that contribute to their tax filing solution selection. To address

Application." *Marketing Science*, 26(5), 596-610, INTUIT-FTC-PART3-000606251. My papers have been cited over 30,000 times based on Google Scholar (visited January 3, 2023).

⁵ Expert Report of Nathan Novemsky, Ph.D., *In the Matter of Intuit, Inc., a corporation, Docket No. 9408*, December 9, 2022 ("Novemsky Report"), CC-00006504.

⁶ Declaration of John R. Hauser, Sc.D., *Federal Trade Commission v. Intuit Inc.*, No. 3:22-cv-1973, United States District Court Northern District of California San Francisco Division, April 4, 2022; and Declaration of John R. Hauser, SC.D., *In the Matter of Intuit, Inc., a corporation, Docket No. 9408*, August 30, 2022. Professor Novemsky also filed a declaration on March 28, 2022, and then subsequently responded to my declaration in an April 8, 2022 declaration. Declaration of Nathan Novemsky, *Federal Trade Commission v. Intuit Inc.*, No. 3:22-cv-1973, United States District Court Northern District of California San Francisco Division, March 28, 2022 ("Novemsky Declaration"), GX-302-306, CC-00006490; and Second Declaration of Nathan Novemsky, *Federal Trade Commission v. Intuit Inc.*, No. 3:22-cv-1973, United States District Court Northern District of California San Francisco Division, April 8, 2022 ("Second Novemsky Declaration"), GX-313-315, CC-00006691. Throughout this report, I also respond to Professor Novemsky's critiques contained in this rebuttal.

⁷ Complaint Counsel allege that the disclosures "a) Are disproportionately small compared to the prominent text emphasizing that the service is free. b) Appear for just a few seconds, when the commercials aired in 15-, 30-, and 60-second versions. c) Are in writing only, often in font color similar to the background color, and are not read by a voiceover." Complaint, *In the Matter of: Intuit Inc., a corporation, Docket No. 9408*, March 28, 2022, ("Complaint"), ¶ 29.

this assignment, I designed, implemented, and analyzed a market research survey (“Purchase Driver Survey”). I describe both studies in more detail later in my report.

8. In undertaking both assignments, I utilized my experience in developing, testing, and analyzing surveys, as well as my experience in interpreting qualitative and quantitative research pertaining to consumer attitudes, intentions, and behavior. **Appendix B** includes a complete list of materials I have considered in connection with this particular assignment, including the Novemsky Report, prior Novemsky Declarations, internal Intuit documents, academic literature, and publicly available materials. As a scientist, I will supplement or update my analysis in the event that new information relevant to my opinions is produced by the parties. Part of the work for this investigation was performed under my direction by others at Analysis Group, Inc., an economic and litigation consulting firm headquartered in Boston, Massachusetts. In preparing my report, I and Analysis Group used the following commercially available computer programs: Microsoft Word, Microsoft Excel, Microsoft PowerPoint, STATA, and Photoshop. My rate of compensation is \$1,100 per hour. In addition, I receive compensation based on the professional fees of Analysis Group for work in support of my opinions contained herein. No compensation is contingent on the nature of my findings or on the outcome of this litigation.

II. CASE BACKGROUND

A. Parties Involved

9. I understand Complaint Counsel have filed a complaint claiming that Intuit has “violated the provisions of the Federal Trade Commission Act.”⁸
10. Defendant in this matter is Intuit Inc., a Delaware tax preparation and financial services software company based in Mountain View, California.⁹ At issue in this matter are Intuit’s TurboTax online products and services that consumers use to prepare and file their income tax returns, and in particular, TurboTax Free Edition.

⁸ Complaint, p. 1.

⁹ Complaint, ¶ 1.

B. Relevant Allegations

11. I understand that Complaint Counsel have alleged that Intuit engaged in “deceptive business practices in the advertising, marketing, distribution, and sale of TurboTax”¹⁰ by disseminating “ads, including via television, YouTube, and other social media, marketing the ‘freemium’ version of TurboTax,”¹¹ with the claim that consumers can file their taxes for free using TurboTax, when “in numerous instances Intuit does not permit consumers to file their taxes for free using TurboTax.”¹² For example, Complaint Counsel allege that Intuit deceived consumers by running TV advertisements in which the primary word spoken is “free” and that Intuit only informs consumers of limitations to who can file for free via fine print disclaimers at the end of the advertisements.¹³
12. Complaint Counsel additionally claim that the TurboTax website home page similarly fails to properly disclose the limitations on who can file for free.¹⁴ Complaint Counsel claim that once customers are lured in to start using TurboTax to file their taxes via the “door opener” advertisements and the website home page, they would face “hard stop” screens that confront customers to upgrade to a paid version only after they “expended substantial time inputting sensitive personal and financial information into Intuit’s user interface.”¹⁵ Complaint Counsel further allege that this process forces customers who expected to file for free when they started the process to ultimately upgrade to a paid version of TurboTax, causing them to suffer injury.¹⁶
13. Complaint Counsel’s complaint also discusses a variety of Intuit’s acts and practices relating to the IRS Free File Program and Intuit’s prior participation in this program.¹⁷ I have not been asked to opine on the allegations relating to the IRS Free File Program, which I understand are not part of the single cause of action in Complaint Counsel’s complaint.

¹⁰ Complaint, ¶ 8.

¹¹ Complaint, ¶ 23. The Bureau of Consumer Protection conceded in a deposition that there is no “freemium” version of TurboTax. They meant the “truly free” version of TurboTax, TurboTax Free Edition. Deposition of William T. Maxson, December 8, 2022, CC-00005358, at 239:16-241:06.

¹² Complaint, ¶ 29.

¹³ Complaint, ¶¶ 23-29.

¹⁴ Complaint, ¶¶ 38-44.

¹⁵ Complaint, ¶¶ 57-58.

¹⁶ Complaint, ¶ 45.

¹⁷ Complaint, ¶ 63-65.

III. SUMMARY OF OPINIONS

14. To evaluate the allegations raised by Complaint Counsel, I reviewed the Novemsky Report and Novemsky Survey, conducted two surveys—a Disclosure Efficacy Survey and a Purchase Driver Survey, and reviewed Intuit internal documents, academic literature, and third-party materials. Based on my review of these materials, I find no evidence to support Complaint Counsel’s theory of deception. Furthermore, the analysis of my surveys suggests that consumers were unlikely to be deceived by Intuit into starting their tax preparation with TurboTax Free Edition.
15. The Novemsky Report and Novemsky Survey do not provide any evidence that Intuit’s TurboTax Free Edition advertisements, website, or disclosures were deceptive. The Novemsky Survey itself is fundamentally flawed and unreliable, and importantly, does not reliably assess whether Intuit’s advertisements, website, or disclosures caused consumers to have a misimpression that they would qualify to file for free with Free Edition or that they have “simple returns.” The Novemsky Survey does not test consumer perceptions of any of the specific allegedly deceptive TurboTax advertisements, does not utilize a standard scientific test-vs.-control methodology, relies on a biased and unrepresentative sample, and asks leading questions that are biased in Complaint Counsel’s favor. Each of these serious flaws individually would render the survey unsuitable for its stated purpose but taken together render the survey completely unreliable. When reviewed more closely, the Novemsky Survey and the internal Intuit market research study the Novemsky Report relies on do not provide evidence of consumer deception, and in fact, highlight the substantial bias in the Novemsky Report’s findings. I discuss and analyze these flaws in more detail in Section IV below.
16. Contrary to Complaint Counsel’s claims, I find that consumers were unlikely to be deceived by Intuit’s advertisements, website, and disclosures into starting their tax preparation with TurboTax Free Edition. Respondents to my Disclosure Efficacy Survey who reviewed an advertisement and webpages that include more prominent disclosures exhibited no decrease in consideration of starting their taxes with Vertax (a disguised brand name for TurboTax), no decrease in their selection of Free Edition, and no decrease in their likelihood of starting their taxes with Free Edition, compared to respondents who reviewed an allegedly deceptive Vertax advertisement and webpage. I discuss these findings in Section V below.

17. Complaint Counsel discount that selecting a tax preparation method and provider is a repeated and high-involvement choice, and that consumers are commensurately engaged in making these choices. My Purchase Driver Survey, as well as evidence from Intuit’s internal documents and publicly available materials, demonstrates that consumers consider an array of factors beyond direct out-of-pocket costs for utilizing a specific service; consumers prioritize ease of use and the balance between out-of-pocket price and quality-indicating factors (e.g., convenience, maximizing refunds), and, as a result, consumers conduct substantial research before choosing a tax preparation solution. Consumers rely on a variety of information sources and evaluate tax filing options based on the factors they consider important. I discuss these findings in Section VI.A – C below.
18. Complaint Counsel allege that consumers only continue to use TurboTax because they feel “locked in.” I observe no evidence that respondents felt “locked in,” either within a given year or year over year. Results from my Purchase Driver Survey illustrate that some consumers are willing to start a tax return and then abandon it as part of their research process, with some respondents reporting that they filled out multiple online tax websites prior to filing to compare prices or to compare refunds. Relatedly, my Purchase Driver Survey and Disclosure Efficacy Survey indicate that some consumers are willing to consider switching providers across tax years. Respondents to the Purchase Driver Survey who indicated that they did not change providers in the past tax year (including respondents who are TurboTax customers) generally reported being satisfied rather than locked in. Because consumers are freely able and willing to switch providers, TurboTax must satisfy consumers to retain them. In the presence of competitive options, both on and off-line, and consumers’ demonstrated willingness to consider and switch to alternative providers, consumers’ use of TurboTax reflects customer satisfaction, and should not be interpreted as lock-in or deception. This is also consistent with the responses in my survey where individuals who did not change providers in the past tax year (including respondents who are TurboTax customers) reported being satisfied and did not report being locked in, again refuting the claim that consumers are deceived by Intuit’s advertisements, website, and disclosures. I discuss these findings in Section VI.D below.

IV. THE NOVEMSKY REPORT DOES NOT PROVIDE EVIDENCE THAT INTUIT'S TURBOTAX FREE EDITION ADVERTISEMENTS WERE DECEPTIVE

19. The Novemsky Report purports to “evaluate [Intuit]’s advertising and marketing of its TurboTax online tax preparation services as ‘free,’ including by designing and supervising an online consumer perception survey,”¹⁸ and by reviewing “Intuit’s own research on the impact of its marketing.”¹⁹ The Novemsky Survey, as described in the Novemsky Report, however cannot be used to address Complaint Counsel’s allegations that Intuit’s advertising, website, and disclosures were deceptive. The Novemsky Survey fails to use the fundamental scientific methods that are necessary to evaluate whether the at-issue messaging in Intuit’s advertisements, website, or disclosures caused consumers’ understanding or perceptions. The Novemsky Survey is also subject to significant flaws, including relying on a biased sample and asking leading questions that encourage guessing, resulting in unreliable data. The failure to follow scientific principles and necessary best practices to avoid demand artifacts and biases is clearly reflected in the Novemsky Survey results. Thus, the Novemsky Survey cannot be relied on as evidence that Intuit’s advertisements, website, or disclosures represent an ongoing harm to consumers. Likewise, the Novemsky Report’s discussion of Intuit’s own marketing research is incomplete and ignores surrounding context, undermining the conclusions drawn by the Novemsky Report from this internal Intuit research. Indeed, Intuit’s own marketing research suggests that the Novemsky Survey is biased.

A. Overview of the Novemsky Survey

20. Between March 11, 2022 and March 24, 2022, Professor Novemsky conducted a survey (“Novemsky Survey”) to assess three topics: “[w]hether, and to what extent, [taxpayers who are not eligible to use TurboTax Free Edition] have the misimpression that they can file income taxes for free using TurboTax,”²⁰ “[w]hether, and to what extent, these taxpayers point to TurboTax advertisements and the TurboTax website (or both) as playing a role in forming the misimpression that they can file income taxes for free using TurboTax,”²¹ and “[w]hether, and

¹⁸ Novemsky Report, ¶ 1. I will refer to Professor Novemsky’s “online consumer perception survey” as the “Novemsky Survey”.

¹⁹ Novemsky Report, ¶ 11.

²⁰ Novemsky Report, ¶ 6.

²¹ Novemsky Report, ¶ 6.

to what extent, these taxpayers [...] have the misimpression that their tax returns meet TurboTax's definition of a 'simple U.S. return.'"²²

21. The Novemsky Report identifies the "consumers of interest" as "potential taxpayers who at the time the survey was conducted were considering using an online tax software to file their 2021 taxes and would not have qualified for TurboTax Free Edition."²³ Specifically, the Novemsky Survey's sample includes respondents who: "(i) were planning to file an income tax return in 2022 (based on income in 2021) [but had not yet done so]; (ii) make or contribute to tax-filing decisions in their household; (iii) have considered or might consider using an online tax software; and (iv) who would not have qualified for TurboTax Free Edition if they were to use TurboTax software to file their 2021 taxes."²⁴ To establish that respondents would not qualify to use TurboTax Free Edition, the survey asks a series of questions related to types of income received, whether respondents expect to take a standard or itemized deduction, and a variety of other tax situations.²⁵ Despite Complaint Counsel's concerns about consumers' ability to understand whether or not they have simple tax returns, the Novemsky Survey relies on respondents to understand, remember, and accurately report their financial and tax situation in a similar level of detail to which consumers have access on the TurboTax website.²⁶
22. For the purpose of analysis, the Novemsky Report reports the results of the Novemsky Survey for two groups, titled "Group A" and "Group B." Group A includes 404 respondents who self-reported that they have not filed their taxes using TurboTax in the last three years.²⁷ Group B includes 203 respondents who self-reported that they have filed their taxes with TurboTax in the last three years, using only paid products.²⁸ The Novemsky Report refers to Group A as the "main group of interest" because they would be "less likely to respond to survey questions

²² Novemsky Report, ¶ 6.

²³ Novemsky Report, ¶ 21.

²⁴ Novemsky Report, ¶ 21.

²⁵ Novemsky Report, Appendix E, Questions S90, S100, S110.

²⁶ Intuit, "What qualifies as a simple tax return?" RX 4. I also understand that the Novemsky Survey screener questions relating to respondents' tax situations were updated as part of the pretest. See, Novemsky Report, Appendix H.

²⁷ See, for example, Novemsky Report, Figure 1.

²⁸ See, for example, Novemsky Report, Figure 1.

based on their past usage of TurboTax.”²⁹ The Novemsky Report also identifies 164 respondents who qualified and completed the survey, but who opted to have their responses deleted upon learning the purpose of the survey.³⁰ The Novemsky Survey provides no information on these respondents other than the fact that they opted out.

23. The Novemsky Survey then asked respondents a series of questions including:³¹

- An open-ended question about whether there is a cost to filing for respondents personally and an open-ended question about who can file for free;
- A closed-ended question about whether respondents can personally file for free;
- A closed-ended question about from where respondents’ impression originated;
- Follow-up questions with respondents who indicated they couldn’t file for free; and
- A series of closed-ended and open-ended questions about whether respondents believe their taxes qualify as a “simple U.S. return.”

24. The Novemsky Report states that based on “the results of the TurboTax Perception Survey, combined with evidence from Intuit’s own research on the impact of its marketing,” there is “strong evidence that Intuit’s marketing is the most likely source of these consumer misperceptions.”³² More specifically, the Novemsky Report concludes that:

- “A substantial portion of the taxpayers who do not qualify to use TurboTax Free Edition under Intuit’s criteria have the misimpression that they can file their income taxes for free using TurboTax;”³³
- “Intuit’s TurboTax advertisements and the TurboTax website are the two most common sources identified as playing a role in taxpayers forming the misimpression that they can file their income taxes for free using TurboTax. A vast

²⁹ Novemsky Report, ¶ 7.

³⁰ Novemsky Report, ¶¶ 50-51. In a prior version of the programming instructions for the “TurboTax Perception Study,” there had been instructions for a quota for 500 Group A respondents and 250 Group B respondents, which has since been removed from the most recent version of the Novemsky Survey programming instructions. The 164 “opt-outs” from the Novemsky Survey are a possible explanation for the difference between the 607 respondents included in the Novemsky Survey results and the quota for 750 respondents. See, Novemsky Survey Programming Instructions, GX-305, p. 1 and Appendix E to Novemsky Report, p. 1.

³¹ Novemsky Report, Appendix E, Questions TAT220 – TAT310.

³² Novemsky Report, ¶ 11.

³³ Novemsky Report, ¶ 8.

majority of the mistaken taxpayers identified at least one of these two sources as playing a role in forming their misimpression;”³⁴ and

- “A substantial portion of the taxpayers who are not eligible to use TurboTax Free Edition under Intuit’s criteria (and hence, do not have a ‘simple U.S. return,’ as Intuit uses the term) nevertheless have the misimpression that their returns meet TurboTax’s definition of a ‘simple U.S. return.’”³⁵

25. The Novemsky Survey is fundamentally flawed and cannot be taken as “strong evidence” that Intuit’s marketing created any consumer misperceptions. Even setting aside the significant design and sampling flaws, the Novemsky Survey at the very most finds that 190 out of 607 respondents (31.3%) who are not Free Edition eligible purportedly believe that they can file for free using TurboTax based on TurboTax advertisements and/or website.³⁶ Further review of the totality of these respondents’ survey data and the Intuit study cited by the Novemsky Report suggests that the Novemsky Survey and the internal Intuit market research study do not provide evidence of consumer deception, and in fact, highlight the substantial bias in the Novemsky Report’s findings.

B. The Novemsky Survey Does Not Provide Causal Evidence Linking Consumer Perceptions to Intuit’s Advertisements, Website, or Disclosures

26. According to the Novemsky Report, “one area of interest relevant to [Complaint Counsel’s] case is the impact of Intuit’s advertising and marketing on the perceptions of those taxpayers who are not eligible to use a free version of TurboTax under Intuit’s eligibility criteria.”³⁷ Yet, the Novemsky Survey does not test the impact of the allegedly deceptive TurboTax advertisements, website, or disclosures on consumer perceptions (let alone any specific at-

³⁴ Novemsky Report, ¶ 9.

³⁵ Novemsky Report, ¶ 10.

³⁶ 121 out of 607 (19.9%) respondents who are not Free Edition eligible purportedly believe they can file for free based on TurboTax advertisements and 130 out of 607 (21.4%) purportedly believe that they can file for free using TurboTax based on TurboTax website. See, Novemsky Report, Figure 2. The total of 31.3% is less than the sum of 19.9% and 21.4% because some respondents are counted for both the advertisements and the website.

³⁷ Novemsky Report, ¶ 4.

issue advertisements or website interfaces).³⁸ By failing to show respondents to the Novemsky Survey any of the specific at-issue advertisements, website, or disclosures, and by failing to conduct a test-vs.-control experiment consistent with scientific standards, the Novemsky Survey cannot be used as causal evidence of the influence of Intuit’s advertising and marketing on consumer perceptions. Notably, the Novemsky Report’s conclusions even appear to acknowledge these limitations, concluding that “Intuit’s marketing is the *most likely* source of these consumer misperceptions.”³⁹ The Novemsky Report cannot conclude that consumers are deceived specifically by TurboTax advertisements, website, or disclosures.

27. To bear on the question of whether consumers were misled by the at-issue advertisements, a survey should test for a causal relationship between the at-issue marketing communications and consumer perceptions and understanding.⁴⁰ The gold standard in testing causality is a test-vs.-control experimental study design, which involves randomly assigning respondents to

³⁸ The Novemsky Report attributes Novemsky Survey respondent impressions to the entirety of Intuit’s “long-running and pervasive marketing campaign,” including advertisements going back as far as 2015. See, Novemsky Report, ¶¶ 2-11. However, the Novemsky Report does not test consumer impressions as they relate to any specific TurboTax advertisement, let alone these older advertisements. It is highly unlikely that respondents are actively recalling TurboTax advertisements from 2015 in responding to the Novemsky Survey questions, especially considering that some of the Novemsky Survey respondents were not even of working age at the time these older advertisements were run. There are 48 respondents who were between the ages of 18 and 24 when they took the survey in March 2022, and therefore would have been between the ages of 11 and 17 at the time of the 2015 advertisements. See, “Novemsky Survey Backup Calcs.xlsx.”

³⁹ Novemsky Report, ¶ 11 (emphasis added).

⁴⁰ Naturally, not all surveys require control groups. For example, if the survey is designed to take a census of self-reported actions consumers might have taken while searching prior to an automotive purchase, the survey need not include a control group as long as other actions are taken to remove survey noise, demand artifacts, and threats to validity. However, if the survey is attempting to measure the origin of opinions, such as what source or sources of information influence a respondent to believe that TurboTax is free for them, and if the survey seeks to attribute causality to any actions, such as Intuit’s marketing campaigns, then a control group is relevant. A control group is particularly relevant when the survey questions themselves can influence reported opinions. See, Diamond, S.S., 2011. “Reference Guide on Survey Research.” In *Reference Manual on Scientific Evidence: Third Edition*, 359-423, The National Academies Press, Washington, DC, INTUIT-FTC-PART3-000603471, pp. 397-401.

different treatment groups.^{41,42} Respondents in the test group would be exposed to a stimulus that contains the causal aspect being studied (in this case, exposure to the “free” claims that Complaint Counsel allege are deceptive), and control group respondents would be shown a comparable stimulus adjusted for the at-issue content. If the experiment is otherwise reliable, then by examining the differences in responses across experimental groups, researchers can isolate the effect of the changes between stimuli. This method also allows researchers to control for noise and other conditions, including any biases that may be present in the survey instrument itself, as long as these effects are common in both groups.

28. The Novemsky Survey is not a test-vs.-control study and does not provide respondents with any stimuli (other than the TurboTax brand name), let alone specific advertising and website stimuli.⁴³ The Novemsky Survey cannot be used to disentangle the impressions created by at-issue messaging from the pre-existing beliefs and aspirations respondents may have or from any biases created by the survey instrument itself. Without stimuli, the Novemsky Survey is simply an unaided test of respondents’ impressions at the time of the survey and possibly influenced by the survey itself. Respondents’ impressions are subject to survey noise; guessing; the impact of information from sources other than TurboTax advertisements, website, or

⁴¹ “Controls play a central role in enabling a survey to rule out threats to valid causal inference. A control group design that includes an appropriate control is the best way to ensure that noise from preexisting beliefs, yea-saying, and guessing (both random and biased) cannot explain away or undermine evidence of confusion or deception reflected in the responses of survey participants. [...] Designing an appropriate control is thus an analytic rather than a mechanical task, one that is crucial in a valid trademark or deceptive advertising survey.” Diamond, S. S., 2012. “Control Foundations: Rationales and Approaches.” In *Trademark and Deceptive Advertising Surveys: Law, Science, and Design*, 201-216. American Bar Association, INTUIT-FTC-PART3-000603449, p. 216; “Hence experiments are well-suited to studying causal relationships. No other scientific method regularly matches the characteristics of causal relationships so well.” Shadish, W.R., Cook, T.D. and Campbell, D.T., 2002. “*Experimental and Quasi-Experimental Designs for Generalized Causal Inference*.” Wadsworth Cengage Learning, INTUIT-FTC-PART3-000606730, p. 7.

⁴² Professor Novemsky has utilized test-vs.-control experimental designs in several other contexts. He has published several academic articles in which he described conducting experiments that randomly assigned participants into one of two or multiple experimental groups. See, for example, Frederick, S. et al., 2009. “Opportunity Cost Neglect.” *Journal of Consumer Research*, 36(4), 553-561, INTUIT-FTC-PART3-000605339; Novemsky, N. et al., 2007. “Preference Fluency in Choice.” *Journal of Marketing Research*, 44(3), 347-356, INTUIT-FTC-PART3-000606074; Wang, J. et al., 2010. “Trade-offs and Depletion in Choice.” *Journal of Marketing Research*, 47(5), 910-919, INTUIT-FTC-PART3-000606699; Pocheptsova, A. and Novemsky, N., 2010. “When Do Incidental Mood Effects Last? Lay Beliefs versus Actual Effects.” *Journal of Consumer Research*, 36(6), 992-1001, INTUIT-FTC-PART3-000606135.

⁴³ According to the Second Novemsky Declaration, “[t]he decision not to show consumers a stimulus in assessing their perception was deliberate and considered.” Second Novemsky Declaration, ¶ 8. Likewise, the Second Novemsky Declaration claims that “in this instance, using a control group was not feasible.” Second Novemsky Declaration, ¶ 9.

disclosures; general beliefs about tax preparation software; and other causes; none of which the Novemsky Report addresses. Without a mechanism to test causality, the Novemsky Report cannot ascribe the results of the Novemsky Survey to any alleged misrepresentations made by Intuit versus any other source of information that respondents may have encountered, including the design of the survey itself. By not ruling out these (likely) alternative explanations, the Novemsky Survey cannot be used as evidence that consumers were misled.

29. The Novemsky Report seems to ignore these alternative explanations and simply assume that they are not relevant. For instance, the Second Novemsky Declaration asks rhetorically “what, other than Intuit’s advertisement and marketing, consumers would be reacting to when they indicate that they believe TurboTax is free” and argues that “[i]t would be hard to conceive that large numbers of consumers would arrive at that conclusion based on any source other than advertisements and marketing from Intuit.”⁴⁴ Assuming that the source of consumer perceptions must be Intuit’s marketing is not a scientifically rigorous or reliable method for determining whether Intuit’s marketing played a role in consumer impressions, let alone determining whether the specific at-issue advertisements, website, or disclosures *caused* consumers’ impressions.
30. The Novemsky Report claims that a test-vs.-control framework is “inappropriate” in the current context because the “limited nature of a survey stimulus is likely to severely underrepresent the extent and the cumulative impact of Intuit’s allegedly deceptive practices” and “it is likely not possible to find an appropriate control group untouched by Intuit’s marketing.”⁴⁵
31. The Novemsky Report does not cite any evidence that a survey stimulus would “severely underrepresent” the extent of consumer deception and simply asserts that the “cumulative impact” of Intuit’s marketing practices is larger than would be measurable based on exposure to an advertisement in the survey environment. These assertions are inconsistent with literature on advertising effectiveness, which typically finds that the impact of specific advertisement is greatest immediately following consumer exposure and that the impact “decays” over time.⁴⁶

⁴⁴ Second Novemsky Declaration, ¶ 8.

⁴⁵ Novemsky Report, ¶ 32.

⁴⁶ Kotler, P. and Keller, K., 2016. “*Marketing Management 15th Ed.*” Pearson Education, INTUIT-FTC-PART3-000597494, p. 194. In fact, the Novemsky Report later cites to an Intuit market research study and concludes that

Moreover, showing respondents a stimulus in a survey context could encourage respondents to focus on the stimulus more than they might in the marketplace. These two effects create the risk that the survey context could if anything result in an overmeasurement, rather than an undermeasurement, of consumer impressions or reactions.⁴⁷ Interestingly, the Novemsky Report itself cites numerous examples of Intuit’s advertisements including a 2015 Super Bowl advertisement, video advertisements “in which ‘free’ is essentially the only word spoken by the actors,” and a 2022 advertisement that “similarly repeated the word ‘free’.”⁴⁸ The Novemsky Report tests none of these cited advertisements. There is no evidence that any of the cited advertisements, or any other advertisements, causally affect consumer impressions, yet the Novemsky Report suggests that the cumulative impact of Intuit’s marketing practices is the most likely cause. The Novemsky Report’s claim that using survey stimuli would “severely underrepresent” the relationship between Intuit’s marketing and consumer impressions is not consistent with any evidence presented in the case.

32. The Novemsky Report acknowledges that “a test / control framework is appropriate when feasible and can be advantageous,” but states further that “a test / control framework is not appropriate when there is no suitable control group” or “when the nature of the deception cannot realistically be replicated in the survey environment.”⁴⁹ I agree that a test-vs.-control framework is appropriate and advantageous and that some method is necessary to establish causality (addressed below) and control for biases in a survey environment. If the Novemsky Survey were designed to avoid demand artifacts, it could have used a test-vs.-control framework to test the combined impact of many of Intuit’s advertising stimuli. The Novemsky Survey could have controlled for the influence of other advertising and website stimuli respondents may have viewed in the past by using an appropriate disguise, as I did in my own

“exposure to a single ad ‘result[ed] in significant lifts for all ads on perceptions around...allows you to file your taxes for free.’” Novemsky Report, ¶ 97.

⁴⁷ See, for example, Schkade, D.A. and Kahneman, D., 1998. “Does Living in California Make People Happy? A Focusing Illusion in Judgments of Life Satisfaction,” *Psychological Science*, 9(5), 340-346, INTUIT-FTC-PART3-000617064, p. 345 (“In allocating probabilities to events (e.g., various situations that might cause a car not to start in the morning), respondents tend to assign more weight to possibilities that are explicitly mentioned than to those implicitly lumped together in the ‘other causes’ category.”).

⁴⁸ Novemsky Report, ¶ 2.

⁴⁹ Novemsky Report, ¶ 31. The Novemsky Report itself relies on the results of an Intuit test-vs.-control study about advertisement copy. See, Novemsky Report, ¶¶ 97-98. See also, Section IV.F for a deeper discussion of this study.

Disclosure Efficacy Survey. Such disguised stimuli are clearly feasible and common in scientific studies. As I discuss in Section V, I designed a test-vs.-control experiment with video and website stimuli where I disguised the Intuit and TurboTax brand names as “Vertax.” By doing so, I was able to test for differences between test and control in respondents’ answers to my key questions, while minimizing any spurious effects on respondents’ answers of the TurboTax brand name.⁵⁰ Here too, the Novemsky Report’s claim that it would be impossible to construct a suitable control group is inaccurate given available research techniques.

33. Instead of actually testing whether or not stimuli could be disguised to account for the hypothesized cumulative effect, the Novemsky Report relies on the results of a “small sample” preliminary study to support the claim that a test-vs.-control design would not be appropriate. The small-sample study suggests only that consumers had existing beliefs, not that control stimuli are not feasible.⁵¹ The Novemsky Report claims that the “results of the preliminary study indicated that most consumers had existing beliefs about their ability to file for free using TurboTax,” relying on the finding that few respondents in this preliminary study responded “Not enough information” or “Not sure” when asked whether they thought they could file for free.⁵² The preliminary study itself is very similar to the Novemsky Survey. Like the Novemsky Survey, the preliminary study was not a test-vs.-control study, did not provide respondents with any stimuli (other than the TurboTax brand name), let alone specific advertising and website stimuli, relied on a biased and unrepresentative sample, and used similar leading question phrasing. For the same reasons that the Novemsky Survey does not control for or rule out survey noise; guessing; information from sources other than TurboTax advertisements, website, or disclosures; general beliefs about tax preparation software; and other causes, the

⁵⁰ In pretests for my Disclosure Efficacy Survey, while respondents noted that the website and advertisements seemed similar to other online tax company webpages, none mentioned that they thought the stimuli were created by or put out by Intuit TurboTax. See, **Appendix C-7**.

⁵¹ See, Novemsky Report, ¶ 33 and Novemsky Report backup, Workpaper 1. There were 208 respondents to the preliminary testing version of the Novemsky Survey. The preliminary study would be subject to the same guessing biases as the Novemsky Survey that I discuss below. This guessing bias would result in relatively few respondents reporting “Not enough information” or “Not sure”—not necessarily because most respondents have all the information they need to answer the question, as the Novemsky Report suggests, but because of an artifact of the survey design that encourages guessing. As a result, this preliminary test cannot be used as independent evidence of consumer existing beliefs, and only acts as a suggestion.

⁵² Novemsky Report, ¶ 33. The Novemsky Report cites to Workpaper 1 which appears to tabulate the responses to Question TAT240 which is a pilot version of Question TAT240 in the Novemsky Survey. See, Novemsky Report, Appendix D, p. 7; Novemsky Report, Appendix E, p. 8; Novemsky Report backup, Workpaper 1.

preliminary study cannot be used as evidence that a test-vs.-control design with stimuli would be inappropriate.

34. In a footnote, the Novemsky Report refers to “non-experimental Structural Equation Modeling” and “quasi-experimental designs” as alternatives to the full experimental, test-vs.-control design.⁵³ The Novemsky Report does not claim to have used either of the two methods. The Novemsky Report does not employ Structural Equation Modeling (SEM), which is “a collection of statistical techniques that allow a set of relationships between one or more independent variables (IVs) [...] and one or more dependent variables (DVs) [...] to be examined” and involves the analysis of the covariance structure among the variables.⁵⁴ There are no data in the Novemsky Report that would enable an expert to analyze the covariance structure among advertising and website stimuli and any of the outcomes measured in the Novemsky Survey.
35. The Novemsky Report does not employ a quasi-experiment survey design. In quasi-experiments, participants are observed in different groups based on their exposure to or experience with the treatment or stimulus. They either self-select into the groups or are assigned by non-random means such as the city in which they live. Respondents are not randomly assigned to experimental conditions and thus it is not possible to conclude from the quasi-experiment alone that exposure to or experience with the stimuli is what *causes* the observed outcome. For example, suppose that Intuit showed an advertisement in Media Market A, but not in Media Market B. Suppose further that all other Intuit advertisements were the same in both markets and shown just as often, that the website is available in both markets, that the markets have similar demographics, that there are no competitive advertising or other actions in one market but not the other, and that the markets are subject to the same socio-economic impacts. Then Media Market B could serve as a quasi-control for Media Market A. Causality is not assured because the two media markets might differ on unobserved variables, but experts could debate whether or not the two media markets are sufficiently similar. There

⁵³ See, Novemsky Report, footnote 31. See also, Jacoby, J., 2002. “Experimental Design and the Section of Controls in Trademark and Deceptive Advertising Surveys.” *Trademark Reporter*, 92(1), 890-956, INTUIT-FTC-PART3-000617112, p. 956.

⁵⁴ Ullman, J.B. and Bentler, P.M., 2012. “Structural Equation Modeling.” In *Handbook of Psychology Second Edition*, 661-690. John Wiley & Sons, Inc., INTUIT-FTC-PART3-000617020, p. 661.

are many other issues involved in the analysis of quasi-experiments, none of which are addressed in the Novemsky Report.⁵⁵

36. The Novemsky Survey surveys two groups of respondents – Group A which contains respondents who self-report that they have not used TurboTax in the last three years and Group B which contains respondents who self-report that they filed their taxes with a paid online version of TurboTax. The Novemsky Report provides no evidence that Group A was exposed to different advertisements and websites than Group B or vice versa. Thus, neither group can serve as a quasi-control for the other group for the purpose of establishing causality of Intuit’s advertisements or website. The Novemsky Report likewise provides no evidence that respondents in Group A and Group B would react similarly to TurboTax’s advertisements and website. On the contrary, it is likely that Group A respondents, who chose not to use TurboTax, have different preferences (and other characteristics) than Group B respondents, who chose to use TurboTax. Groups A and B differ on the dependent variable, the choice of using TurboTax, and, hence, neither is an appropriate quasi-control for the other.
37. According to the experimental design article cited in the Novemsky Report, “[a]lthough not as ‘clean’ as experiments, quasi-experiments also enable one to draw causal inferences and important treatises have been written on how this may be accomplished.”⁵⁶ An authoritative treatise written on the topic of quasi-experiments explains that for a quasi-experiment to be valid, the researcher has to rule out every single possible alternative explanation one by one to make sure the results could not be explained by any other systematic difference between experimental groups.⁵⁷ The Novemsky Report does not discuss, let alone rule out, any

⁵⁵ Shadish, W.R., Cook, T.D. and Campbell, D.T., 2002. “*Experimental and Quasi-Experimental Designs for Generalized Causal Inference*.” Houghton Mifflin Company, INTUIT-FTC-PART3-000606730, pp. 13-17.

⁵⁶ Jacoby, J., 2002. “Experimental Design and the Selection of Controls in Trademark and Deceptive Advertising Surveys.” *Trademark Reporter*, 92(1), 890-956, p. 902.

⁵⁷ “[Q]uasi-experimental design features usually create less compelling support for counterfactual inferences. For example, quasi-experimental control groups may differ from the treatment condition in many systematic (non-random) ways other than the presence of the treatment. Many of these ways could be alternative explanations for the observed effect, and so researchers have to worry about ruling them out in order to get a more valid estimate of the treatment effect. [...] In quasi-experiments, the researcher has to enumerate alternative explanations one by one, decide which are plausible, and then use logic, design, and measurement to assess whether each one is operating in a way that might explain any observed effect.” Shadish, W.R., Cook, T.D. and Campbell, D.T., 2002. “*Experimental and Quasi-Experimental Designs for Generalized Causal Inference*.” Houghton Mifflin Company, INTUIT-FTC-PART3-000606730, p. 14.

alternative explanations for the results of the Novemsky Survey that vary between any two identified groups of respondents.

38. The Novemsky Survey does not employ a test-vs.-control design and acknowledges that a test-vs.-control design was not used, does not and cannot identify any quasi-controls (nor claims to do so), does not have the data for an SEM analysis (nor claims to have used SEM analyses), and does not identify any other analyses that might establish causality. As a result, the Novemsky Report cannot rule out likely alternative explanations such as survey noise; guessing; the impact of information from sources other than TurboTax advertisements, website, or disclosures; general beliefs about tax preparation software; and other causes. The Novemsky Report claims that a test-vs.-control design would have been neither appropriate nor feasible. A test-vs.-control design would have been appropriate and feasible to establish whether TurboTax’s advertisements, website, and disclosures caused any effect on respondent impressions.⁵⁸ The Novemsky Report’s reliance on a preliminary study, highly similar to the Novemsky Survey, is circular and does not establish that a test-vs.-control design would not be feasible. For all of these reasons and for reasons cited elsewhere in this report, the Novemsky Report does not provide any evidence that TurboTax’s advertisements, website, or disclosures caused the impressions measured in the Novemsky Survey.

C. The Novemsky Survey Sample Is Not Representative of the Target Population and Is Biased

39. The Novemsky Report defines the Novemsky Survey’s target population as “potential taxpayers who *at the time the survey was conducted* were considering using an online tax software to file their 2021 taxes and would not have qualified for TurboTax Free Edition.”⁵⁹ The Novemsky Survey sample did not include respondents “who had already filed an income tax return in 2022,” at the point at which the survey was fielded.⁶⁰ The Novemsky Report

⁵⁸ My own Disclosure Efficacy Survey demonstrates by example that a test-vs.-control design is feasible.

⁵⁹ Novemsky Report, ¶ 21 (emphasis added). Note, this target population description differs from prior descriptions of the Novemsky Survey’s target population: “potential taxpayers who were considering using an online tax preparation service to file their 2021 taxes and do not qualify to file for free using TurboTax Free Edition.” See, Novemsky Declaration, ¶ 18.

⁶⁰ Novemsky Report, ¶ 22. Notably, according to the Second Novemsky Declaration, “[t]he target population for the survey, consumers who had not yet filed their taxes was important because these are the consumers who would be immediately protected by changes to Intuit’s marketing requested in this matter,” referring to Complaint Counsel’s request for a temporary restraining order and preliminary injunction in March 2022. See, Second Novemsky Declaration, ¶ 14.

extrapolates from this target population to opine on the perceptions of all “taxpayers who do not qualify to use TurboTax Free Edition under Intuit’s criteria”—a broader and different population than the stated target population for the Novemsky Survey.⁶¹ Thus, the stated target population and the screening procedures in the Novemsky Survey do not reflect a sample that is representative of “taxpayers who do not qualify to use TurboTax Free Edition under Intuit’s criteria,” and certainly does not reflect a sample that “can be generalized to the population at large with a degree of scientific certainty.”⁶²

40. The Novemsky Survey was in the field from March 11 to March 24, 2022 and only surveyed respondents who had not yet filed their taxes.⁶³ The Novemsky Report indicates that the “survey sample includes people who were planning to file their taxes in the last five weeks prior to the tax filing deadline as well as anybody who planned to file their taxes after having been granted an extension,” which “corresponds to a substantial portion of all tax filers,” or approximately 40% of tax filers.⁶⁴ Yet, to the extent that later filers are different from earlier filers, the timing of the Novemsky Survey would result in a non-representative sample, affecting the results from the survey and the overall conclusions of the Novemsky Report. The Novemsky Report does not discuss whether or not early filers and later filers are similar in their demographic characteristics, perceptions, willingness to choose TurboTax, or willingness to react to marketing communications. In fact, according to a 2018 study, early filers tend to be younger and have lower incomes than later filers.⁶⁵ Early filers also tend to be owed higher refunds. These discrepancies in demographics suggests that the Novemsky Survey’s respondents, none of whom could be considered an early filer, were not representative of the population of “taxpayers who do not qualify to use TurboTax Free Edition under Intuit’s criteria.”
41. There is significant potential for selection bias resulting from respondents being able to opt-out of the survey after completion. At the end of the survey, the Novemsky Survey informs

⁶¹ Novemsky Report, ¶¶ 8, 10.

⁶² Novemsky Report, ¶¶ 5, 8, 10.

⁶³ Novemsky Report, ¶ 22.

⁶⁴ Novemsky Report, ¶ 22, footnote 20.

⁶⁵ Farrell, D., Greig, F. and Hamoudi, A., “Filing Taxes Early, Getting Healthcare Late,” *JPMorgan Chase & Co.*, April 2018, available at <https://www.jpmorganchase.com/institute/research/healthcare/insight-filing-taxes-early#finding-1>, INTUIT-FTC-PART3-000606964.

respondents about the sponsor of the survey (the FTC), the entity being investigated (Intuit), and the purpose for the survey (an investigation into “unfair and deceptive conduct”).⁶⁶ The survey specifically explains that “[t]he FTC investigates unfair and deceptive conduct by companies. The information you provide could help us further our mission under the FTC Act to protect consumers” and that “[t]he information collected in this survey may be made available to others (for example, in the course of litigation against companies for potential alleged violations of consumer protection laws, or if required by a court).”⁶⁷ The survey then asks respondents if they would like to delete or keep their submission.⁶⁸ According to the Novemsky Report, 164 respondents chose to delete their submissions after seeing this information.⁶⁹ Although the Novemsky Report suggests that “there is no evidence to suggest that the set of opted-out respondents would have systematically different responses than the set that opted-in,” the lack of evidence is only the case because these data were not recorded.⁷⁰ Critically, respondents who request to opt-out may differ substantially from respondents who do not opt-out. Such respondents may differ in ways that are unobservable because the Novemsky Survey collected no such data, raising the likelihood of bias in the final sample population. For example, respondents with more positive views of TurboTax may have exited the survey after learning that the survey was designed to be used *against* TurboTax.⁷¹

⁶⁶ See, Novemsky Report, Appendix E, p. 11. Professor Novemsky states that he “was informed by Counsel that when a survey is commissioned by a federal agency, federal law requires the disclosure of the agency’s authority, purpose, routine uses, whether the survey is voluntary or mandatory, and the consequences (or lack thereof) if the requested information is not provided.” See, Novemsky Report, ¶ 50. I note that respondents to the Novemsky Survey were drawn from two well-established panels, Dynata and Schlesinger Group, who typically ensure that responses are anonymous and cannot be tied to respondents. See, Novemsky Report, ¶ 53. Respondents were promised that “answers will be kept confidential.” See, Novemsky Report, Appendix E, p. 1. I am not an attorney; hence I cannot comment on interpretation of the relevant laws discussed in the Novemsky Report. Nonetheless, the survey bias remains and could be substantial.

⁶⁷ Novemsky Report, Appendix E, p. 11.

⁶⁸ Novemsky Report, Appendix E, p. 11.

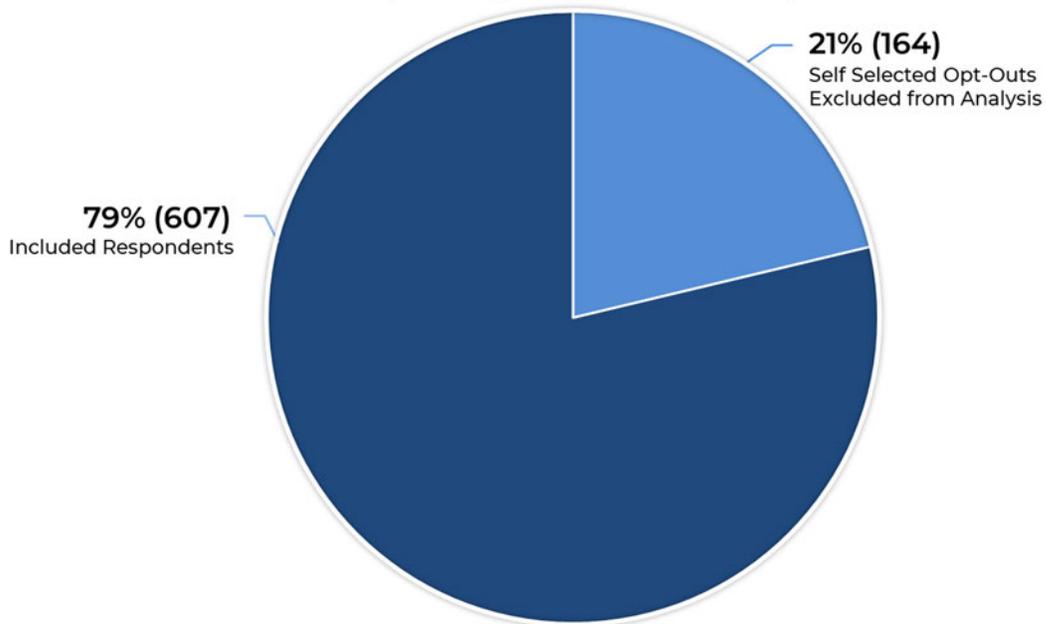
⁶⁹ Novemsky Report, ¶ 51.

⁷⁰ Novemsky Report, ¶ 51.

⁷¹ The Novemsky Report includes a sensitivity analysis in which the ‘opt-out’ respondents were assigned to Group A, finding that including the 164 respondents in the Group A denominator would reduce the share of respondents who believe they can file for free to 37.5%. To the extent that TurboTax users were more likely to exit the survey after learning it was designed to be used against TurboTax, an appropriately conservative sensitivity analysis would be an analysis assigning all ‘opt-out’ respondents to Group B, as former TurboTax users. Such a sensitivity analysis would have resulted in a confusion rate of 13.4% for Group B respondents. See, “Adjusted Novemsky Opt-Out.xlsx.” Even these percentages are an overestimate for the reasons I have stated elsewhere in this report,

Furthermore, despite the Novemsky Report’s characterization that 164 opt-outs “is only a fraction of the total [771] completes,” and that “any effect the opt-outs would have on the survey results is limited,” these 164 opt-outs represent more than 21% of the entire sample that completed the Novemsky Survey, as shown in Figure 1 below. To the extent the 164 opt-outs did have more favorable views of TurboTax, including them in overall population could reduce the rate of purported misimpressions from 43.2% (262 out of 607 respondents) to 34.0% (262 out of 771 respondents).⁷² The Novemsky Report inappropriately dismisses out of hand the potential bias created when more than 21% of the survey sample self-selects out of the sample when notified of the sponsor and purpose of the survey.

Figure 1
Novemsky Survey Respondents and Opt-Outs⁷³



42. Lastly, it is typical in surveys for the purposes of litigation to ask respondents if they are familiar with any litigation that relates to the issues addressed in the survey or more generally the parties to the litigation. Such consumers may react to the parties’ advertisements, websites, or products differently than consumers who are not aware of relevant litigation. The facts at

including the lack of a control group. See, Novemsky Report, ¶ 71; Second Novemsky Declaration, Opt-Out Sensitivity, GX-314.

⁷² Novemsky Report, ¶ 51.

⁷³ Novemsky Report, ¶ 51.

issue in the FTC’s investigation into Intuit have received substantial media attention for the past several years.⁷⁴ The focus on TurboTax and whether or not respondents believe they can file for free throughout the Novemsky Survey would likely clue in any respondents familiar with the allegations to the purpose of the survey. The Novemsky Survey does not appear to ask any questions to identify such respondents and therefore cannot analyze them separately or screen them out.⁷⁵

43. Together, (1) the exclusion of early filers who tend to be younger, lower-income, and who tend to receive higher refunds; (2) the elimination of opt-out respondents who are likely to be favorable toward Intuit; and (3) the potential inclusion of “litigation aware” respondents and respondents who are likely to be informed on the “free” issue through their knowledge of the litigation suggest that the sample upon which the Novemsky Report is based has potentially serious issues with non-representativeness.

D. The Novemsky Survey Asks Leading Questions that Likely Create Demand Artifacts

44. The Novemsky Report claims that the Novemsky Survey was designed following “best practices to minimize the possibility of bias and avoid potential demand artifacts”⁷⁶ and following “standard scientific methods to ensure the reliability of the results” such that “[t]he questions asked were clear and not leading”⁷⁷ Yet, several elements in the screening and main questionnaire of the Novemsky Survey are likely to create demand artifacts and lead

⁷⁴ See, Elliot, J., “The FTC Is Investigating Intuit Over TurboTax Practices,” *ProPublica*, September 8, 2020, available at <https://www.propublica.org/article/the-ftc-is-investigating-intuit-over-turbotax-practices>, INTUIT-FTC-PART3-000606961; Sandler, R., “FTC Probes Intuit Over Suspicions It Diverted TurboTax Users From Free Filing,” *Forbes*, September 8, 2020, available at <https://www.forbes.com/sites/rachelsandler/2020/09/08/ftc-probes-intuit-over-suspicions-it-diverted-turbotax-users-from-free-filing/?sh=2f7d8bec265a>, INTUIT-FTC-PART3-000607238.

⁷⁵ Both my Disclosure Efficacy Survey and Purchase Driver Survey asked respondents whether they were aware of any media reports, investigations, or lawsuits involving tax preparation websites or providers and found that 24.4% of the Disclosure Efficacy sample (conducted in 2022) and 13.1% of the Purchase Driver Main Analytical Sample (conducted in 2021) indicated being “litigation aware.” See, “Disclosure Efficacy Backup Calcs.xlsx” and “Purchase Driver Backup Calcs.xlsx.” Sensitivities on my analyses demonstrated that my results were robust to the inclusion of these respondents. See, Sensitivities 1a-1e and 7a-7b. The Disclosure Efficacy Survey disguised the tax preparation service (Vertax) and the Purchase Driver Survey was not specific to TurboTax. On the other hand, TurboTax is explicit throughout the Novemsky Survey. Thus, the lack of sensitivity to “litigation aware” respondents in my surveys cannot be used as evidence that the Novemsky Survey would have found a lack of sensitivity had it asked questions to identify “litigation aware” respondents.

⁷⁶ Novemsky Report, ¶ 57.

⁷⁷ Novemsky Report, ¶ 19.

respondents into providing certain responses favorable to Complaint Counsel’s position, undermining the Novemsky Report’s claims to best practices and standard scientific methods. Demand artifacts “include all aspects of the experiment [or survey] which cause the subject to perceive, interpret, and act upon what he [or she] believes is expected or desired of him [or her] by the experimenter.”⁷⁸ Specifically, “[s]elf-reports of behaviors and attitudes are strongly influenced by features of the research instrument, including question wording, format, and context.”⁷⁹ As evidence of demand artifacts, it is notable that six of the Novemsky Survey respondents specifically indicated in their open-ended responses that elements of the survey influenced their responses.⁸⁰ Respondents who “voice” demand artifacts are indicative of a potentially more-pervasive set of respondents who are affected by demand artifacts but do not “voice” concerns. For example, in response to the question asking respondents why they believe they can file their taxes for free (TAT250), one respondent noted that “[b]ecuae [sic] this survey is suggesting that I can file it for free,”⁸¹ while another noted that “[i]t’s been said a few times now during survey that you can file for free using TurboTax.”⁸² To have respondents actively note the impact of the survey on their answers without prompting is strongly indicative of a more widespread demand artifact issue. As discussed below, the Novemsky Survey likely creates demand artifacts and biases in favor of Complaint Counsel and cannot be used as evidence of consumer deception or confusion.

⁷⁸ Sawyer, A.G., 1975. “Demand Artifacts in Laboratory Experiments in Consumer Research.” *Journal of Consumer Research*, 1(4), 20-30, INTUIT-FTC-PART3-000606146, p. 20.

⁷⁹ Schwarz, N., 1999. “Self-Reports. How the Questions Shape the Answers.” *American Psychologist*, 54(2), 93-105, INTUIT-FTC-PART3-000606158, abstract.

⁸⁰ Novemsky Survey Data. Five respondents gave responses indicative of demand artifacts in response to question TAT250: Respondent ID 1175 (“I think I can file for free because it was mentioned in this survey and I have seen advertising for this product.”), Respondent ID 1610 (“It is evident form [sic] the past questions that it is free.”), Respondent ID 5708 (“It’s been said a few times now during survey that you can file for free using TurboTax.”), Respondent ID 5783 (“Because you keep yelling [sic] me I can”), and Respondent ID 10394 (“Becuae [sic] this survey is suggesting that I can file it for free”). One respondent gave a response indicative of a demand artifact in response to question TAT270: Respondent ID 1836 (“Just to be told that I can. I’m assuming since this has been asked 4 times that it must be free.”).

⁸¹ Novemsky Survey, Respondent ID 10394.

⁸² Novemsky Survey, Respondent ID 5708.

1. *The Novemsky Survey’s Key Question on Respondents’ Ability to File for Free Encourages Guessing and Is Unreliable*

45. TAT240, shown in Figure 2 below, is the Novemsky Survey’s key question to assess “the likelihood of [taxpayers who are not eligible to use a free version of TurboTax] having the misimpression that they can file their income taxes for free using TurboTax.”⁸³

Figure 2
Novemsky Survey: TAT240

TAT240. You may have already said this above, but please tell us again, which of the following best describes your understanding of filing your 2021 income taxes for free using TurboTax online software?

Select one only.

[PROGRAMMER: RANDOMIZE ASCENDING / DESCENDING 1 to 3. KEEP 4 LAST.]

[IF RESPONDENT SELECTS 1, GO TO TAT250]

[IF RESPONDENT SELECTS 2, GO TO TAT260]

[IF RESPONDENT SELECTS 3, GO TO TAT270]

[OTHERWISE GO TO TAT290]

1. I think I can file my 2021 income taxes for free using TurboTax online software
2. I don’t think I can file my 2021 income taxes for free using TurboTax online software
3. I do not have enough information to say whether or not I can file my 2021 income taxes for free using TurboTax online software
4. I’m not sure

46. Respondents do not like to admit that they do not know the answer to something and can be prone to guessing, especially if encouraged to do so through the question framing.⁸⁴ As designed, the framing of question TAT240 provides respondents with license to guess. First, the question phrasing “*which of the following **best** describes your **understanding***” (emphasis added) encourages guessing if the respondent is unsure. Second, using the introductory phrase “*I think...*” as a qualifier to the response options encourages respondents who have some doubt to select one of the two “Yes...” or “No...” options rather than “I do not have enough information.” The Novemsky Report describes having “deliberately used phrases that let

⁸³ Novemsky Report, ¶ 4.

⁸⁴ The Novemsky Report claims that the Novemsky Survey prevents guessing by presenting “a clear set of choices,” using quasi-filters (“I do not have enough information,” “I’m not sure”), and directing respondents not to guess. Novemsky Report, ¶ 58. However, the format of the question and answer options in TAT240 would undermine the benefits of these techniques.

respondents express their state of mind, [...] rather than more definitive wording that expresses certainty or specific knowledge.”⁸⁵ The Novemsky Report does not discuss why, contrary to this statement, the remaining options in TAT240 do not include the words “*I think*,” and are rather stated definitively as “*I do not have*” and “*I’m not sure*.”

47. The Novemsky Report thus acknowledges that there could be a range of certainty in respondents’ understanding of their ability to file for free, yet the Novemsky Survey does not take any steps to measure or control for this range in respondent certainty. The Novemsky Report presents the results of the Novemsky Survey data as though respondents definitively have such misimpressions, concluding that “[a] substantial portion of the taxpayers who do not qualify to use TurboTax Free Edition under Intuit’s criteria *have the misimpression* that they can file their income taxes for free using TurboTax.”⁸⁶
48. Even though Intuit explicitly provides criteria by which consumers qualify for free filing, the Novemsky Survey chooses not to make these criteria available and, thus, the responses to question TAT240 are not externally valid in the sense that such information is available to consumers in the marketplace. The absence of this information in the survey related to actual TurboTax advertisements, website, or disclosures will likely lead respondents to be overly optimistic about their ability to file for free. At the point of responding to the survey, respondents may hold aspirational expectations that they can file for free with TurboTax—not because of Intuit’s advertisements, website, or disclosures—but because they have seen other offers for free tax preparation support from competitors with different qualification criteria (or possibly even used these competitor products for free);⁸⁷ because they have an impression that the qualification rules have changed over time; or because they simply would like to believe

⁸⁵ Novemsky Report, ¶ 49.

⁸⁶ Novemsky Report, ¶ 8 (emphasis added).

⁸⁷ For example, H&R Block Free Online currently covers several situations which are not included in TurboTax Free Edition, such as Form 1098-T (Tuition and Fees Statement), Form 8863 (Education Credits), and Form 8615 (Tax for certain children with investment income). See, “H&R Block Free Online vs. TurboTax Free Edition: Get More FREE with Block,” *H&R Block*, available at <https://www.hrblock.com/tax-center/around-block/offers/hrblock-free-vs-turbotax-free/>, INTUIT-FTC-PART3-000606980. The Complaint also refers to Credit Karma’s free tax preparation as a reason consumers might have believed that TurboTax was free for all consumers: “at least one of TurboTax’s competitors, Cash App Taxes (formerly Credit Karma Tax), has offered a truly free online tax preparation and filing service to all consumers for five years. Further, online products and services in many industries are routinely offered to consumers completely free of charge, leading consumers to understand that online tax preparation products and services are often truly free.” See, Complaint, ¶ 35.

that they could file for free.⁸⁸ As noted earlier, the inclusion of the “I think...” qualifier in the answer options to this question gives respondents license to guess when they have very little information. It is fully reasonable that, in the absence of any information provided by the survey itself and having not yet filed taxes for the year, respondents would not know for sure whether they would qualify for a particular tax preparation provider’s free product, and therefore, would be more prone to guessing in the Novemsky Survey.

49. The Novemsky Report claims that “[t]o the extent that respondents guess (despite the instructions [to not guess]), their guesses would likely be based on their impression of whether they can file their 2021 income taxes for free through TurboTax, an impression resulting from years of being exposed to Intuit’s advertising.”⁸⁹ This statement is, at best, an assumption. The statement assumes the outcome that the Novemsky Survey is trying to test. The Novemsky Report provides no direct evidence that Intuit’s advertising is the source of respondents’ impressions. Moreover, the Novemsky Report implies that guessing is acceptable, suggesting that “many of the questions included in the survey—such as TAT240—are the types of questions respondents would need to answer for themselves when considering whether to use TurboTax online software.”⁹⁰ Guessing in a survey context, especially based on leading questions, is not equivalent to consumers having a distinct “misimpression” that they can file for free as a result of Intuit’s advertising and marketing, and then acting on that “misimpression” to consider or choose TurboTax.
50. The Novemsky Report even notes that the direction of a “guessing bias” is also likely to lean in Complaint Counsel’s favor. First, the Novemsky Report acknowledges that respondents “are more likely to answer ‘yes’ to [the question regarding simple returns] because motivated reasoning, wishful thinking and optimistic bias, will drive many consumers to give themselves the answer that is advantageous for them—namely, that their tax return is indeed simple and therefore they can file for free.”⁹¹ The Novemsky Report itself hypothesizes a bias toward “yes” that would influence respondents’ answers to the question of whether or not they believe

⁸⁸ See, for example, Novemsky Report, ¶ 87. The Novemsky Report acknowledges that “motivated reasoning, wishful thinking and optimistic bias, will drive many consumers to give themselves the answer that is advantageous for them...”

⁸⁹ Novemsky Report, ¶ 59.

⁹⁰ Novemsky Report, ¶ 59.

⁹¹ Novemsky Report, ¶ 87.

that they can file for free, even when they have full information in the marketplace and are making a choice of which tax preparation to use.⁹² By endorsing these phenomena as explaining respondents' answers, the Novemsky Report provides an alternative explanation, other than Intuit's advertisements and website, why consumers may believe they could file their taxes for free. Second, the Novemsky Report opines further that "[m]odern consumers, particularly those who are familiar with online products, are not inherently skeptical that a product can be free, as they have been conditioned by years of exposure to numerous free and 'freemium' products, like the Google suite of products, Facebook, or smart phone games, to name a few."⁹³ Taking the Novemsky Report's characterization of consumer expectations at face value implies that consumers are likely to believe that products can be free, and so when asked in a survey, consumers may be more likely to guess that a product is free than to guess that it is not free. Based on the hypothesis in the Novemsky Report, a "guessing bias" with respect to this key question of whether respondents believe they can file for free would have an inflationary bias consistent with Complaint Counsel's allegations, undermining the reliability of the Novemsky Survey's data and findings.

51. As evidence of a "guessing bias," only a relatively small share of respondents responded that they "do not have enough information to say," or are "not sure."⁹⁴ This is particularly true for

⁹² Novemsky Report, ¶ 59. ("Additionally, many of the questions included in the survey—such as TAT240—are the types of questions respondents would need to answer for themselves when considering whether to use TurboTax online software.")

⁹³ Novemsky Report, ¶ 81. Of note, Professor Novemsky previously claimed that to the extent respondents were guessing, they would be unlikely to 'guess' that a product was free: "Furthermore, even if consumers were merely guessing without relying on Intuit's marketing, it is unlikely that consumers would guess that the product was free when the vast majority of products are not free." See, Second Novemsky Declaration, ¶¶ 10, 18.

⁹⁴ The Novemsky Report interprets a low rate of "do not have enough information to say" and "not sure" responses as evidence that respondents have pre-existing beliefs. See, Novemsky Report, ¶ 33. However, academic literature has shown that it can be problematic to assume that respondents carry the same certainty in their beliefs. See, for example, Beebe, B. et al., 2021. "The Role of Consumer Uncertainty in Trademark Law: An Experimental and Theoretical Investigation." *Law and Economics Research Paper Series*, No. 21-13, INTUIT-FTC-PART3-000617190, p. 5 ("[L]eading survey formats inquire into consumer beliefs without providing any way for respondents to *indicate the strength with which they hold a particular belief*; i.e., their 'belief strength' or 'attitude strength.' While it is true that each format now conventionally provides respondents with the option to respond 'Don't know/No opinion,' decades of experience show that in many settings only very low proportions of respondents resort to that response." Emphasis in original.); p. 6 ("In a sense, the way the survey is framed causes uncertainty to disappear and makes all beliefs appear equal regardless of how strongly or weakly-held they really are at the individual level."); p. 7 ("Consumers, especially when asked to make decisions based on little information or experience, operate in an environment of uncertainty. In such conditions, many consumers will believe various propositions to be more or less likely true, and the beliefs of consumers with a low level of certainty are more likely to be unstable (i.e., subject to change based on small changes in context, including small changes in the way the

Group A, which includes taxpayers who have not used TurboTax to file their taxes in the past three years and have not yet filed their taxes for the 2021 tax year, and therefore are unlikely to have had as much exposure to the information and disclosures related to qualifications that are available on the TurboTax website. Yet only 20% (80/404) of respondents with no TurboTax experience in the last three years indicated they couldn't answer definitively.⁹⁵ With little or no prior experience with TurboTax *and* having been provided no information about the allegedly deceptive TurboTax advertisements, website, or disclosures, Group A is particularly prone to guessing. In light of this implicit permission to guess, it is no wonder that 80% (324/404) of these respondents provided a definitive answer that they think they can or can't file for free.⁹⁶

52. The Novemsky Survey's Group B results reveal a potential bias towards over-reporting of respondents' beliefs about being able to file for free. The Novemsky Survey finds that 24.1% of Group B respondents (49/203) report that they think they could file for free, when they have also reported that they filed their taxes with TurboTax and *did not* file for free in the past three years.⁹⁷ These respondents have not been exposed to allegedly deceptive claims through the Novemsky Survey and have prior experience that indicates that they could not file for free, yet a large proportion still report that they believe they could file for free.⁹⁸ According to the Second Novemsky Declaration, the "[h]igh response rates in Group B [...] are evidence of the reach of Intuit's marketing campaign, clearly overcoming consumers' reliance on their experience of paying for TurboTax."⁹⁹ The subsequent Novemsky Report only suggests that "[t]o the extent that these respondents' misimpressions result from Intuit's advertising, this provides some indication of the power of 'free' messaging, and its potential to overcome even past experiences of those who have previously paid to use TurboTax."¹⁰⁰ The Novemsky Report does not offer any evidence of the "extent to which these respondents' misimpressions result from Intuit's advertising." The Novemsky Report also fails to acknowledge that the

belief is elicited in a survey question). And, perhaps not surprisingly, the certainty—or lack of certainty—with which consumers hold beliefs is likely to shape their behavior in the marketplace.”).

⁹⁵ See, “Novemsky Survey Backup Calcs.xlsx.”

⁹⁶ See, “Novemsky Survey Backup Calcs.xlsx.”

⁹⁷ Novemsky Report, Figure 1.

⁹⁸ Novemsky Report, ¶ 8.

⁹⁹ Second Novemsky Declaration, ¶ 19.

¹⁰⁰ Novemsky Report, ¶ 70.

repeated use of the word “free” in the Novemsky Survey itself could have led these respondents to answer as they did, rather than Intuit’s advertisements, website, or disclosures. To the contrary, this large Group B percentage demonstrates the biased nature of this key question in the Novemsky Survey and is not, as the Novemsky Report would suggest, evidence of deception.

53. Further evidence of the biased nature of Question TAT240 is provided by an examination of the Novemsky Survey respondents’ open-ended responses. Two independent coders, who were blind to any hypotheses, were directed to review the responses to the Novemsky Survey’s two open-ended questions related to respondents’ understanding of their ability to file their 2021 income taxes for free with TurboTax. Both open-ended questions directly preceded the Novemsky Survey’s key question TAT240.¹⁰¹ The Novemsky Report explains that the goal of asking these two open-ended questions “and getting the respondents to explain their thoughts in their own words,” was to “‘center’ the respondents and get them to think actively about the issues of interest in this case[.]”¹⁰² The Novemsky Report does not, however, appear to consider or analyze respondents’ open-ended responses relative to their response to the closed-ended question, TAT240.
54. The independent coders categorized respondents according to the response options provided as part of TAT240. The independent coders’ categorizations were compared to respondents’ answers to TAT240.¹⁰³ As shown in Table 1 and Figure 3 below, when taking their open-ended responses into consideration (TAT220/TAT230), the share of respondents who believe that they can file for free is significantly lower (16.8% across all 607 respondents) than when considering respondents’ closed-ended answer choices in isolation (43.2% across all 607

¹⁰¹ These questions include TAT220 and TAT230. See, Novemsky Report, Appendix E, p. 7 (“What is your understanding about whether or not there is a cost to filing your own income taxes using TurboTax online software?”); (“You may have already said this above, but please tell us again, in your understanding, who, if anyone, can file their taxes for free using TurboTax online software?”).

¹⁰² Novemsky Report, ¶ 45.

¹⁰³ See, **Appendix E** for the instructions provided to the independent coders. Upon reviewing the open-ended answers, the independent coders opted to include two additional categories to categorize respondents: “Respondent contradicted themselves across open-ended responses” and “Respondent provided non-responsive open-ended responses.” Full results of the independent coding, including analysis by Novemsky Survey group, are included in my backup.

respondents).¹⁰⁴ This expanded analysis reveals the inherent bias in the Novemsky Survey’s TAT240 question and the bias in the Novemsky Report’s limited analysis of the available data.

Table 1
Adjusted Novemsky Report Figure 1
Using Closed-Ended and Open-Ended Responses

Adjusted Response to TAT240^[1]	Total	
	<i>N</i>	%
<u>I think I can file my 2021 income taxes for free with with TurboTax</u>	102	16.8%
<u>I don’t think I can file my 2021 income taxes for free with with TurboTax</u>	137	22.6%
<u>I do not have enough information</u>	75	12.4%
I’m not sure	26	4.3%
<i>Inconsistent Respondents^[2]</i>	267	44.0%
Total Respondents	607	

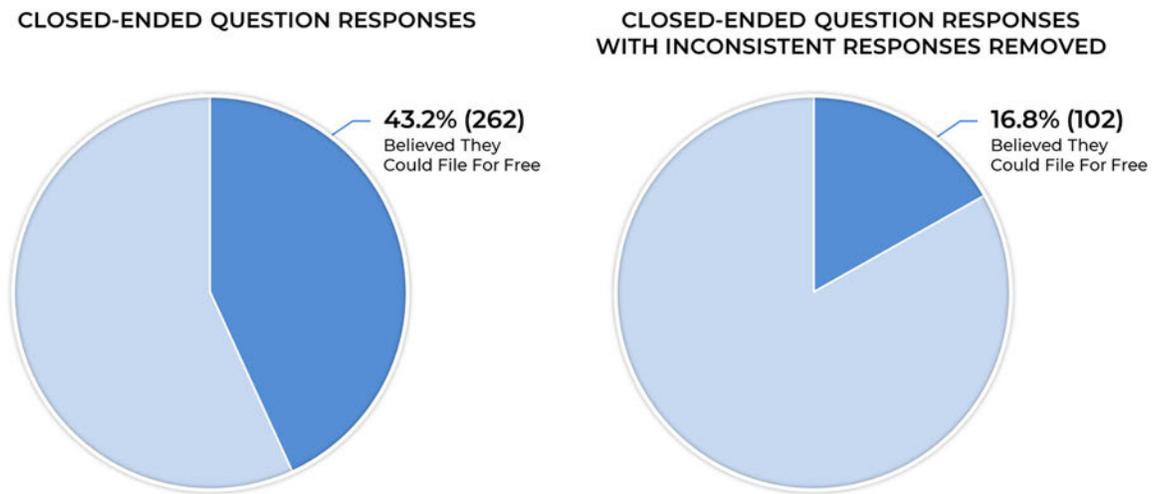
Notes:

[1] Based on independent coding of open-ended responses to TAT220 and TAT230. Response counts in Table 1 for “I think I can file [...]” and “I don’t think I can file [...]” exclude respondents who contradicted themselves between open-ended and closed-ended responses, respondents who contradicted themselves between open-ended responses, and respondents who answered conclusively in a closed-ended response but expressed uncertainty in their open-ended response. Respondents with non-responsive open-ended responses were not included in the inconsistent respondent count.

[2] Inconsistent respondents consist of respondents who selected “I think I can file [...]” or “I don’t think I can file [...]” and either contradicted themselves between open-ended and closed-ended responses, contradicted themselves between open-ended responses, or answered conclusively in a closed-ended response but expressed uncertainty in their open-ended response.

¹⁰⁴ The 43.2% consists of 213 respondents in Group A and 49 respondents in Group B. See, Novemsky Report, Figure 1.

Figure 3
Novemsky Survey: Comparison of Respondent Understanding Based on Closed-Ended Responses Alone and With Inconsistent Responses Removed¹⁰⁵



2. *The Novemsky Survey’s Source Question Cannot Be Used to Reliably Establish the Source of Respondents’ Impressions*

55. Rather than testing for causal relationships between respondents’ impressions and the allegedly deceptive statements and disclosures, the Novemsky Survey includes a set of questions (TAT255 and TAT265) asking respondents directly: “*You have stated that you [think/don’t think] you can file your 2021 income taxes for free using TurboTax online software. Which of the following sources played a role in you forming that impression? Select all that apply*”¹⁰⁶

The response options include:

- “TurboTax advertisements;”
- “TurboTax website;”
- “Word of mouth (such as information from family, friends, etc.);”
- “Advice from a financial professional (such as an accountant or a tax preparer);”
- “Information online not from TurboTax (such as articles on websites, blog posts, etc.);”

¹⁰⁵ See, Novemsky Report, Figure 1. See, Table 1.

¹⁰⁶ Novemsky Report, Appendix E, pp. 8-9.

- “Other;” and
- “Don’t know / Not sure.”

56. Questions TAT255 and TAT265 are at best a memory test and do not establish causality. Because there is no control whatsoever, the Novemsky Report cannot rule out that the results of the Novemsky Survey are driven by the myriad flaws in this question (and the overall Novemsky Survey) that render it unusable to establish the origin of respondents’ perceptions. The Novemsky Report also cannot rule out any other sources of information (other than the at-issue communications) that led to consumer beliefs for several reasons.
57. First, Questions TAT255 and TAT265 are subject to a demand artifact. Demand artifacts include any parts of the survey which cause respondents to form an interpretation of the purpose of the study and change their behavior to align with what they believe is desired by the experimenter.¹⁰⁷ With the focus throughout the survey on TurboTax, and that the list of options provided included two TurboTax sources, but not other advertising or website sources, respondents are encouraged to guess that these sources are the sources of origin. Although the Novemsky Survey instructs respondents not to guess when they do not know an answer or when they do not have an opinion,¹⁰⁸ the Novemsky Report provides no evidence that this small instruction early in the survey would address the tendency among respondents to want to provide an answer.
58. Second, despite the quasi-filter (Don’t Know / Not Sure), the completeness of response options matter.¹⁰⁹ The phrasing of the prompt, “*Which of the following ...*,” makes it more likely the respondent will select from one of the options if one of the options is plausible. The respondents are more likely to choose from the options provided than from options not

¹⁰⁷ Schwarz, N., 1999. “Self-Reports. How the Questions Shape the Answers.” *American Psychologist*, 54(2), 93-105, INTUIT-FTC-PART3-000606158, pp. 96, 99-100.

¹⁰⁸ Novemsky Report, Appendix E, pp. 1, 7.

¹⁰⁹ Failing to make explicit reasonable responses can have a material impact on respondents’ answers. This impact has been accepted by courts. In a previous matter, I modified a survey by Professor Ravi Dhar to explicitly include some response options that were not included in the original survey. Respondents’ answers were substantially different in my revised survey than in the original survey, and the court found “the original Dhar Survey to be seriously flawed.” *In re Determination of Royalty Rates and Terms for Transmission of Sound Recordings by Satellite Radio and “Preexisting” Subscription Services (SDARS III)*, Docket No. 16-CRB-0001 SR/PSSR (2018-2022), United States Copyright Royalty Board, the Library of Congress.

provided.¹¹⁰ Because advertisements or websites are common sources of information, the respondent is encouraged to guess that these sources are the source of origin. Items such as websites of other tax preparation services are not listed. Intuit is far from the only provider that advertises free filing.¹¹¹ Respondents may have seen advertising from competing tax preparation providers that advertise their own free options or that compare their tax preparation offerings to TurboTax.¹¹² In particular, the Novemsky Survey's Group A respondents self-reported that they are not recent TurboTax customers and therefore are more likely to have had recent experiences and familiarity with competing tax preparation providers. Egregiously missing from the list of response options is the respondents' own experience.¹¹³ Every respondent in Group B has filed for a fee with TurboTax in the past three years and it is likely that many respondents in Group A have filed with another tax preparation service in the past

¹¹⁰ See, Diamond, S.S., 2011. "Reference Guide on Survey Research." In *Reference Manual on Scientific Evidence*, 359-423, The National Academies Press, INTUIT-FTC-PART3-000603471, p. 392 ("The response alternatives in a closed-ended question may remind respondents of options that they would not otherwise consider or which simply do not come to mind as easily."); Beebe, B. et al., 2021. "The Role of Consumer Uncertainty in Trademark Law: An Experimental and Theoretical Investigation." *Law and Economics Research Paper Series*, No. 21-13, INTUIT-FTC-PART3-000617190, p. 7 ("Consumers, especially when asked to make decisions based on little information or experience, operate in an environment of uncertainty. In such conditions, many consumers will believe various propositions to be more or less likely true, and the beliefs of consumers with a low level of certainty are more likely to be unstable (i.e., subject to change based on small changes in context, including small changes in the way the belief is elicited in a survey question). And, perhaps not surprisingly, the certainty—or lack of certainty—with which consumers hold beliefs is likely to shape their behavior in the marketplace.").

¹¹¹ I understand that the Deal Report includes a comparison of different free digital DIY Tax product offerings, including TurboTax Free Edition, H&R Block Free Online, Tax Slayer Simply Free, and CashApp Taxes. See, Expert Report of Bruce Deal, In the Matter of: Intuit Inc., a corporation, Docket No. 9408, January 13, 2023 ("Deal Report"), Appendix C.

¹¹² To the extent that any consumers relied on advertisements to inform their choice of a tax preparation provider, they may also have been exposed to competitors' advertisements that point to limitations on who can use TurboTax for free. For example, H&R Block's current advertising of its Free Online product states, "[t]he best part about doing things yourself? It's free. Like doing your own taxes with H&R Block Free Online." The advertisement then goes on to draw a direct comparison with TurboTax Free Edition by claiming that "more people can file free [with H&R Block] than with TurboTax." See, "File Online Free," *H&R Block*, February 14, 2022, available at <https://www.youtube.com/watch?v=EnzdfD0bcr4>, INTUIT-FTC-PART3-000593208. See also, Intuit, "FY21/TY20 OA & PR/Comms Plans on a Page WIP," July 2020, INTUIT-FTC-PART3-000602376, slide 21.

¹¹³ The Second Novemsky Declaration suggests that "if consumers were not able to indicate their prior experience as a source of their information and randomly selected among other sources, one would expect those guesses to be evenly distributed among the answer options, not concentrated on any of the options presented." See, Second Novemsky Declaration, ¶ 11. Professor Novemsky offers no evidence that respondents would respond to the absence of this option by "randomly selecting among other sources." Rather, given the clear focus throughout the survey on TurboTax and the demand artifacts discussed above, it is highly unlikely that respondents would follow a "random" guessing pattern, but instead would focus their guesses on responses consistent with Complaint Counsel's hypothesis.

three years. Had these sources of information been provided explicitly, the answers to this question would likely have been substantially different.

59. Third, consumer recall about the source of an impression is subject to bias. For example, an article in *Psychological Science* begins: “In everyday life, it is commonplace to remember a fact without its source.”¹¹⁴ When answering recall questions about the source of an impression, respondents may use cues from their general knowledge and expectations as well as the question context in addition to what they retrieve from memory about the source. Academic literature has shown that respondents are not able to accurately recall the source from which they obtained information. This phenomenon is called “source amnesia,” which is a well-known construct defined as “[f]ailing to remember the source of retrievable information.”¹¹⁵ Long-term source amnesia occurs “regardless of whether respondents expected to report the source information.”¹¹⁶ The Novemsky Survey does not specify a time frame over which respondents need remember the source of their information, but that time frame can be months or even years.¹¹⁷ Respondents’ responses are likely affected by source amnesia. The Novemsky

¹¹⁴ Chen, H., Carlson, R.A. and Wyble, B., 2018. “Is Source Information Automatically Available in Working Memory?” *Psychological Science*, 29(4), 645-655, INTUIT-FTC-PART3-000617050, p. 645.

¹¹⁵ Xu, M. et al., 2020. “Source Information is Inherently Linked to Working Memory Representation for Auditory but not for Visual Stimuli.” *Cognition*, 197(104160), INTUIT-FTC-PART3-000617179, abstract, p. 1 (“We all have some experience of remembering the content of a particular event but forgetting where and when the event occurred, or how we acquired the knowledge of the event. This is a well-known phenomenon, namely source amnesia (also known as source misattribution, source forgetting, source-monitoring error, and source error; Mitchell & Johnson, 2009).”). Contrary to the Second Novemsky Declaration, source amnesia is a well-documented phenomenon in consumer behavior research. See, Second Novemsky Declaration, ¶ 12. The Second Novemsky Declaration states that “[Professor Novemsky is] unfamiliar with ‘source amnesia’ and was unable to find peer-reviewed literature supporting such a construct among healthy adults.” The Second Novemsky Declaration cites a peer-reviewed paper on “source monitoring” (see, Second Novemsky Declaration, ¶ 12). That highly cited paper states: “A central claim is that people do not typically directly retrieve an abstract tag or label that specifies a memory’s source, rather, activated memory records are evaluated and attributed to particular sources through decision processes performed during remembering.” Johnson, M.K., Hashtroudi, S. and Lindsay, D.S., 1993. “Source Monitoring.” *Psychological Bulletin*, 114(1), 3-28, INTUIT-FTC-PART3-000616994. The paper provides many examples among healthy adults. Another highly cited paper by the same first author reviews 15 years of neural mechanisms of source memory and explicitly equates inaccurate source memory to source amnesia. That article states that “source errors can *feel* very real,” (emphasis in the original). See, Mitchell, K.J. and Johnson, M.K., 2009. “Source Monitoring 15 Years Later: What Have We Learned from fMRI about the Neural Mechanisms of Source Memory?” *Psychological Bulletin*, 135(4), 638-677, INTUIT-FTC-PART3-000617072.

¹¹⁶ Chen, H., Carlson, R.A. and Wyble, B., 2018. “Is Source Information Automatically Available in Working Memory?” *Psychological Science*, 29(4), 645-655, INTUIT-FTC-PART3-000617050, p. 653.

¹¹⁷ Short-term source amnesia occurs when respondents do not expect to report the source when observing the information. In the case of the Novemsky Survey, respondents would not necessarily have expected to be asked about the source of their information about TurboTax when acquiring such information (e.g., through watching advertisements, reviewing websites, reading reviews, talking with friends, advice from a financial professional, etc.).

Report does not explain how the Novemsky Survey avoided source amnesia and the biases caused by source amnesia or what strategies were adopted to control for source amnesia and its biases.¹¹⁸

60. Fourth, the Novemsky Survey offers respondents a “TurboTax advertisements” answer option that is not specific to the allegedly deceptive advertisements. The data in the Novemsky Survey provide no way to disentangle which advertisement(s), if any, respondents may have had in mind while answering the question. According to the Novemsky Report, Intuit has “communicated to potential customers that they can file their taxes for free with TurboTax even though TurboTax is (and has been) free for only some consumers,” as part of a “long-running and pervasive marketing campaign,” going back as far as 2015.¹¹⁹ Even if the Novemsky Report attempted to hypothesize a direct connection between the at-issue advertising and respondent beliefs, the Novemsky Report provides no mechanism to disentangle recall of the message from multiple sources.¹²⁰
61. Each of these flaws is individually problematic, but they also have the potential to interact and compound the biases associated with each flaw. The Novemsky Survey asks respondents a question that is particularly difficult to answer reliably, and likely contains a demand artifact. In spite of consumers’ well-studied difficulties with recall and source amnesia and without assisting respondents with a task that is extremely challenging to complete accurately, the Novemsky Survey presented an incomplete list of options without sufficient filtering.

Thus, short-term amnesia may also apply. See, Chen, H., Carlson, R.A. and Wyble, B., 2018. “Is Source Information Automatically Available in Working Memory?” *Psychological Science*, 29(4), 645-655, INTUIT-FTC-PART3-000617050, p. 653.

¹¹⁸ The Second Novemsky Declaration states that my Purchase Driver Survey “employs similar recall-reliant questions in [the Purchase Driver] survey.” Second Novemsky Declaration, ¶ 13. That is incorrect. For example, Question 6c of my Purchase Driver Survey asks respondents to report which of many things the respondent did in researching tax preparation methods / providers. The respondent is not asked to recall the source of any impressions and, hence, the question is not subject to source amnesia. None of the questions in the Purchase Driver Survey ask respondents to recall the source of impressions or the specific time that they took any actions or made any decisions. Consumers can often remember that they took an action, but not when they took that action and whether that action caused an impression.

¹¹⁹ Novemsky Report, ¶¶ 2-4.

¹²⁰ “[I]t is important to note that recall aids can only be effective for material that was encoded in memory. [...] When information *is* encoded in memory, its retrieval is strongly affected by both the information’s salience and the elapsed time since the information was encoded.” Krosnick, J.A. and Presser, S., 2010. “Question and Questionnaire Design.” In *Handbook of Survey Research*, 263-313. Elsevier, INTUIT-FTC-PART3-000606002, p. 288.

62. The Novemsky Survey’s approach of apparently attempting to connect respondents’ general impressions with Intuit’s communications via this question rather than simply providing respondents with the at-issue advertisements, website, or disclosures is not responsive to the need to test Intuit’s marketing actions, is misleading, and is completely unreliable. It is extremely unlikely that respondents, when faced with a non-exhaustive list that clearly emphasizes TurboTax, would accurately recall the sources of their impressions about whether they qualified for the TurboTax free product.

3. *The Novemsky Survey’s Key Question on Respondents’ Understanding of “Simple U.S. Returns” Is Leading and Unreliable*

63. The Novemsky Survey’s key question to assess “taxpayers’ understanding of the phrase ‘simple U.S. returns’”¹²¹ (TAT290) asks a one-sided question (“Do you think...”), as shown in Figure 4 below. A two-sided question would provide both sides of the option such as “Do you or do you not think...” Simply adding the negative side of the option (e.g., “do you not think”) can have a substantial effect on respondents’ answers—stating the negative explicitly can reduce positive responses by almost half.¹²² As developed, this question likely leads the respondent to an answer preferred by Complaint Counsel.

¹²¹ Novemsky Report, ¶¶ 5, 48.

¹²² Payne, S.L., 1951. “*The Art of Asking Questions*.” Princeton University Press, Princeton, NJ, INTUIT-FTC-PART3-000617335, pp. 7-8. For example, when only one side was made explicit, 63% of respondents said companies could avoid layoffs. However, just changing the question to a two-sided question gave the result that 35% of respondents said companies could avoid layoffs. Other examples might not be as large, but the one-vs.-two-sided issue is very important. The Novemsky Report does not ask a two-sided question so we have no evidence to evaluate how respondents would have answered a two-sided question. See also discussion on “Failure to Give Comparable Explicit Emphasis to the Affirmative, Negative, and Neutral Positions,” in Jacoby, J., 2012. “Are Closed-Ended Questions Leading Questions?” In *Trademark and Deceptive Advertising Surveys: Law, Science and Design*, 261-285. American Bar Association, INTUIT-FTC-PART3-000605355, p. 275.

Figure 4 Novemsky Survey: TAT290

TAT290. Thank you! You are almost done. Just a few more questions...

In some of its advertisements, TurboTax mentions “simple U.S. returns”.

Do you think that your 2021 income tax return meets TurboTax’s definition of a “simple U.S. return”?

[PROGRAMMER: RANDOMIZE 1, 2. ANCHOR 3 LAST]
[IF RESPONDENT SELECTS 1 (“Yes”), GO TO TAT300]
[IF RESPONDENT SELECTS 2 (“No”), GO TO TAT310]
[OTHERWISE GO TO NEXT PAGE]

1. Yes, I think my 2021 income tax return meets TurboTax’s definition of a “simple U.S. return”
2. No, I don’t think my 2021 income tax return meets TurboTax’s definition of a “simple U.S. return”
3. Don’t know / Not sure

64. Without the kind of information about what constitutes a simple return that is normally available in the marketplace, and faced with a one-sided question favoring “yes,” respondents in the Novemsky Survey will be prone to guessing.¹²³ The Novemsky Report even acknowledges that respondents “are more likely to answer ‘yes’ to this question [TAT290] because motivated reasoning, wishful thinking and optimistic bias, will drive many consumers to give themselves the answer that is advantageous for them—namely, that their tax return is indeed simple and therefore they can file for free.”¹²⁴ This kind of motivated or aspirational reasoning is not evidence of deception.
65. A solution to attempt to deal with the leading nature of one-sided questions is to add control groups or control questions to the survey. The Novemsky Survey does not include any such control group or control questions, and as a result, any results based on TAT290 are very likely inflated in Complaint Counsel’s favor.
66. The Novemsky Survey provides no information to respondents about what constitutes “simple returns,” even though such information is available in the marketplace. The marketplace is very different from the survey environment because consumers in the marketplace are making

¹²³ Although the Novemsky Survey uses a quasi-filter (Don’t know / Not sure) and encourages respondents not to guess, the quasi-filter and no-guessing statement are unlikely to correct for the one-sided nature of the question and the lack of information that would normally be available in the marketplace.

¹²⁴ Novemsky Report, ¶ 87.

real choices and have incentives to search out and use information. On the other hand, respondents in the Novemsky Survey are presented with Question TAT290 and are not given any means or incentives to obtain information about what constitutes a simple return. The Novemsky Report provides no evidence that the survey environment is externally valid and corresponds to actions in the marketplace.

67. In the marketplace, consumers who are unsure about whether their tax situation qualifies as a simple return are motivated to conduct research and seek out the information needed.¹²⁵ Consumers looking for additional information on whether their tax situation constitutes a “simple return” will find that information readily available from multiple sources, including from the disclosures on the TurboTax website¹²⁶ and through several third-party product reviews that describe the eligibility requirements for using TurboTax Free Edition.¹²⁷ This information is available to consumers both before they start a return at TurboTax and throughout the preparation process. The Novemsky Report provides no evidence to justify that consumers, if given the chance, would make a judgment about the meaning of “simple returns” without consulting this readily available information.

E. The Novemsky Survey Data Do Not Provide “Strong Evidence” of Consumer Deception

1. The Novemsky Survey Data Do Not Provide “Strong Evidence” of Misimpressions as a Result of Intuit Advertisements or Website

68. The Novemsky Report claims to find “strong evidence” that “a substantial portion of the taxpayers who do not qualify to use TurboTax Free Edition under Intuit’s criteria have the misimpression that they can file their income taxes for free using TurboTax,” and that “Intuit’s

¹²⁵ See, for example, Kotler, P. and Keller, K., 2016. “*Marketing Management 15th Ed.*” Pearson Education, INTUIT-FTC-PART3-000597494, pp. 195-196.

¹²⁶ See, for example, Intuit, “What qualifies as a simple tax return?” RX 4.

¹²⁷ See, for example, Parys, S. and Orem, T., “TurboTax Review 2022,” *NerdWallet*, March 3, 2022, available at <https://www.nerdwallet.com/article/taxes/turbotax-review/>, INTUIT-FTC-PART3-000607174; Ward, C., “TurboTax Review In-Depth: Does Free Really Mean Free?” *Listen Money Matters*, available at <https://www.listenmoneymatters.com/turbo-tax-review/>, INTUIT-FTC-PART3-000607262; Rosenberg, E., “TurboTax review: Not the cheapest online tax software, but good for complex situations,” *Business Insider*, March 24, 2022, available at <https://www.businessinsider.com/personal-finance/turbotax-review>, INTUIT-FTC-PART3-000607226; and Baluch, A., Van Bloom, C. and Rosenberg, E., “TurboTax Tax Software Review,” *U.S. News & World Report*, February 2, 2022, available at <https://www.usnews.com/360-reviews/technology/tax-software/turbotax>, INTUIT-FTC-PART3-000606933.

TurboTax advertisements and the TurboTax website are the two most common sources identified as playing a role in taxpayers forming the misimpression that they can file their income taxes for free using TurboTax.”¹²⁸ These conclusions are based on a misleading presentation of the survey data. The Novemsky Report presents the data in two steps, first identifying respondents who indicate that they believe they can file for free (based only on the biased closed-ended question TAT240), and second, identifying the share of this subset of “misled” respondents who identify the TurboTax advertisements and/or website as one source of their understanding. Taken in steps this way, the Novemsky Report reports that the “vast majority of the mistaken taxpayers identified at least one of these two sources as playing a role in forming their misimpression.”¹²⁹ This percentage is misleading. Taken all together in one step, however, the Novemsky Survey data implies that at the very most 190 out of 607 respondents (31.3%) who are not Free Edition-eligible purportedly believe that they can file for free using TurboTax based on TurboTax advertisements and/or website.¹³⁰ Further review of these respondents’ survey data shows that the Novemsky Survey does not provide evidence of consumer deception, and in fact, highlights the substantial bias in the Novemsky Report’s findings

69. An examination of the Novemsky Survey data reveals that very few respondents who attributed their misimpression to the TurboTax advertisements and/or website did so reliably.¹³¹ There is evidence that of the 190 respondents who indicated that they believed they could file for free based on TurboTax’s advertisements and/or website, several had offered inconsistent or uncertain responses in their open-ended responses (TAT220/TAT230). In Table 2 and Figure 5 below, I examine respondents whom the Novemsky Report classifies as attributing their misimpressions to the TurboTax advertisements and/or website and take the respondents’ open-

¹²⁸ Novemsky Report, ¶¶ 7-9.

¹²⁹ Novemsky Report, ¶ 9.

¹³⁰ 121 out of 607 (19.9%) respondents who are not Free-Edition-eligible purportedly believe they can file for free based on TurboTax advertisements and 130 out of 607 (21.4%) purportedly believe that they can file for free using TurboTax based on TurboTax website. See, Novemsky Report, Figure 2. To the extent the 164 opt-outs did have more favorable views of TurboTax, including them in overall population could have reduced the rate of purported misimpressions related to Intuit advertisements and/or website from 31.3% (190 out of 607 respondents) to 24.6% (190 out of 771 respondents).

¹³¹ I conduct the same analysis by Novemsky Survey group and for respondents who selected “TurboTax advertisements” but not website, and “TurboTax website” but not advertisements, which is included in my backup.

ended responses into account. As described previously, two independent coders, who were blind to any hypotheses, identified and categorized respondents’ understandings of whether they could file for free based on their open-ended responses, TAT220 and TAT230. The independent coder analysis enabled me to identify respondents who expressed inconsistency in their responses.¹³² The two open-ended responses that the coders considered occur before the biases introduced by the closed-ended questions TAT240 and TAT255. Removing less reliable (inconsistent) respondents results in only 74 respondents (12.2%) in the Novemsky Survey for whom TurboTax’s advertisements and/or website purportedly played a role in forming the perception that they could file their taxes for free with TurboTax Free Edition.

Table 2
Waterfall Analysis: Respondents Who Indicate They Can File for Free
Based on TurboTax Advertisements and/or Website

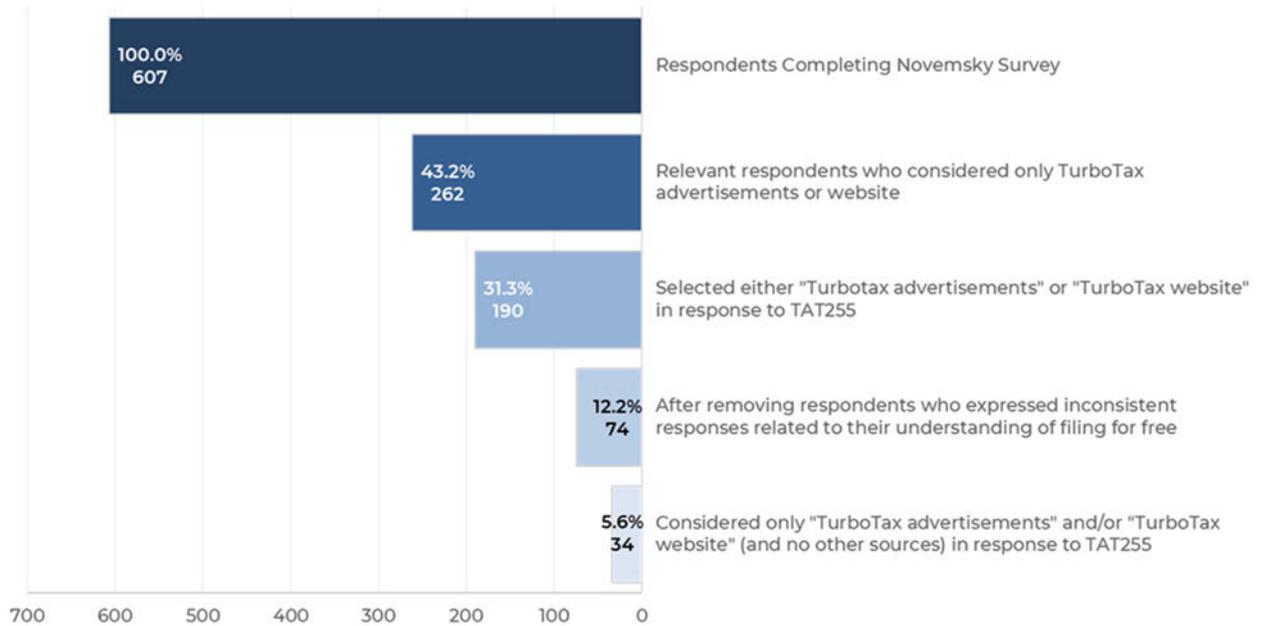
	Total	
	<i>N</i>	%
Respondents Completing Novemsky Survey	607	100.0%
Selected "I think I can file for free" in response to TAT240	262	43.2%
Selected either "TurboTax advertisements" or "TurboTax website" in response to TAT255	190	31.3%
After removing respondents who expressed inconsistent responses related to their understanding of filing for free^[1]	74	12.2%
Considered <u>only</u> "TurboTax advertisements" and/or "TurboTax website" (and no other sources) in response to TAT255	34	5.6%
Total Respondents	607	

Note:

[1] Based on independent coding of open-ended responses to TAT220 and TAT230. Includes respondents who selected “I think I can file [...]” or “I don’t think I can file [...]” in TAT240 and either contradicted themselves between open-ended (TAT220/TAT230) and closed-ended responses (TAT240), contradicted themselves between open-ended responses (TAT220/TAT230), or answered conclusively in a closed-ended response (TAT240) but expressed uncertainty in their open-ended response (TAT220/TAT230).

¹³² See, Section IV.D.1 for a more detailed discussion of this analysis.

Figure 5
Waterfall Analysis: Respondents Who Indicate They Believe They Can File for Free Based on TurboTax Advertisements and/or Website¹³³



70. I also reviewed all of the sources the remaining 74 respondents reported in TAT255. Of the remaining 74 respondents, more than half (40) attributed their understanding in part to sources other than TurboTax’s advertisements and/or website. Removing these respondents whose understanding was reportedly based on multiple sources leaves only 34 respondents (5.6%) who gave consistent responses and for whom TurboTax’s advertisements and/or website played the only reported role in forming the perception that they could file their taxes for free with TurboTax Free Edition.^{134,135}

¹³³ See, Table 2.

¹³⁴ Paragraph 58 above argues that more sources would have been identified had the sources been made explicit in TAT255, thus, the 40 respondents reporting multiple sources is an underestimate and the 34 respondents reporting only TurboTax advertisements or website is an overestimate.

¹³⁵ Even if the 116 respondents with inconsistent responses are subtracted from the denominator of total respondents (607 - 116 = 491), I find 6.9% of total respondents for whom TurboTax’s advertisements and/or website played the only reported role in forming the perception that they could file their taxes for free with TurboTax Free Edition (34/491 = 6.9%).

2. The Novemsky Survey Data Do Not Provide “Strong Evidence” of Misimpressions Regarding Eligibility to File for Free

71. The Novemsky Report also attempts to buttress its findings related to respondents’ alleged misunderstanding that they could file for free with examples of purported respondent confusion in the open-ended responses.¹³⁶ The Novemsky Report’s presentation of these examples, however, appears to be based on examples cherry-picked to support Complaint Counsel’s allegations. Two independent coders, who were blind to any hypotheses were directed to review all of the responses to the Novemsky Survey’s four open-ended questions relating to respondents’ understanding of the criteria determining eligibility to file for free with TurboTax.^{137,138} As shown in Table 3 and Figure 6 below, when reviewed holistically by independent coders, the Novemsky Survey data reveal that respondents are more likely to indicate there *are* qualification criteria to file with Free Edition (51.9%) than that there are not qualification criteria (12.0%). As shown in Figure 7, respondents are more likely to suggest that those qualification rules relate to the simplicity or complexity of tax returns (38.2%) than any other criteria.

¹³⁶ See, Novemsky Report, ¶¶ 72-75.

¹³⁷ To avoid any potential demand effects, these questions only include those asked prior to the questions concerning simple returns: TAT220, TAT230, TAT250/260, and TAT270. See, Novemsky Report, Appendix E, p. 7 (“What is your understanding about whether or not there is a cost to filing your own income taxes using TurboTax online software?”); (“You may have already said this above, but please tell us again, in your understanding, who, if anyone, can file their taxes for free using TurboTax online software?”); p. 8 (“You may have already said this above, but please tell us again why you think you can file your 2021 income taxes for free using TurboTax online software?”); p. 9 (“You may have already said this above, but please tell us again why you don’t think you can file your 2021 income taxes for free using TurboTax online software?”); p. 10 (“You may have already said this above, but please tell us again what information you need to say whether or not you can file your 2021 income taxes for free using TurboTax online software?”).

¹³⁸ The independent coders were initially provided with three categories: “Respondent expresses understanding that there are criteria determining eligibility to use TurboTax for free,” “Respondent expresses understanding that there are not criteria determining eligibility to use TurboTax for free,” and “Respondent does not express any understanding of whether or not there are criteria determining eligibility to use TurboTax for free.” Upon reviewing the open-ended answers, the independent coders opted to include five additional subcategories to commonly categorize respondents, including the specific criteria referenced by respondents (“simple or complex taxes,” “income level,” and “federal vs. state”) and understanding related to no criteria (“...because it is always free” and “... because there is always a cost”). See, **Appendix F** for the instructions provided to the independent coders. I conduct the same analysis for both Novemsky Survey Group A and Group B. The analyses are included in my backup.

Table 3
Review of Novemsky Survey Open-Ended Responses
For Respondent Understanding, if any, of Eligibility Criteria

Respondent Understanding Related to Criteria Determining Eligibility to Use TurboTax for Free	Total	
	<i>N</i>	<i>%</i>
Respondent expresses understanding that <u>there are criteria</u>	315	51.9%
<i>Criteria: simple or complex taxes</i>	232	38.2%
<i>Criteria: income level</i>	89	14.7%
<i>Criteria: federal vs. state</i>	48	7.9%
Respondent expresses understanding that <u>there are not criteria</u>	73	12.0%
<i>... because it is always free</i>	25	4.1%
<i>... because there is always a cost</i>	48	7.9%
Respondent does <u>not express any understanding</u>	219	36.1%
Total Respondents	607	

Note:

[1] Based on independent coding of open-ended responses.

Figure 6
Novemsky Survey: Respondent Understanding, if any, of Eligibility Criteria ¹³⁹

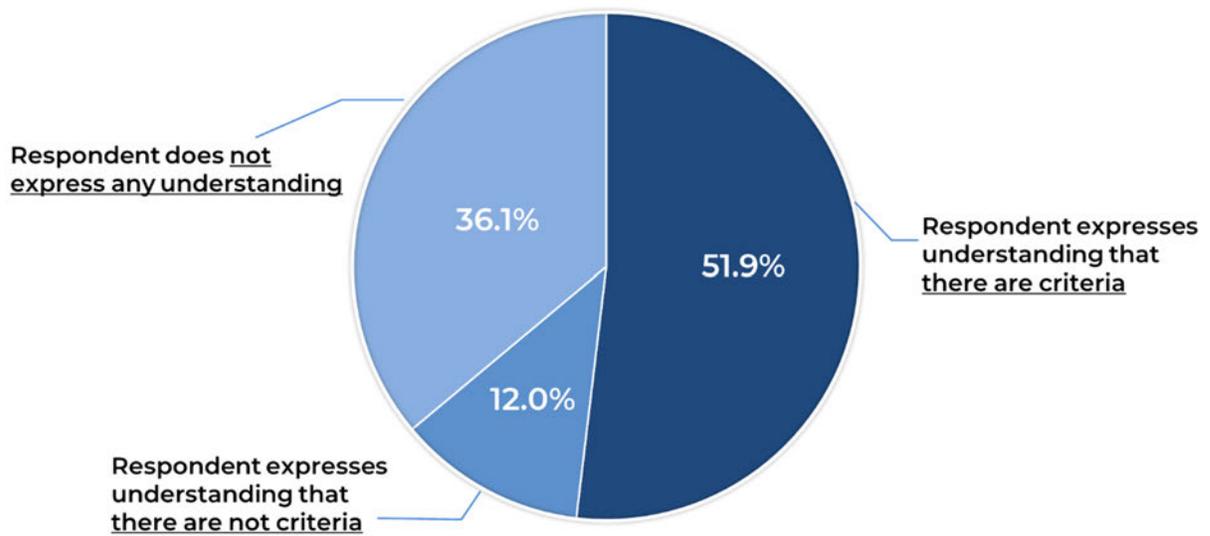
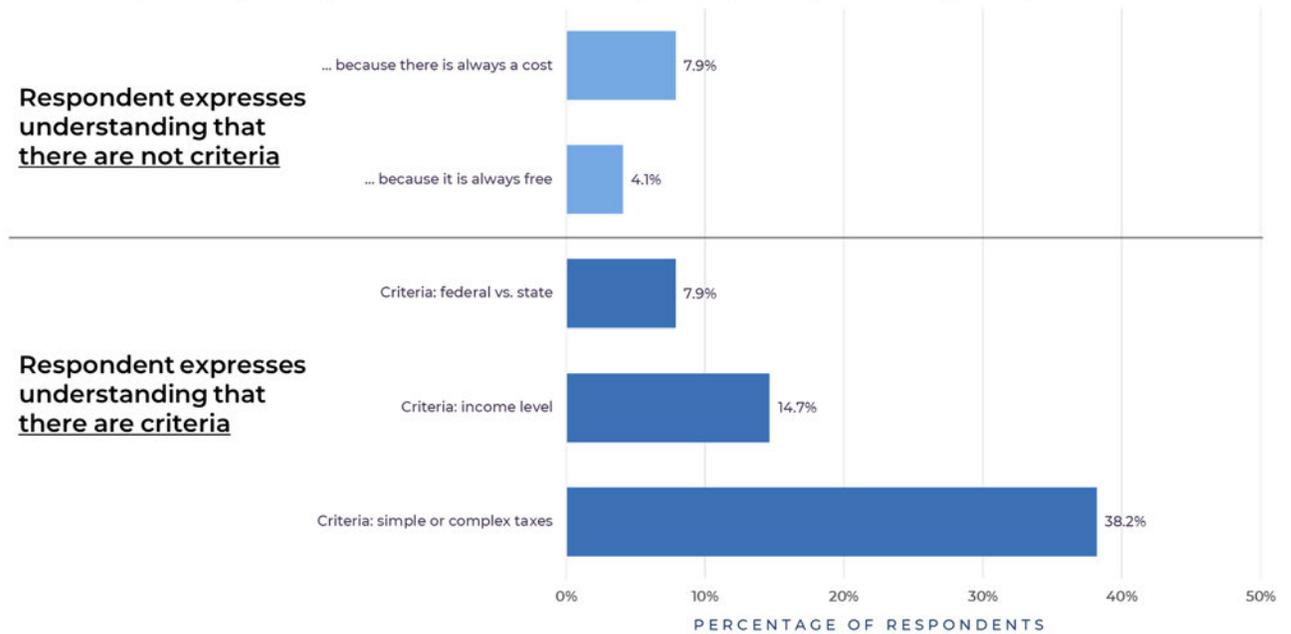


Figure 7
Novemsky Survey: Respondent Understanding, if any, of Specific Eligibility Criteria ¹⁴⁰



¹³⁹ See, Table 3.

¹⁴⁰ See, Table 3.

72. The Novemsky Report specifically highlights that “[s]ome respondents wrongly believed that everyone is eligible for using TurboTax for free, some respondents identified incorrect criteria determining eligibility for using TurboTax for free, and some respondents had an incomplete understanding of criteria determining eligibility for using TurboTax for free.”¹⁴¹ Table 3 provides a more complete and unbiased summary of observations and examples that could have been cited in the Novemsky Report. The two independent coders identified only 25 respondents out of 607 (4.1%) who expressed that there are no eligibility criteria because it is always free to file with TurboTax. The two coders categorized nearly twice as many respondents (48 out of 607, 7.9%) as indicating that there is always a cost to file with TurboTax and more than ten times as many respondents (315 out of 607, 51.9%) as expressing some understanding that there were qualification criteria to file for free. The two independent coders also identified the types of qualification criteria expressed by respondents (i.e., tax simplicity/complexity, income levels, federal vs. state). The independent coders found that a total of 137 respondents (22.6%) identified an “incorrect” type of eligibility criteria, either associating eligibility with specific income levels or with the differences between federal and state returns. Many more respondents (232 respondents, 38.2%) correctly indicated qualification criteria would be associated with having simple or complex returns than those (4.1%) who expressed there are no eligibility criteria because it is always free, even without being given the opportunity to consult any sources for these beliefs.

3. The Novemsky Survey Data Do Not Provide “Strong Evidence” of Misimpressions as they Relate to “Simple U.S. Returns”

73. The Novemsky Report also claims to find “strong evidence” that “[a] substantial portion of the taxpayers who are not eligible to use TurboTax Free Edition under Intuit’s criteria (and hence, do not have a ‘simple U.S. return,’ as Intuit uses the term) nevertheless have the misimpression that their returns meet TurboTax’s definition of a ‘simple U.S. return.’”¹⁴² Although the Novemsky Survey reports that a total of 280 out of 607 respondents (46.1%) believe they have “simple U.S. returns,” this measure is subject to the substantial demand artifacts and guessing biases described above. The Novemsky Report identifies 204 out of 607 respondents (33.6%)

¹⁴¹ Novemsky Report, ¶ 72.

¹⁴² Novemsky Report, ¶ 10.

who state in the survey that they believe that they can file for free and that they have a “simple U.S. return.”¹⁴³ The Novemsky Report identifies 184 out of 607 respondents (30.3%) who don’t believe they can file for free and don’t believe they have a “simple U.S. return.”¹⁴⁴ Adding these mutually exclusive groups together implies that 63.9% of respondents are categorized as correctly associating filing for free (or not) with having simple (or more complex) tax returns. Of the remaining 219 respondents, the majority (146 respondents, 24.1% of the 607 total respondents) indicated some uncertainty in whether they had simple returns or could file for free,¹⁴⁵ leaving 34 respondents (5.6%) who indicated without uncertainty that they believe they do not have simple returns, but believe they can file for free.¹⁴⁶ This percentage is comparable to the 39 respondents (6.4%) who indicated that they have simple returns and believe they could not file for free—results that are consistent with respondents guessing in the Novemsky Survey.¹⁴⁷ Only the small group of 5.6% of respondents, a percentage that is upwardly biased for the issues discussed elsewhere in this report and may be subject to guessing, express with certainty an impression that they can file for free with a return that is not simple.

74. The Novemsky Report highlights respondents who “identified either incorrect or insufficient criteria,” in response to questioning about why they believe their return qualifies as a “simple U.S. return.”¹⁴⁸ First, the Novemsky Report claims that “some respondents” provided “incorrect” or “insufficient” answers, but offers no analysis of the extent to which respondents’ answers were “incorrect” or “insufficient.” Second, respondents are not necessarily deceived if they express an accurate yet incomplete understanding of the differences between “simple” and “complex” returns (e.g., “Because I have no deductions”¹⁴⁹), especially given they were asked to do so without any stimuli or exposure to TurboTax’s own disclosures.

¹⁴³ Novemsky Report, Figure 4.

¹⁴⁴ Novemsky Report, Figure 4.

¹⁴⁵ The remaining count of 146 respondents includes respondents who selected “I do not have enough information” or “I’m not sure” in TAT240 (22+5+8+2+22+6+5+3=73, shown in Novemsky Report, Figure 4) and respondents who selected “Don’t know / Not sure” in TAT290 (52+21=73, shown in Novemsky Report, Figure 3).

¹⁴⁶ Novemsky Report, Figure 4.

¹⁴⁷ Novemsky Report, Figure 4.

¹⁴⁸ Novemsky Report, ¶¶ 87-91.

¹⁴⁹ Novemsky Survey, Respondent ID 1088; Novemsky Report, ¶ 89.

F. The Novemsky Report’s Interpretation of Intuit’s Own Market Research Does Not Reflect “Strong Evidence” of Consumer Deception

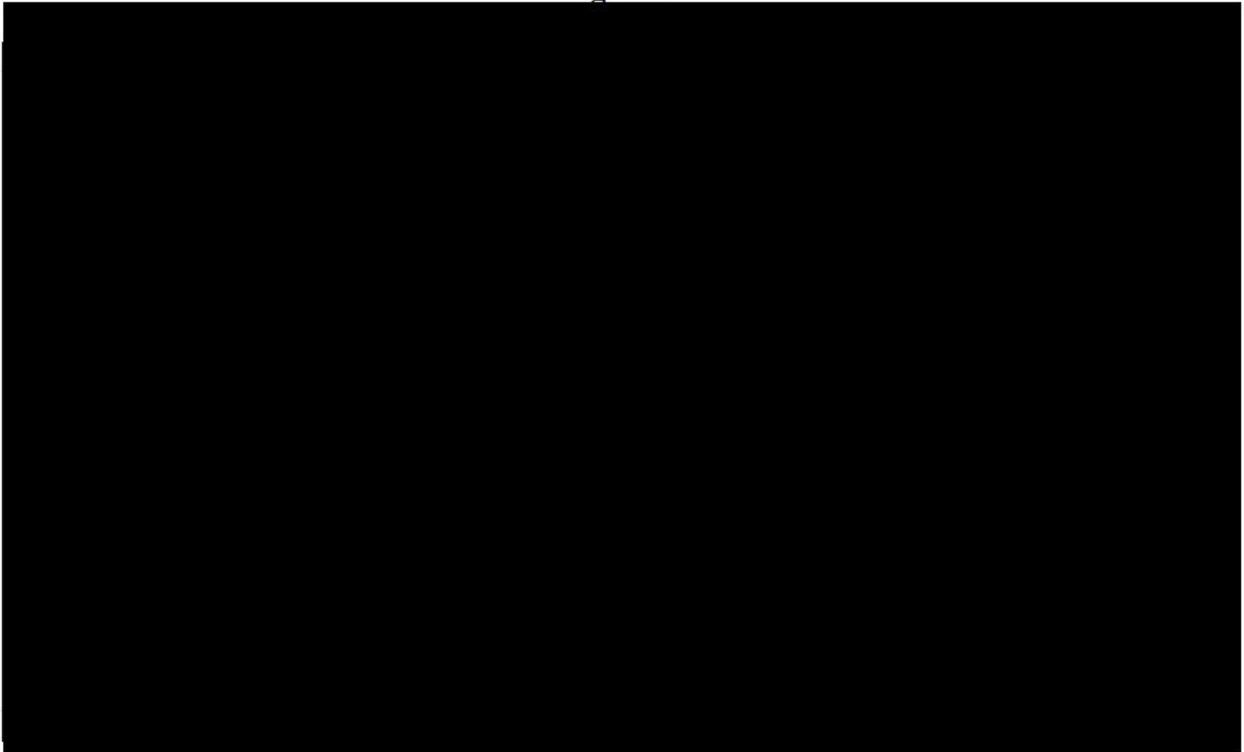
75. The Novemsky Report cites an internal Intuit presentation, [REDACTED]¹⁵⁰ and claims that it supports the Novemsky Report’s opinion that there is “strong evidence that Intuit’s marketing is the most likely source of consumer misimpressions.”¹⁵¹ The Novemsky Report misrepresents the internal Intuit presentation. The internal Intuit presentation provides further evidence that the Novemsky Survey is biased.

76. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

¹⁵⁰ Intuit, “TY20 Campaign Copy Testing,” September 2020, INTUIT-FTC-PART3-000490565. See also, Novemsky Report, Section V.

¹⁵¹ Novemsky Report, ¶ 95.

Figure 8



77. I agree with the Novemsky Report that “the effect is limited to the incremental contribution of one additional ad exposure to subjects’ pre-existing beliefs and does not measure the impact of Intuit’s years-long marketing activities on overall impressions in the market.”¹⁵³ Thus, both Professor Novemsky and I agree that [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED] For example, if the advertising is persuasive, as suggested by the Novemsky Report,¹⁵⁴ then the net effect of short-term lifts is the long-term effect as measured for the control group in the Intuit TY20 Study. The Novemsky Report seems to take the position that Intuit’s control stimulus, which is roughly the same as the stimulus in the Novemsky Survey, is the proper way to measure long-term effects. As discussed below, data from the Intuit TY20

¹⁵² [REDACTED] INTUIT-FTC-PART3-000490565, slide 2.

¹⁵³ Novemsky Report, footnote 128.

¹⁵⁴ Novemsky Report, ¶ 97.

Study control group demonstrate that taxpayers’ perceptions are consistent with the marketplace.¹⁵⁵

78. [REDACTED]

79. [REDACTED]

[REDACTED] I understand that approximately 39% of taxpayers were eligible to file their taxes with the Free Edition.¹⁵⁶ The Novemsky Report acknowledges that this percentage is “around a third of taxpayers.”¹⁵⁷ Using the Novemsky Report’s more conservative percentage, roughly 33% of taxpayers are eligible for Free Edition. [REDACTED]

[REDACTED] Comparing the Novemsky Survey to [REDACTED] suggests that any “misimpressions” measured in the Novemsky Survey are due to the biases in the Novemsky Survey and not misimpressions in the marketplace.

¹⁵⁵ Novemsky Report, footnote 128. “The rate at which subjects reported their expectation that they can file for free was 33% without any exposure to an advertisement in the study, suggesting that the impression was already present in the market in 2020.”

¹⁵⁶ I understand that in TY 2019, approximately 39% of taxpayers electronically filed a Form 1040 with no Schedules 1-6 or Schedule A attached and thus were eligible to file their taxes for free using Free Edition (specifically, of the 148,496,552 electronic returns filed with the IRS in 2020, 57,671,912 returns included only Form 1040 with no Schedules 1-6 or Schedule A attached). See, “Table 1. All Individual Returns: Selected Income Items, Adjustments, Credits, and Taxes, by Size of Adjusted Gross Income, Tax Year 2019 (through Filing Season 2020 Cycle 53, December 31, 2020),” RX 95, p. 2. See also, Novemsky Report, footnote 129. (“In tax years 2018 and 2019, consumers filing their taxes on a Form 1040 without any attached schedules were eligible for TurboTax Free Edition. [...] However, only around a third of taxpayers during those years filed their returns on a Form 1040 without any attached schedules.”)

¹⁵⁷ Novemsky Report, footnote 129.

¹⁵⁸ The Novemsky Report, footnote 128, endorses the 33% as an indication that “the impression was already present in the market in 2020.”

80. [REDACTED]

81. [REDACTED]

82. [REDACTED]

83. The Novemsky Report specifically points to [REDACTED]

¹⁵⁹ Novemsky Report, ¶ 97.

¹⁶⁰ 12% = 45% – 33%; 24% = 57% – 33%.

¹⁶¹ [REDACTED] INTUIT-FTC-PART3-000490565, slide 2.

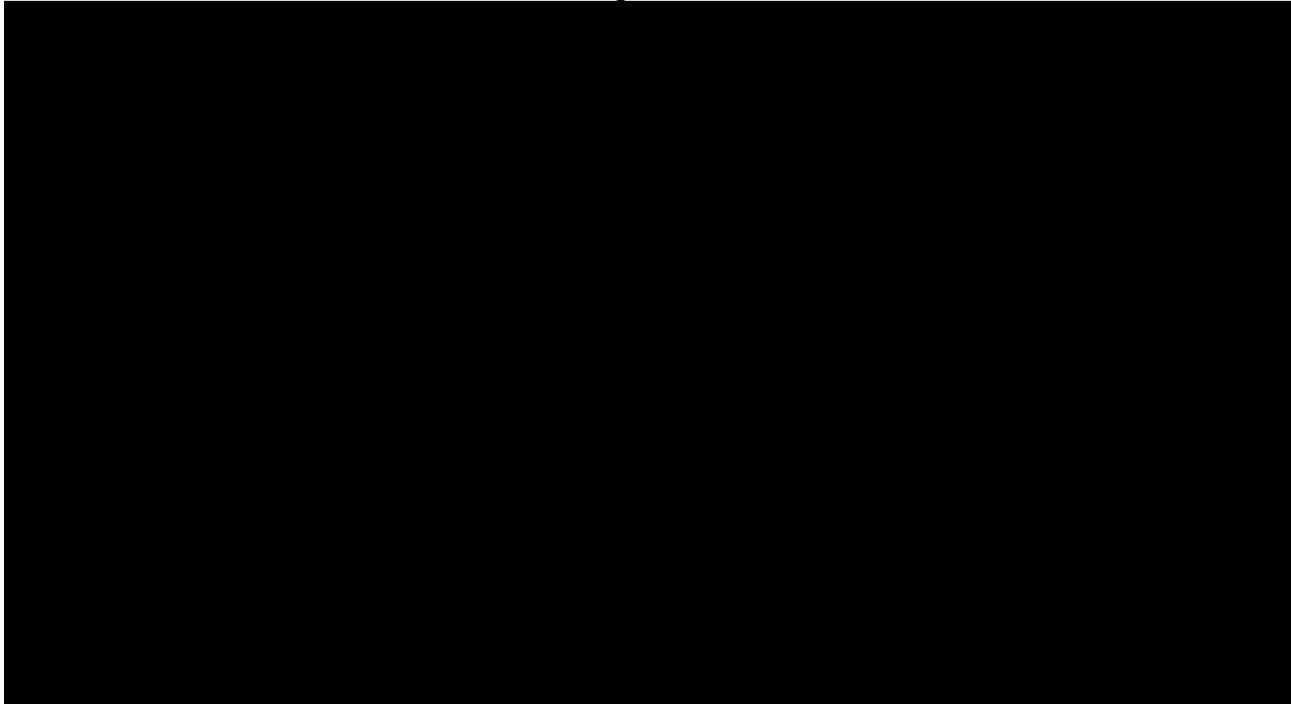
¹⁶² [REDACTED] INTUIT-FTC-PART3-000490565, slides 12, 19, 28.

¹⁶³ [REDACTED] INTUIT-FTC-PART3-000490565, slides 3-5. See also, Deposition of Jack Rubin, November 29, 2022, CC-00005259, at 89:01-06 [REDACTED]

[REDACTED]

[REDACTED] This finding (among others discussed below) appears to contradict the Novemsky Report’s assertion that “[m]odern consumers, particularly those who are familiar with online products, are not inherently skeptical that a product can be free.”¹⁶⁶

Figure 9



84. [REDACTED]

¹⁶⁴ Novemsky Report, ¶ 97.

¹⁶⁵ [REDACTED] INTUIT-FTC-PART3-000490565, slide 28.

¹⁶⁶ Novemsky Report, ¶ 81.

¹⁶⁷ [REDACTED] INTUIT-FTC-PART3-000490565, slide 28.

¹⁶⁸ [REDACTED] INTUIT-FTC-PART3-000490565, slide 10.

[REDACTED]

[REDACTED]

[REDACTED]

V. INTUIT'S MARKETING WAS UNLIKELY TO DECEIVE CONSUMERS INTO STARTING THEIR RETURNS WITH TURBOTAX FREE EDITION

85. Complaint Counsel claim that Intuit's advertisements "misrepresent that consumers can file their taxes for Free using TurboTax"¹⁷¹ and that the TurboTax website "does not disclose adequately to consumers, including those who see Intuit's advertisements, the limitations on eligibility for the 'freemium' version of TurboTax."¹⁷² Complaint Counsel further allege that "Intuit's advertisements funneled consumers to the purportedly-free version of TurboTax, only to require millions to upgrade and pay Intuit to file their taxes after consumers had invested time and shared sensitive information with Intuit."¹⁷³ To evaluate the impact of Intuit's advertisements and website on consumers' consideration of TurboTax and their likelihood of starting their return with Free Edition, I designed, conducted, and analyzed an online survey (the "Disclosure Efficacy Survey"). My Disclosure Efficacy Survey was fielded from July 11, 2022 to July 19, 2022. A comprehensive description of my Disclosure Efficacy Survey design, target population, pretesting, and development of test and control stimuli is attached as **Appendix C** to my Expert Report.

86. My Disclosure Efficacy Survey relied on a test-vs.-control experimental design, which is a standard method to evaluate causal relationships.¹⁷⁴ The two groups differed only by the

¹⁶⁹ [REDACTED] INTUIT-FTC-PART3-000490565, slide 28.

¹⁷⁰ [REDACTED] INTUIT-FTC-PART3-000490565, slides 14-17.

¹⁷¹ Complaint, p. 4.

¹⁷² Complaint, ¶ 36.

¹⁷³ Complaint, ¶ 59.

¹⁷⁴ "[E]xperiments are well-suited to studying causal relationships. No other scientific method regularly matches the characteristics of causal relationships so well. [...] [R]andom assignment creates two or more groups of units that are probabilistically similar to each other on the average. Hence, any outcome differences that are observed between those groups at the end of a study are likely to be due to treatment, not to differences between the groups that already existed at the start of the study. Further, when certain assumptions are met, the randomized experiment yields an estimate of the size of a treatment effect that has desirable statistical properties, along with estimates of the probability that the true effect falls within a defined confidence interval" Shadish, W.R., Cook, T.D. and Campbell, D.T., 2002. *Experimental and Quasi-Experimental Designs for Generalized Causal Inference*, Wadsworth Cengage Learning, INTUIT-FTC-PART3-000606730, pp. 7, 13. See also, Diamond, S.S., 2011. "Reference Guide on Survey

advertisement and website pages (“stimuli”) presented to them (“a between-subjects design”). By using a between-subjects design, I am able to isolate the impact, if any, that Intuit’s allegedly misleading advertisements, website, and disclosures would have had on a) consumers’ consideration of starting their taxes on TurboTax, b) the specific TurboTax product that customers select to start their taxes with, and c) their likelihood of starting their taxes with their selected product relative to an advertisement and website with revised written and verbal disclosures. For the remainder of this report, I will refer to the control group as the “Original Disclosures Group” and the test group as the “Revised Disclosures Group.”

87. The stimuli used in my Disclosure Efficacy Survey included a video advertisement, a website homepage, and a product information webpage. The stimuli were designed to replicate the advertisements and webpages used by Intuit in marketing their TurboTax products. The advertisements and webpages were used to inform customers about TurboTax products before the customer invested time to share any sensitive information with Intuit.¹⁷⁵ To avoid potential demand artifacts, I replaced the Intuit and TurboTax brands with a disguised brand name, Vertax, in all stimuli.^{176,177} The disguised brand name was chosen so that it would be a believable brand name for a tax preparation service, but not the name of a real tax preparation service.

88. In the Complaint, Complaint Counsel outline specific reasons why Intuit’s advertisements and website allegedly mislead consumers. For the advertisements, Complaint Counsel claim that:

- “[F]ree is essentially the only word spoken by the actors in the commercials;”¹⁷⁸

Research.” In *Reference Manual on Scientific Evidence*, 359-423, The National Academies Press, INTUIT-FTC-PART3-000603471, pp. 397-401.

¹⁷⁵ [REDACTED] INTUIT-FTC-PART3-000602247, slide 36; [REDACTED] INTUIT-FTC-PART3-000606811, p. 71.

¹⁷⁶ To ensure respondents’ objectivity and the reliability of results, survey design should seek to make the respondent “blind” to the sponsor and purpose of the survey, and to avoid any unintended biases in the form of demand artifacts. Demand artifacts “cue” respondents as to what is “expected of [them] and what the experimenter hopes to find,” which may influence the results of experiments in consumer behavior. See, Sawyer, A.G., 1975. “Demand Artifacts in Laboratory Experiments in Consumer Research.” *Journal of Consumer Research*, 1(4), March 1975, 20-30, INTUIT-FTC-PART3-000606146. To ensure that respondents remain blind to the objective of the survey, I used a disguised brand name to divert respondents away from the sponsor and purpose of the survey.

¹⁷⁷ To the best of my knowledge, there is no online tax preparation company called Vertax.

¹⁷⁸ Complaint, ¶ 26.

- “[The disclaimers] [a]re disproportionately small compared to the prominent text emphasizing that the service is free;”¹⁷⁹
- “[The disclaimers] [a]ppear for just a few seconds;”¹⁸⁰ and
- “[The disclaimers] [a]re in writing only, often in font color similar to the background color, and are not read by a voiceover.”¹⁸¹

89. Complaint Counsel further claim that on the website:

- “Intuit’s current website page emphasizes ‘FREE,’ ‘\$0,’ and ‘File for \$0’;”¹⁸²
- “‘Simple tax returns’ is not understood by many consumers;”¹⁸³ and
- “‘Simple tax returns only’ is hyperlinked to more detailed terms and conditions...and consumers who assume they have a ‘simple tax return’ are not likely to click to read more.”¹⁸⁴

90. I designed the stimuli shown to the Original Disclosures Group to replicate Intuit’s marketing materials used in Tax Year 2021 (“TY 2021”),¹⁸⁵ and designed the stimuli shown to the Revised Disclosures Group to account for revisions previously advocated for by Complaint Counsel as described above and consistent with Intuit’s agreement with the state attorneys general.^{186,187} For example, in designing the video stimuli, I used the TY 2021 “Dance Class”

¹⁷⁹ Complaint, ¶ 29.

¹⁸⁰ Complaint, ¶ 29.

¹⁸¹ Complaint, ¶ 29.

¹⁸² Complaint, ¶ 43.

¹⁸³ Complaint, ¶ 43.

¹⁸⁴ Complaint, ¶ 43.

¹⁸⁵ TY 2021 refers to the tax season that ran from January 2022 – April 2022, when taxpayers filed their taxes on income earned in calendar year 2021.

¹⁸⁶ These revisions are also consistent with Intuit’s settlement agreement with the state attorneys general, signed May 4, 2022. Settlement Agreement with State Attorneys General (Assurance of Voluntary Compliance), May 4, 2022, INTUIT-FTC-PART3-000614654.

¹⁸⁷ I designed the stimuli shown to the Revised Disclosures Group based on scientific principles to address the scientific issues as they relate to the Complaint. However, I sought advice from Counsel for Intuit to assure that, in their legal opinion, the Revised Disclosures stimuli addressed the legal issues in the Complaint. I can confirm that the Revised Disclosures stimuli are scientifically appropriate for a test-vs.-control survey. I am not making a legal judgment.

advertisement¹⁸⁸ with the Original Disclosures Group as a “free, free, free, free” advertisement, and the TY 2017 “Fishing” advertisement¹⁸⁹ from Intuit’s “AbsoluteZero” campaign, which featured fewer verbal mentions of the term “free.” Accordingly, the video advertisement shown to the Revised Disclosures Group implemented two different revisions for which Complaint Counsel have advocated: (1) the advertisement did not involve the repetition of the word “free”; and (2) the advertisement provided more prominent information about the limitations for filing for free with Vertex. **Appendix C-1** includes a full description of the development of the stimuli and the differences between the Original Disclosures Group stimuli and the Revised Disclosures Group stimuli.

A. Intuit’s Advertisements and Website Were Unlikely to Deceive Consumers into Considering TurboTax to File their Taxes

91. Complaint Counsel refer to Intuit’s advertisements as “door-opener[s]”¹⁹⁰ and claim that they “bring consumers to the TurboTax website representing that consumers can file their taxes for free using TurboTax”¹⁹¹ and that the “TurboTax website does not disclose adequately to consumers, including those who see Intuit’s advertisements, the limitations on eligibility for the ‘freemium’ version of TurboTax.”¹⁹² If it were true that Intuit’s advertisements and website served simply as “door openers,” one would expect that respondents in the Revised Disclosures Group, who were exposed to expanded disclosures about the limitations to filing for free, would be substantially less likely than respondents in the Original Disclosures Group to consider starting their taxes with Vertex. This hypothesis is rejected scientifically by the results of my Disclosure Efficacy Survey. My Disclosure Efficacy Survey finds that, even with the adjustments advocated for by Complaint Counsel to cure the allegedly deceptive representations, there is no statistically significant difference between groups in respondents’ consideration of starting their taxes using Vertex. Based on these results, I find that the more prominent disclosures related to Free Edition eligibility, as tested in the Disclosure Efficacy

¹⁸⁸ Intuit, “TY 2021 Dance Class Advertisement,” INTUIT-FTC-PART3-000594976.

¹⁸⁹ Intuit, “TY 2017 Fishing Advertisement,” INTUIT-FFA-FTC-000528212; Intuit, “TY 2017 Fishing Advertisement,” INTUIT-FFA-FTC-000169116.

¹⁹⁰ Complaint, ¶ 57.

¹⁹¹ Complaint, ¶ 57.

¹⁹² Complaint, ¶ 36.

Survey, are unlikely to have a material impact on consumers’ consideration of using TurboTax to start their tax return.

92. After viewing the stimuli in my Disclosure Efficacy Survey, respondents were asked whether, based on their review of the advertisement and webpages, they would consider starting their taxes on Vertax.¹⁹³ Each respondent was asked to choose among three possible responses: “Yes, I would consider starting my taxes on Vertax,” “No, I would not consider starting my taxes on Vertax,” and “Don’t know / Unsure.”¹⁹⁴ The first two options were rotated. I calculated the number of respondents who chose each of the response options for the Original Disclosures Group and the Revised Disclosures Group. As shown in Table 4 and Figure 10 below, I find that 77.7% of the Original Disclosures Group respondents (314 out of 404 respondents) and 75.9% of the Revised Disclosures Group respondents (308 out of 406 respondents) would consider starting their taxes on Vertax. The 1.8% difference across the two groups is not statistically significantly different from zero.

Table 4
Disclosure Efficacy Survey: Responses to Vertax Consideration¹⁹⁵

Q7 Response	Original Disclosures Group		Revised Disclosures Group		Test of Equality	Test of Equality
	Number of	% of	Number of	% of	of Proportions	of Distribution
	Respondents	Respondents	Respondents	Respondents	P-value ^[1]	P-value ^[1]
Yes, I would consider starting my taxes on Vertax	314	77.7%	308	75.9%	0.531	
No, I would not consider starting my taxes on Vertax	51	12.6%	60	14.8%	0.373	0.672
Don’t know / Unsure	39	9.7%	38	9.4%	0.887	
Total	404		406			

Note:

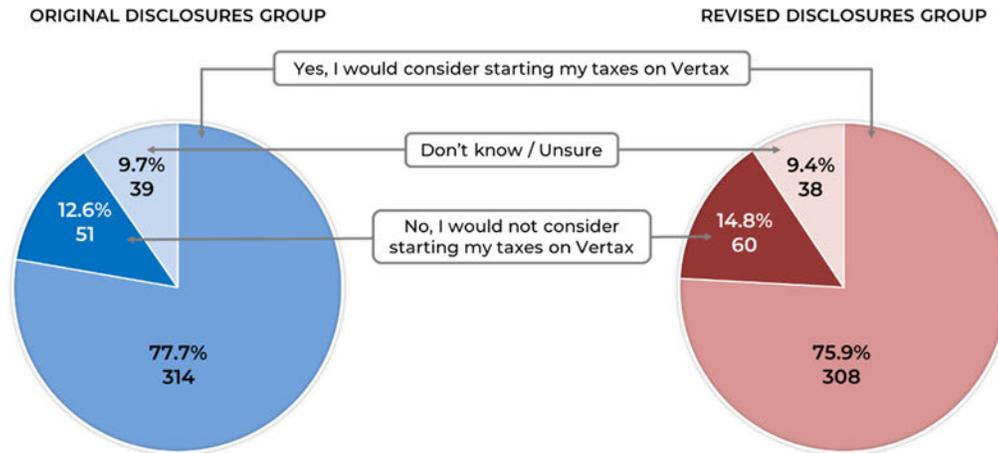
[1] The test of equality between groups is based on a chi-squared test. P-values below 0.05 reflect statistical significance, i.e., p-values below 0.05 show that the proportions are different across groups at the 5% significance level. “***” indicates significance at 1% level, “**” indicates significance at 5% level, “*” indicates significance at 10% level.

¹⁹³ Disclosure Efficacy Survey, Question Q7.

¹⁹⁴ Disclosure Efficacy Survey, Question Q7.

¹⁹⁵ See, Exhibit 3.

Figure 10
Disclosure Efficacy Survey: Responses to Vertax Consideration¹⁹⁶



93. To evaluate the robustness of my results, I conducted several sensitivity analyses on my survey data. My sensitivity analyses reveal qualitatively similar results across the following subsets of respondents: (1) respondents who were unaware of the litigation;¹⁹⁷ (2) respondents who were not prior TurboTax users;¹⁹⁸ (3) respondents who were prior TurboTax users;¹⁹⁹ (4) respondents with annual household income under \$75K;²⁰⁰ (5) respondents who did not pay to file their taxes in 2022;²⁰¹ and (6) excluding respondents who completed the survey very quickly (“speeders”) or very slowly (“laggards”).²⁰²

B. Intuit’s Advertisements and Website Were Unlikely to Inflate Consumers’ Likelihood of Starting with TurboTax Free Edition

94. Complaint Counsel allege that consumers were deceived into believing that they could file for free using TurboTax Free Edition based on Intuit’s advertisements and website, with the implication that had consumers fully understood the limitations, they would not have chosen

¹⁹⁶ See, Exhibit 3.

¹⁹⁷ Sensitivity 1a.

¹⁹⁸ Sensitivity 2a.

¹⁹⁹ Sensitivity 3a.

²⁰⁰ Sensitivity 4a.

²⁰¹ Sensitivity 5a.

²⁰² Sensitivity 6a. Excluded respondents completed the survey in less than 4 minutes or more than 35 minutes.

to start their tax returns with TurboTax Free Edition. If these allegations were true, one would expect that respondents in the Revised Disclosures Group, who were exposed to more prominent disclosures about the limitations to filing for free, would choose to start their taxes with Free Edition less frequently than respondents in the Original Disclosures Group.

95. Respondents to my Disclosure Efficacy Survey who indicated that they would consider starting their taxes on Vertax were subsequently asked which product they would be most likely to start with.²⁰³ They could select from: “Vertax Free Edition,” “Vertax Deluxe,” “Vertax Premium,”²⁰⁴ “Vertax Self-Employed,” and “Don’t know / Unsure.” I calculated the number of respondents who chose each of the response options for the Original Disclosures Group and the Revised Disclosures Group. As shown in Table 5 and Figure 11 below, I find that the share of respondents who indicated they would be most likely to start their taxes with Vertax Free Edition was greater in the Revised Disclosures Group (198 out of 308 respondents, or 64.3%) than in the Original Disclosures Group (176 out of 314 respondents, or 56.1%). The difference is statistically significant.
96. My Disclosure Efficacy Survey rejects the hypothesis that respondents, who were exposed to more prominent disclosures about the limitations to filing for free, would choose to start their taxes with Free Edition less frequently. The data in my Disclosure Efficacy Survey indicate that respondents chose to start with Vertax Free Edition more frequently in the Revised Disclosures Group than in the Original Disclosures Group. More prominent disclosures related to Free Edition eligibility likely tend to encourage (rather than discourage, as per Complaint Counsel’s allegations) consumers to start their tax return using TurboTax Free Edition.

²⁰³ Disclosure Efficacy Survey, Question Q8.

²⁰⁴ There is a typo in my survey instrument in that the product information webpage stimulus refers to a “Premier” product, while Q8 offers respondents the ability to choose “Vertax Premium” as one of the available products. I conducted a post-test with 10 respondents and found that when asked to recall the names of the products that Vertax offers, no respondents mentioned seeing both a Premium and Premier product, indicating that they did not struggle with or find the name change confusing. Hence, I find this typo to be small and not material to my findings or opinions.

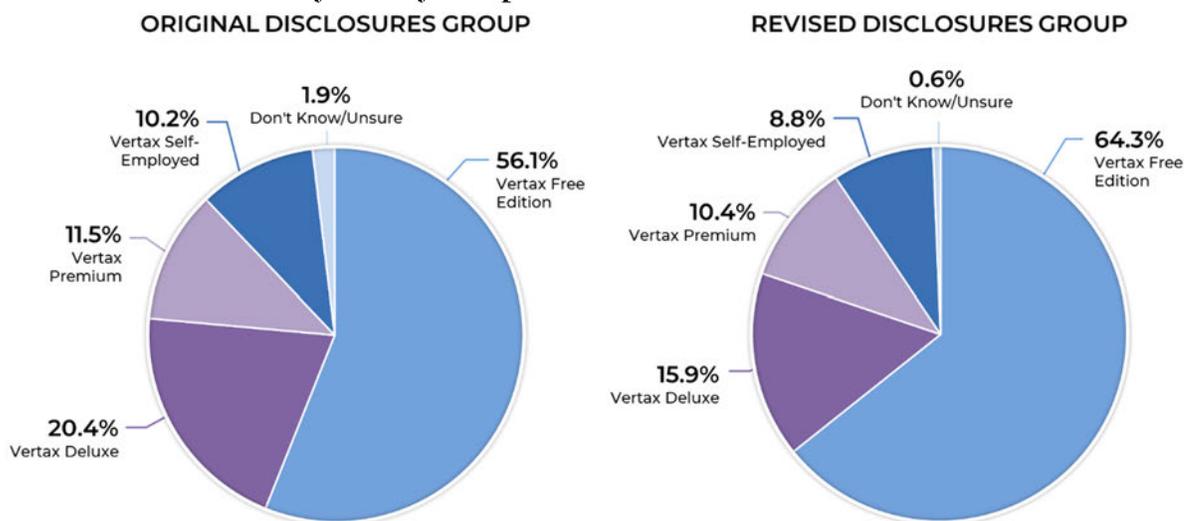
Table 5
Disclosure Efficacy Survey: Responses to Vertax Product Consideration²⁰⁵

Q8 Response	Original Disclosures Group		Revised Disclosures Group		Test of Equality of Proportions	Test of Equality of Distribution
	Number of Respondents	% of Respondents	Number of Respondents	% of Respondents	P-value ^[1]	P-value ^[1]
Vertax Free Edition	176	56.1%	198	64.3%	0.04 **	
Vertax Deluxe	64	20.4%	49	15.9%	0.15	
Vertax Premium	36	11.5%	32	10.4%	0.67	0.21
Vertax Self-Employed	32	10.2%	27	8.8%	0.54	
Don't know / Unsure	6	1.9%	2	0.6%	0.16	
Total	314		308			

Note:

[1] The test of equality between groups is based on a chi-squared test. P-values below 0.05 reflect statistical significance, i.e., p-values below 0.05 show that the proportions are different across groups at the 5% significance level. “***” indicates significance at 1% level, “**” indicates significance at 5% level, “*” indicates significance at 10% level.

Figure 11
Disclosure Efficacy Survey: Responses to Vertax Product Consideration²⁰⁶



97. Although contradictory to Complaint Counsel’s allegations, and to the extent these results are indicative of an effect,²⁰⁷ these results are consistent with marketing theory indicating that two-

²⁰⁵ See, Exhibit 4a.

²⁰⁶ See, Exhibit 4a.

²⁰⁷ One approach to evaluating the effect is to compare the distribution of percentages between the Original Disclosures Group and the Revised Disclosures Group. This difference in distributions is not statistically significant and thus not consistent with Complaint Counsel’s hypothesis. The line-by-line significance tests, if considered simultaneously, do favor a significant effect in the direction inconsistent with Complaint Counsel’s hypothesis. However, even if the difference in the share of respondents who selected Vertax Free Edition across groups was not statistically significant, that non-significance is also inconsistent with Complaint Counsel’s hypothesis.

sided product-related appeals (i.e., marketing materials that disclaim particular attributes, while highlighting positive product claims) can be more effective than one-sided appeals that include no negative information about the product being marketed. A meta-analysis of several marketing research studies conducted on two-sided appeals in advertisements reveals that “[t]wo-sided messages significantly enhance the perceived credibility of the source and reduce negative cognitive responses. Furthermore, two-sided messages enhance brand attitude and purchase intention.”²⁰⁸ Compared to the Original Disclosures Group, the advertisement and webpages shown to the Revised Disclosures Group provide more prominent information about the limitations for filing for free with Vertax. Intuit’s own research suggests that consumers expect that for-profit companies cannot provide their products for free to everyone,²⁰⁹ and, hence, the emphasis in the Revised Disclosures stimuli on the product limitations (i.e., that there are qualifying rules and that not everyone can file their taxes for free) might make the free offer more plausible and realistic.²¹⁰ Although my Disclosure Efficacy Survey does not

²⁰⁸ Eisend, M., 2006. “Two-Sided Advertising: A Meta-Analysis.” *International Journal of Research in Marketing*, 23(2),187-198, INTUIT-FTC-PART3-000617343, p. 194.

²⁰⁹

INTUIT-FFA-FTC-000139031-032. See also, Complaint, ¶ 30.

INTUIT-FTC-PART3-000606811, p. 16.

INTUIT-FFA-FTC-000054305, at 309.

²¹⁰ Relatedly, Greg Johnson, Executive Vice President and General Manager for Intuit’s consumer group of businesses, emphasized in his deposition that “[w]e try and ensure consumers get into the product for which they intend. We do that by disclosing things like the requirements for each individual SKU. You know, it’s in our best interest for consumers to – to be aware of the SKU they’re going into so that we can, in fact, give them a delightful experience. And we measure that through things like our product recommendation score. We also hope to retain customers, and so we innovate to make sure year after year they come back, because they’re very confident and feel great about the experience we deliver.” Deposition of Greg Johnson, September 29, 2020, CC-00003866, at 66:23-67:8.

Intuit managers have been mindful though of possible confusion that providing too much information could cause for some consumers and have been striving to find the optimal level of disclosures to provide in their advertisements. “Q. [...] And you would want to provide enough information to all the customers so they would feel like you – Intuit had been forthright and honest with them; is that right? A. We would strive to do that, but we also have to balance that. Because more information for some customers might be more confusing to someone else. And so, what we’re trying to do is design an experience that deliveries [sic] the best experience for most of our customers.” Deposition of Catherine C. Goode, October 23, 2020, CC-00003393, at 133:4-13.

test the mechanism by which disclosures might enhance consumer choice of the Free Edition, this observed outcome is consistent with both published research and research by Intuit.

98. I conducted sensitivity analyses to assess the robustness of my results about the impact of disclosures. My sensitivity analyses evaluated the following subsets of respondents: (1) respondents who were unaware of the litigation;²¹¹ (2) respondents who were not prior TurboTax users;²¹² (3) respondents who were prior TurboTax users;²¹³ (4) respondents with annual household income under \$75K;²¹⁴ (5) respondents who did not pay to file their taxes in 2022;²¹⁵ and (6) excluding respondents who completed the survey very quickly (“speeders”) or very slowly (“laggards”).²¹⁶ All sensitivity analyses reject Complaint Counsel’s theory of deception. Between groups, more prominent disclosures either increased consumer choice of the Free Edition (sensitivities 1b, 3b, and 4b) or did not have a significant impact (sensitivities 2b and 5b).
99. Respondents who indicated that they would be most likely to start in one of the products described above (and did not select “Don’t know / Unsure”) were then asked how likely they are to start their taxes with that product on a scale of 1% to 99% likelihood.²¹⁷ I calculated the mean for both the likelihood of starting with individual Vertax products and for the likelihood of starting with any Vertax product.²¹⁸ As shown in Figure 12 below, I find that there is no statistically significant difference between respondents’ likelihood to start with Free Edition between the Original Disclosures Group (the mean likelihood of 76.5%) and the Revised Disclosures Group (the mean likelihood of 75.4%). Additionally, there are no statistically

²¹¹ Sensitivity 1b.

²¹² Sensitivity 2b.

²¹³ Sensitivity 3b.

²¹⁴ Sensitivity 4b.

²¹⁵ Sensitivity 5b.

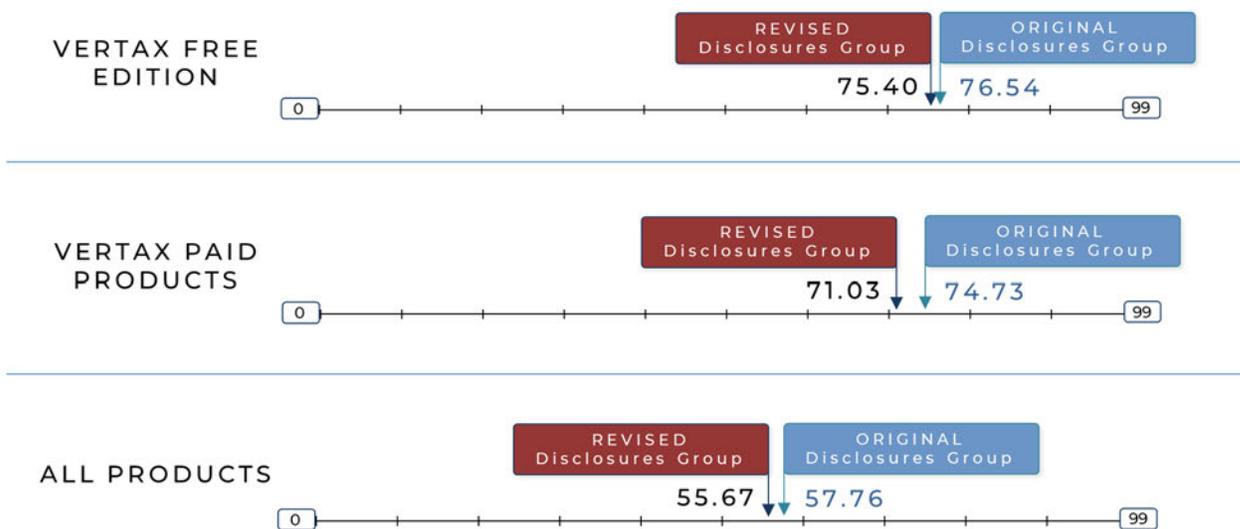
²¹⁶ Sensitivity 6b. Excluded respondents completed the survey in less than 4 minutes or more than 35 minutes.

²¹⁷ Disclosure Efficacy Survey, Question Q9.

²¹⁸ I calculated the mean likelihood of starting with any Vertax product as the average likelihood reported by respondents for the products they selected in Q8. Respondents who either indicated they would not consider starting their taxes on Vertax or were unsure in Q7 (“Based on your review of the advertisement and webpages, would you or would you not consider starting your taxes on Vertax?”) or who indicated they would consider starting their taxes on Vertax in Q7 but were unsure of which product they would select in Q8 (“You indicated that you would consider starting your taxes on Vertax. Based on your review of the advertisement and webpages, which product would you be most likely to start with?”) were assigned a likelihood of zero.

significant differences between groups for any of the paid products, nor for all products as a whole.²¹⁹ My sensitivity analyses for this measure revealed no statistically significant differences in respondents’ likelihood to start with Vertax Free Edition or with paid products.²²⁰

Figure 12
Disclosure Efficacy Survey: Aggregated Responses to Vertax Product Consideration Likelihood²²¹



100. The results of my Disclosure Efficacy Survey scientifically reject the hypotheses underlying Complaint Counsel’s allegation about TurboTax’s advertisements, website, and disclosures. The Disclosure Efficacy Survey reveals that there is no statistically significant difference in respondents’ consideration of Vertax across groups, that respondents who saw the Revised Disclosures stimuli are potentially statistically significantly more likely than respondents who saw the Original Disclosures stimuli to choose Free Edition, and there is no statistically significant difference in their stated likelihood of starting with Free Edition. These results contradict Complaint Counsel’s allegations that consumers were deceived into starting their tax returns with TurboTax Free Edition based on Intuit’s allegedly deceptive advertisements and website.

²¹⁹ In the Original Disclosures Group, the overall likelihood was 57.8% and in the Revised Disclosures Group it was 55.7%. See, Exhibit 5a-b.

²²⁰ Sensitivity 1c – 6c.

²²¹ See, Exhibit 5b.

VI. CONSUMERS ARE UNLIKELY TO BE DECEIVED OR LOCKED-IN GIVEN THE NATURE OF THE PURCHASE PROCESS FOR TAX PREPARATION SOFTWARE

101. Complaint Counsel allege that Intuit’s marketing materials significantly impact respondents’ consideration and respondents’ choice or likelihood of starting with Free Edition. My Disclosure Efficacy Survey scientifically rejects that hypothesis. To understand better the relative impact of Intuit’s TurboTax advertising and website on consumer consideration and choice, I also undertook a study of the processes consumers typically rely upon when considering and making their tax filing product purchase decisions.
102. Tax preparation can be considered a high-involvement product—it relates directly to consumers’ personal finances and, in some cases, a tax refund can be the single largest check a consumer receives in a particular year.²²² The purchase process for high-involvement goods typically involves consumers engaging closely with the purchase process and conducting substantial research prior to making a purchase decision. A longer and more realistic consumer journey contradicts Complaint Counsel’s assertion that consumers, upon seeing an Intuit advertisement, go directly to the TurboTax website, are deceived into starting with Free Edition, and then are immediately locked into paying for TurboTax products.²²³
103. To study the process of consumers’ tax preparation information acquisition, I designed, conducted, and analyzed an online survey (the “Purchase Driver Survey”) to provide insight on the process that tax filers go through to identify a tax preparation solution, including any research they may conduct, and the factors consumers consider important when selecting a tax preparation method/provider. My Purchase Driver Survey was fielded from July 1, 2021 to July 9, 2021, after the May 17, 2021 tax filing deadline²²⁴ and, therefore, after most tax filers had made their decisions with respect to tax preparation for that year. Unlike the Novemsky

²²² Assael, H., 2004. “*Consumer Behavior: A Strategic Approach*.” Houghton Mifflin Company, Boston, MA, INTUIT-FTC-PART3-000603049, pp. 90-91. Tax software can be considered important to the consumer and can entail significant risk, making its purchase more likely to be a high-involvement, considered process. See also, Farrell, D., Greig, F. and Hamoudi, A., “Filing Taxes Early, Getting Healthcare Late,” *JPMorgan Chase & Co.*, April 2018, available at <https://www.jpmorganchase.com/institute/research/healthcare/insight-filing-taxes-early#finding-1>, INTUIT-FTC-PART3-000606964.

²²³ This assertion is particularly incongruent with the low switching costs and robust competition in the tax preparation market, topics which I understand are addressed in the Deal Report. See, Deal Report, Sections IV.B.2 and IV.B.4.

²²⁴ “The 2021 Tax Deadline Extension: Everything You Need to Know,” *TurboTax*, January 21, 2022, available at <https://turbotax.intuit.com/tax-tips/general/the-2020-tax-deadline-extension-everything-you-need-to-know/L8Ph4Vnci>, INTUIT-FTC-PART3-000607244.

Survey, which focused on consumers not eligible for the TurboTax Free Edition, my Purchase Driver Survey used a target market of tax filers irrespective of their tax preparation method or provider.²²⁵ A comprehensive description of my Purchase Driver Survey design, target population, pretesting, and independent coding analysis of open-ended responses is attached as **Appendix D** to my Expert Report.²²⁶

104. Results from my Purchase Driver Survey suggest that most consumers do not rely solely on advertisements and instead conduct substantial research when selecting a tax preparation method/provider. Contrary to Complaint Counsel’s allegations, I find that consumers consider a variety of factors important when selecting a tax preparation method/provider and that consumers are willing to make trade-offs between price and other features. The Purchase Driver Survey provides evidence that consumers are unlikely to feel “locked in” to a tax preparation provider and instead often feel comfortable abandoning returns and switching providers, both within and across tax years. Each of these points is consistent with evidence from publicly available materials and internal Intuit materials.

A. Consumers Do Not Rely Solely on Advertisements and Instead Conduct Substantial Research Before Selecting a Tax Preparation Provider

105. Complaint Counsel allege that Intuit’s advertisements act as a “door-opener” and lead consumers directly to filing their taxes.²²⁷ This allegation fails to account for the multiple sources of information consumers generally rely upon when choosing a tax preparation method/provider, as well as consumers’ beliefs about advertising. Tax preparation is a purchase decision with financial implications that consumers make relatively infrequently but at a

²²⁵ My Purchase Driver Survey included 300 respondents, with a Main Analytical Sample of 282 respondents. There were 157 respondents who indicated that they used the same method / provider in 2021 and did not consider switching to another method / provider (Track 1). The remaining 125 respondents included those who considered switching in 2021 but remained with their prior method / provider (Track 2), those who considered and switched to a new method / provider in 2021 (Track 3), and those who did not file taxes in 2020 or were not sure of their prior method (Track 4). My Purchase Driver Survey asked similar questions regarding research conducted and important factors considered by this group of 125 respondents, and will refer to this group as “Considerers and Switchers.”

²²⁶ To evaluate the robustness of my results, I conducted several sensitivity analyses on my survey data. My sensitivity analyses revealed qualitatively similar results across the following subsets of respondents: (1) all respondents, compared to the Main Analytical Sample; (2) respondents who were prior TurboTax users; (3) excluding respondents who completed the survey very quickly (under 2 minutes for “speeders”) or very slowly (greater than 30 minutes for “laggards”); and (4) respondents who were unaware of the litigation. See, Sensitivities 7a and 7b.

²²⁷ Complaint, ¶ 57.

regular interval, generally once per year for many years. Literature on consumer decision making for high-involvement goods suggests that consumers are “information seekers,” and evaluate and compare brands on various attributes as consumers “actively search[] for information.”^{228,229} In part because advertisements are relatively short, they focus on a limited set of consumer needs and benefits. A full comparison of the wide variety of factors that consumers find important (described in more detail below in Section VI.B), especially for a complex product such as tax preparation software, cannot be effectively communicated solely via a few advertisements. Consumers often conduct additional research. My Purchase Driver Survey examines whether or not these hypotheses generally apply to tax preparation.

106. Most consumers have a general expectation that for-profit companies earn revenue and do not provide everything for free,²³⁰ leading consumers to be skeptical of free claims made in advertisements.²³¹

[REDACTED]

²²⁸ Assael, H., 2004. “*Consumer Behavior: A Strategic Approach*.” Houghton Mifflin Company, Boston, MA, INTUIT-FTC-PART3-000603049, p. 105.

²²⁹ I understand that the Deal Report addresses the robust competition in the tax preparation market. See, Deal Report, Section IV.B.2.

²³⁰ The Second Novemsky Declaration agrees, noting that “even if consumers were guessing at answers and had no other knowledge about the price of the product, it is more likely that consumers would guess a product was not free rather than free, as the vast majority of products are indeed not free.” See, Second Novemsky Declaration, ¶ 18; see also, ¶ 10.

²³¹ The lift for more-prominent disclosures (two-sided appeal) that I found in my Disclosure Efficacy Survey is consistent with this hypothesis.

²³² [REDACTED] INTUIT-FFA-FTC-000139031-032. See also, Complaint, ¶¶ 23-25.

²³³ [REDACTED] INTUIT-FTC-PART3-000606811, p. 15.

²³⁴ [REDACTED] INTUIT-FTC-PART3-000606811, p. 16.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] A few respondents to the Novemsky Survey also indicated skepticism that TurboTax could be free in their open-ended responses.²³⁹

107. Given this skepticism about a product provided for free for a high-involvement purchase decision, it is reasonable to expect that consumers would not rely solely on abbreviated messages from advertisements. It is reasonable to hypothesize that consumers would actively seek additional information. My Purchase Driver Survey examines this hypothesis. My Purchase Driver Survey suggests that very few respondents reported having researched using solely through advertisements or email marketing when considering tax preparation solutions.

²³⁵ [REDACTED] INTUIT-FTC-PART3-000601645, slide 21.

²³⁶ [REDACTED] INTUIT-FTC-PART3-000608479.

²³⁷ [REDACTED] INTUIT-FTC-PART3-000490565, slide 28.

[REDACTED]

²³⁸ [REDACTED] INTUIT-FTC-PART3-000490565, slide 28.

²³⁹ Novemsky Survey Data. For example, Novemsky Survey, Respondent ID 8852: “TurboTax and other online filing softwares have to make money somehow, financially, it doesn’t make sense if it’s a free service.”; Novemsky Survey, Respondent ID 5262: “I would think some type of cost will have to be due everything isn’t free.”

Two independent coders, who were unaware of any hypotheses, reviewed the open-ended responses to the Purchase Driver Survey and categorized the responses to the open-ended research questions posed to the “Considers and Switchers” as shown in Figure 13. Independent coders identified only three of these 125 respondents (2.4%) as having mentioned “viewed advertisements” and no respondents as having mentioned “reviewed marketing emails” as research methods.²⁴⁰ Even when prompted with a closed-ended question, only 33 of the 125 respondents (26.4%) selected “Viewed advertisements” as a research method and only 19 of the 125 respondents (15.2%) selected “Reviewed marketing emails”.²⁴¹ Of note, the vast majority of these respondents who “viewed advertisements” or “reviewed marketing emails” also indicated that they had used other research methods, with only three of the 125 respondents (2.4%) reporting that they *only* “Viewed Advertisements” and/or “Reviewed Marketing Emails.”²⁴²

²⁴⁰ Exhibit 11b.

²⁴¹ Exhibit 11a.

²⁴² See, “Purchase Driver Backup Calcs.xlsx.” In their open-ended responses, two of these respondents also described conducting price comparisons between different services before choosing their method/provider. When asked about what research they conducted, Purchase Driver Survey, INTUIT-FTC-PART3-000607560, Respondent ID 767 noted, “I looked at prices online to compare,” and Purchase Driver Survey, INTUIT-FTC-PART3-000607560, Respondent ID 1179 described, “I looked at different prices for Tax services. I tried to determine how easy/difficult it would be to switch my information over from Turbo Tax. I looked at what safety measures store front tax prep services in my area were using in light of COVID.”

[REDACTED]

[REDACTED]

[REDACTED]

109. Consumers obtain information from a variety of information sources before choosing a tax preparation method/provider.²⁴⁸ As shown in Figure 14, out of the 125 “Considers and Switchers” in my Purchase Driver Survey, 58 respondents reported that they explored tax preparation websites (46.4%), 54 out of 125 respondents spoke with friends and family (43.2%), 47 out of 125 respondents read reviews or testimonials (37.6%), and 46 out of 125 respondents read articles, rankings, or third-party reviews (36.8%)—all of which were cited more frequently than having viewed advertisements (33 out of 125 respondents, or 26.4%).²⁴⁹ On average, respondents reported using three different sources of information in their research

²⁴⁷ [REDACTED] INTUIT-FTC-PART3-000616732, tab “Audience Buckets_%.” See also, [REDACTED] INTUIT-FTC-PART3-000617283.

²⁴⁸ The Second Novemsky Declaration “agree[s] that consumers do not rely solely on advertisements in making tax product selections, and that consumers may conduct additional research.” Yet it goes on to claim that “[c]onsumers are unlikely to seek out additional information about price if they believe they have that information already.” See, Second Novemsky Declaration, ¶ 26. This assumes that TurboTax customers learn about TurboTax first through the allegedly deceptive advertisements and then stop looking for more information about pricing. Intuit’s research indicates this is not the case. [REDACTED]

[REDACTED] INTUIT-FTC-PART3-000602936, [REDACTED] Furthermore, the Second Novemsky Declaration’s critique implicitly assumes that consumers are not skeptical of TurboTax’s free offer. The available evidence does not support this assumption.

²⁴⁹ Exhibit 11a. The Second Novemsky Declaration asserts that some sources of information that respondents to my survey rely most often on, namely, friends and family as well as online reviews, “are unlikely to provide consumers with information about whether or not they can file their taxes for free using TurboTax” because “[f]riends and family are unlikely to understand the consumers’ tax situation or be able to explain all of TurboTax’s eligibility criteria. Online reviews are also unlikely to provide granular information about eligibility to the reader.” See, Second Novemsky Declaration, ¶ 28. Although these sources may not provide personally tailored information about whether a consumer would qualify for TurboTax Free Edition, such sources may include information about the presence of eligibility rules that consumers could then investigate more closely at their discretion. Likewise, to the extent friends and family or other users felt deceived by their experience, one would expect them to share that information and warn new consumers from using TurboTax. Yet, new TurboTax customers most frequently cite recommendations from friends and family as their source for learning about TurboTax. See, [REDACTED] INTUIT-FTC-PART3-000602936, [REDACTED]

See also, for example, Orem, T., “TurboTax Review 2018,” *NerdWallet*, January 25, 2018, available at <https://web.archive.org/web/20180925035640/https://www.nerdwallet.com/blog/taxes/turbotax-review/>, INTUIT-FTC-PART3-000607100.

process (see, Figure 15),²⁵⁰ with 92 of the 125 respondents (73.6%) reporting using two or more sources of information when researching tax preparation methods.²⁵¹ The data from the unaided open-ended questions results in a similar pattern of research sources. For example, one respondent, when asked what research they conducted noted, “I checked around [for] prices as well as how long [it] would take to get my taxes back. I called around places and did a lot of reading before going back to the site I used before.”²⁵² Another respondent stated, “I researched who had the best pricing for what I needed, and also offered the best support. I used an online search engine to compare and read reviews.”²⁵³ A third respondent noted that they “asked friends and did google searches.”²⁵⁴

²⁵⁰ Exhibit 12. The Second Novemsky Declaration states that several options among the sources included in my Purchase Driver Survey could be marketing communications from Intuit, including “[r]eviewed marketing emails,” “explored tax preparation software / service websites,” and “viewed advertisements.” The Second Novemsky Declaration claims that “it is possible that consumers conduct their research by relying exclusively on TurboTax marketing materials as their source” See, Second Novemsky Declaration, ¶ 27. I note that only seven respondents indicated they relied only on these three sources. From those, only two respondents were TurboTax users. See, “Purchase Driver Backup Calcs.xlsx.”

²⁵¹ Exhibit 12.

²⁵² Purchase Driver Survey, INTUIT-FTC-PART3-000607560, Respondent ID 1708.

²⁵³ Purchase Driver Survey, INTUIT-FTC-PART3-000607560, Respondent ID 1670.

²⁵⁴ Purchase Driver Survey, INTUIT-FTC-PART3-000607560, Respondent ID 1698.

Figure 14
Purchase Driver Survey: Responses to Closed-Ended Research Questions (Q6c, Q10c, Q13c)²⁵⁵

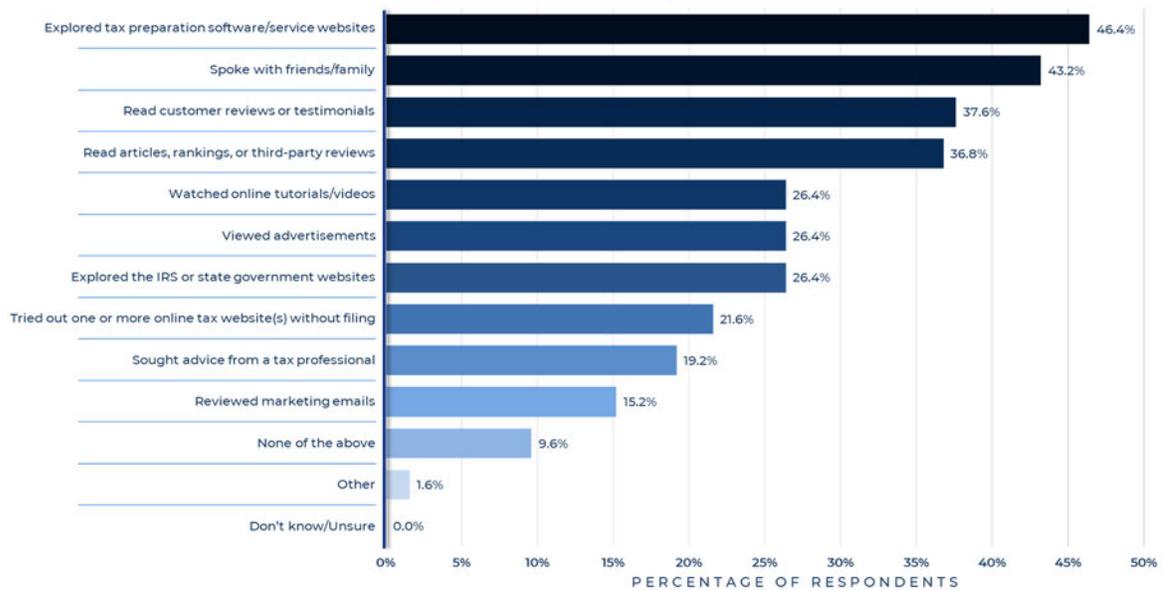
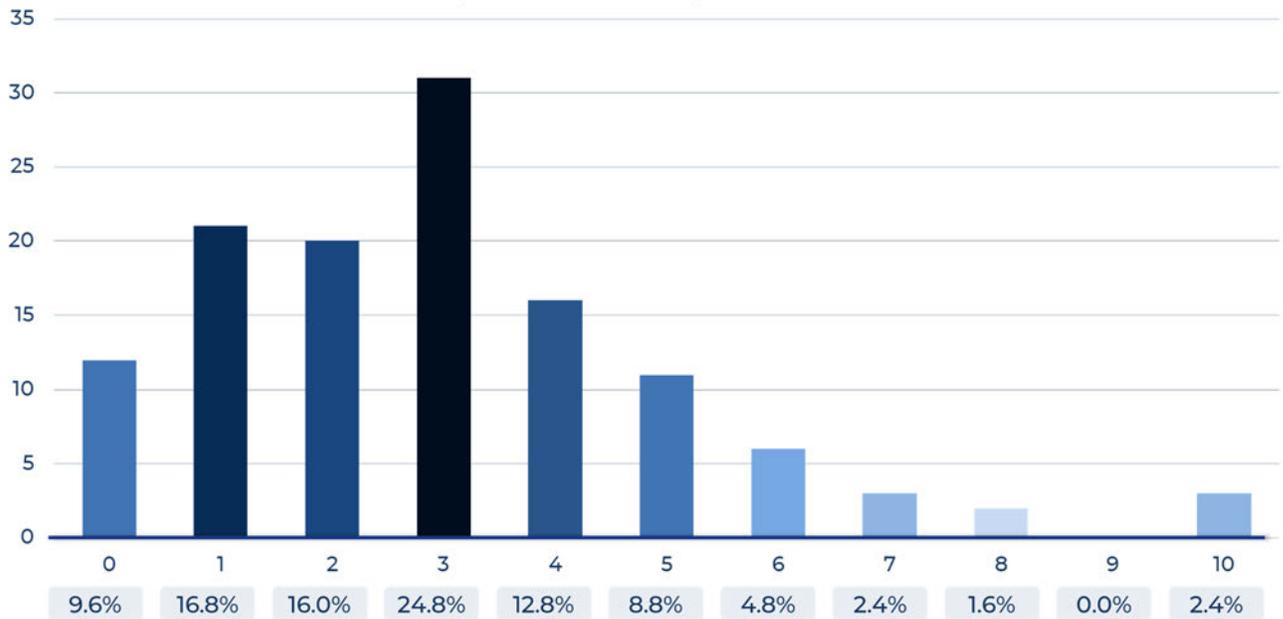


Figure 15
Purchase Driver Survey: Frequency of Research Resources Used by Respondents (Q6c, Q10c, Q13c)²⁵⁶



110. Recommendations from friends and family appear to play a particularly important role in consumers' research process for tax preparation methods/providers. [REDACTED]

[REDACTED]

111. Together, the evidence from a variety of studies suggests that most consumers do not rely solely on TurboTax advertisements. Instead, most consumers engage in substantial research using a variety of methods. The Novemsky Report provides no evidence that (1) consumers rely on the at-issue advertisements or that (2) the at-issue advertisements are an influential source of consumer beliefs and perceptions about TurboTax Free Edition.

B. Consumers Consider Many Factors when Selecting Tax Preparation Providers

112. My Purchase Driver Survey confirms that price is an important factor that consumers considered in choosing a tax preparation provider. However, price does not necessarily equal “free,” and price is not the *only* or the most important factor consumers consider. When consumers choose to purchase a high-involvement product, such as a tax preparation service, academic literature finds that consumers will engage in “complex decision making” and evaluate options in a “detailed and comprehensive manner.”²⁵⁹ My Purchase Driver Survey examines this hypothesis for tax preparation service.

113. My Purchase Driver Survey asked the 125 “Considers and Switchers” to cite factors important to them in their choice of a tax preparation provider (shown in Figure 16 below),²⁶⁰

²⁵⁵ See, Exhibit 11a.

²⁵⁶ See, Exhibit 12.

²⁵⁷ [REDACTED] INTUIT-FTC-PART3-000616732, [REDACTED] INTUIT-FTC-PART3-000617283.

²⁵⁸ [REDACTED] INTUIT-FTC-PART3-000602936. [REDACTED]

²⁵⁹ Assael, H., 2004. “*Consumer Behavior: A Strategic Approach.*” Houghton Mifflin Company, Boston, MA, INTUIT-FTC-PART3-000603031, pp. 28-31.

²⁶⁰ The Second Novemsky Declaration claims that “[c]onsumers may not know how important each factor was in

and respondents could cite a single factor or more than one factor. Price was the most frequently cited factor that was important to respondents in their choice of a tax preparation provider, with 88 respondents out of the 125 respondents (70.4%) indicating so.²⁶¹ However, respondents did not focus exclusively on price and frequently cited non-price factors such as ease of use (86 out of 125 respondents, 68.8%), confidence in the accuracy and reliability of the results (66 out of 125 respondents, 52.8%), and data security (57 out of 125 respondents, 45.6%) as important factors in their choice of a tax preparation method/provider.²⁶² Only six out of 125 respondents (4.8%) selected price as their only important factor.²⁶³ On average, respondents reported 4.6 different product attributes that were important in their choice of a tax preparation method/provider, and 114 out of 125 respondents (91.2%) selected two or more factors.²⁶⁴ Marketing theory accepts that consumers would consider price in their choice of tax preparation software, but the data indicate clearly that price is not the only factor and that consumers evaluate price relative to other product attributes when making a decision to consider or use a tax preparation service.

their decision-making process.” See, Second Novemsky Declaration, ¶ 31. The Second Novemsky Declaration seems to mis-interpret the questions in my Purchase Driver Survey, as I did not ask respondents to rank or otherwise indicate “how important each factor was to their decision-making process.” The questions in the Purchase Driver Survey included both open and closed-ended formats to elicit from respondents whatever factors were relevant to their decision-making process.

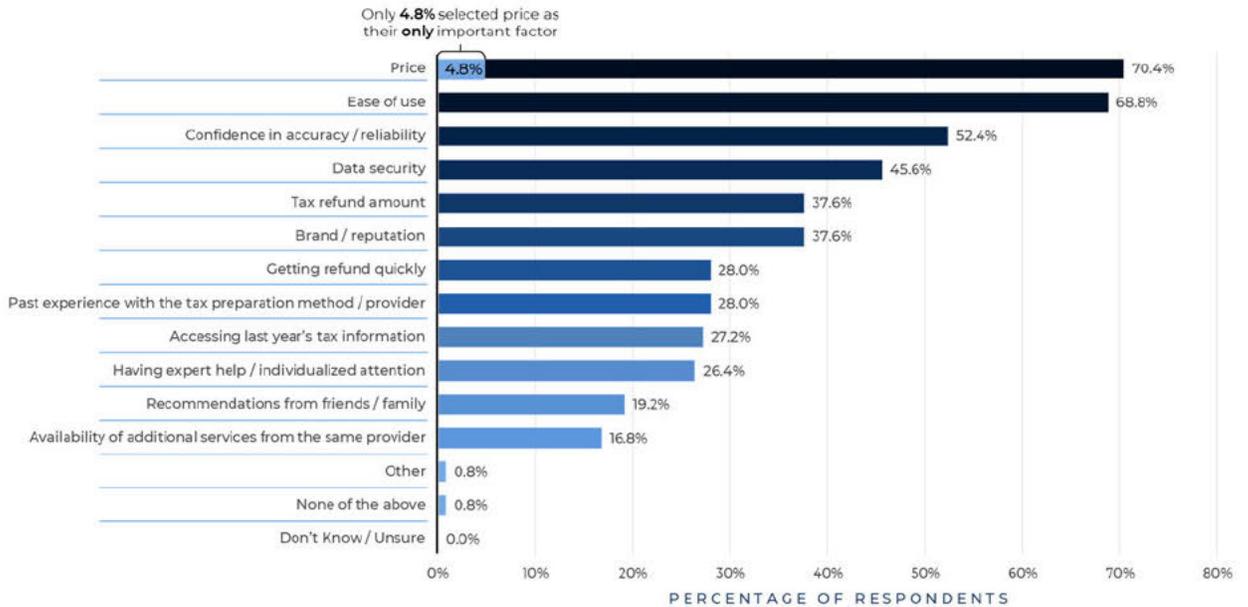
²⁶¹ Exhibit 13a.

²⁶² Exhibit 13a.

²⁶³ See, “Purchase Driver Backup Calcs.xlsx.” The Second Novemsky Declaration claims that this question may create demand artifacts because “consumers, who want to please the survey taker and do not want to appear cheap, would select more than just the price option when selecting important factors.” See, Second Novemsky Declaration, ¶ 31. First, the Second Novemsky Declaration did not provide any reasoning as to why a simple question that asks which factors were important to respondents would create a preconceived notion for respondents that not suggesting they wanted a low price product would please the survey taker. Second, this critique assumes that for all respondents who selected “price” along with other options, “price” was the only important factor important to them and they selected other options only for the sake of not appearing cheap. The Second Novemsky Declaration does not provide any reason for this assumption.

²⁶⁴ Exhibit 14.

Figure 16
Purchase Driver Survey: Responses to Closed-Ended Important Factors Questions
(Q7c, Q11c, Q14c)²⁶⁵



114. The observation that price is only one of many factors in consumer consideration and choice is consistent with [REDACTED]

²⁶⁵ See, Exhibit 13a, "Purchase Driver Backup Calcs.xlsx."

²⁶⁶ [REDACTED] INTUIT-FTC-PART3-000602936. [REDACTED]

[REDACTED]

[REDACTED]

²⁶⁷ [REDACTED] INTUIT-FTC-PART3-000602936. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] A January 2020 survey about TurboTax conducted by Guggenheim Securities similarly found that “Convenience and Ease of Use Keep Customers Loyal,” with 63% of respondents selecting “Convenience” as a factor they considered, while 61% selected “Price.”²⁷⁰ These studies are consistent with the importance of non-price attributes to consumers’ choices and their satisfaction with those choices.

115. In summary, there are numerous studies including my Purchase Driver Survey, studies by Intuit, and third-party studies that establish that consumers consider multiple factors in addition to price (and that price is often not the most important factor) when considering or choosing tax preparation software. “Free” is a price, but not the only price that affects consumers’ decisions.

116. The Second Novemsky Declaration states that “Professor Hauser seems to make the claim that because consumers also consider other important factors and conduct their own research when making tax product selection decisions, deception about the price does not matter. That does not follow. [...] While consumers may consider other factors, deception about one important factor in the presence with other important factors is deception that can obviously influence consumer behavior.”²⁷¹ I disagree with the Second Novemsky Declaration’s assertion that I am making the claim that deception, if any, about one factor does not matter. The evidence from my Purchase Driver Survey is that consumers are not likely to be deceived because they generally conduct research across multiple sources beyond TurboTax advertisements (see, Section VI.A). Furthermore, data from my Purchase Driver Survey and

²⁶⁸ Net Promoter Score (NPS) is a metric measuring consumer satisfaction where consumers rate on a scale of 0 – 10 how likely they would be to recommend a product to a friend. Customers who rate the product from 0 – 6 are considered “detractors,” while customers who rate the brand a 9 or 10 are called “promoters.” The NPS is then calculated by netting out detractors from promoters. See, Chen, E., “What is the Net Promoter Score (NPS)?” *MIT Orbit*, March 5, 2019, available at <https://orbit-kb.mit.edu/hc/en-us/articles/206440723-What-is-the-Net-Promoter-Score-NPS->, INTUIT-FTC-PART3-000606959.

²⁶⁹ [REDACTED] INTUIT-FFA-FTC-000206456, slide 2.

²⁷⁰ Wong, K., Garrett, A. and Liu, N., “INTU: Proprietary Tax Survey Shows TurboTax Share Gains, Some FFA Leakage & Sustained Live Interest,” *Guggenheim Securities, LLC*, January 28, 2020, INTUIT-FTC-PART3-000490270, p. 5.

²⁷¹ Second Novemsky Declaration, ¶ 30.

from other studies suggests that consumers consider many product features to be important and have varied preferences. Even if Intuit were shown to have deceived consumers about “free,” (and the Novemsky Report provides no evidence of deception) “free” is not the only driver of consumer choice (as discussed above in Section VI.B). Consumers will make trade-offs among product attributes according to their preferences (see, Section VI.C). The Novemsky Report, or other sources I have considered, provides no evidence that the use of “free” in TurboTax marketing implies causally that consumers are misled in their decisions to consider or choose TurboTax. Many consumers choose to pay for TurboTax tax preparation service based on their individual preferences and the trade-offs that they make.

C. Consumers Make Trade-offs Between Price and Quality and “Free” Is Not a Universal Priority

117. Complaint Counsel allege that Intuit’s advertising and website leads consumers to “believe that the TurboTax products and services Intuit advertises as free are free for them,” and point to “at least one of TurboTax’s competitors, Cash App Taxes (formerly Credit Karma Tax), [which] has offered a truly free online tax preparation and filing service to all consumers for five years,” to suggest that consumers “understand that online tax preparation products and services are often truly free.”²⁷² While “free” tax preparation may be an attractive offer to some consumers, Complaint Counsel fail to recognize that consumers can and do make trade-offs among various product features (including price, ease of use, reliability, security, and availability of additional support), and that in the market for tax preparation, “free” is not a universal priority.²⁷³
118. Consumers may be willing to make trade-offs between price and other measures of quality because they expect higher priced products to be higher quality or value.²⁷⁴ It is common that

²⁷² Complaint, ¶ 35.

²⁷³ The Second Novemsky Declaration states that “academic literature also shows that making ‘free’ claims leads to a significant increase in demand, showing that claims that a product are ‘free’ are significant drivers of consumer behavior.” See, Second Novemsky Declaration, ¶ 31. This statement, as applied to tax preparation, is inconsistent with findings from my Disclosure Efficacy Survey in which using a non-“free free free” advertisement and including more prominent disclosures does not reduce demand for Vertax generally or for Vertax Free Edition. As shown in Table 5 and discussed in Section V.B, the results from my Disclosure Efficacy Survey reveal that the share of respondents who indicated they would be most likely to start their taxes with Vertax Free Edition was greater in the Revised Disclosures Group (with fewer mentions of “free” and more prominent disclosures) than in the Original Disclosures Group (with more mentions of “free” claims) with the difference being statistically significant.

²⁷⁴ Keller, K. and Swaminathan, V., 2020. “*Strategic Brand Management – Building, Measuring and Managing*

consumers pay more for products they perceive as higher quality or value, even if there is a free alternative. For example, consumers often choose to pay to purchase books or other media even if there is a library nearby offering free rentals. Given that many attributes besides price are important to consumers when considering or choosing tax preparation software, we expect that many consumers would have preferences for alternatives other than a free tax filing option because they believe a higher priced option is likely to have better features or additional functionality. It is reasonable to expect that consumers may choose to pay a fee for such services after choosing to visit the TurboTax website.

119. The results from my Disclosure Efficacy Survey confirm that consumers are indeed willing to make these trade-offs. Of respondents who indicated that they would consider starting their taxes with Vertax, a substantial number (132/314 representing 42.0% of respondents in the Original Disclosures Group and 108/308 representing 35.1% of respondents in the Revised Disclosures Group) selected that they would likely start with one of Vertax's paid products (Deluxe, Premium, or Self-Employed).²⁷⁵ Respondents who indicated that they would likely start their returns with a paid product may have done so either because they are aware that they are not eligible to file with Free Edition, or because there are capabilities that they find valuable in those more expensive products. Either way, these respondents are signaling that they value other capabilities more than they value price, and specifically they are not swayed only by the possibility of filing for *free*. They are willing to make trade-offs to satisfy their goals.

120. The hypothesis that consumers are willing to trade off price and other features is supported by public-facing reviews, which describe price and quality trade-offs. Popular consumer-facing websites publish reviews of TurboTax products, with several noting that although TurboTax is generally more expensive than other online options (though still less than in-person help or accountants), TurboTax is worth the extra cost.²⁷⁶ For example:

Brand Equity." Pearson Education, Hoboken, New Jersey, INTUIT-FTC-PART3-000605380, pp. 160-161.

²⁷⁵ Exhibit 4b.

²⁷⁶ Based on key competitive metrics reported by Intuit, TurboTax outperforms its competitors (i.e., Tax Act, H&R Block, Credit Karma Tax, and Jackson Hewitt) on several customer satisfaction attributes, including relevance, quality, value, consideration, and usage. Moreover, TurboTax outperforms nearest competitors (i.e., TaxAct and H&R block) on accomplishment, convenience, leadership, and best outcome. See, [REDACTED] INTUIT-FTC-PART3-000602321, slides 19, 36, and 45.

- A 2021 *NerdWallet* review noted that “TurboTax is generally pricier than everything else out there, but even though confident filers may not need all the bells and whistles that most TurboTax online products offer, many people will find the experience and the availability of human help worth the extra cost.”²⁷⁷
- A 2022 *U.S. News & World Report* review similarly states “TurboTax retains the top spot in our annual analysis of the best tax software. While it’s not the cheapest option around, TurboTax provides the best overall user interface that makes it easy to do your taxes, efficiently handling most households’ needs for inputting your income from work, self-employment, investments, or rental properties, and most common deductions and credits.”²⁷⁸
- A 2022 *Business Insider* review was even titled “TurboTax review: Not the cheapest online tax software, but good for complex situations.”²⁷⁹
- The current *Listen Money Matters* review highlights that “TurboTax offers accurate and user-friendly software. It’s a steal if you qualify to use it for free.”²⁸⁰

121. Many consumers are generally willing to pay a price higher than “free” to choose the product that meets their needs. For example, some consumers choose to file taxes using an accountant or an in-person tax preparer rather than putting in the time and effort of doing it themselves, despite the higher associated cost.²⁸¹ Even some TurboTax customers who qualify for Free Edition may select to pay for optional add-on bundles to benefit from additional support that Intuit offers, such as audit defense, ID theft protection services, and other benefits.²⁸² A 2022

²⁷⁷ Orem, T., “TurboTax Review 2021,” *NerdWallet*, March 15, 2021, available at <https://web.archive.org/web/20210403145347/https://www.nerdwallet.com/article/taxes/turbotax-review/>, INTUIT-FTC-PART3-000607130.

²⁷⁸ Baluch, A., Van Bloom, C. and Rosenberg, A., “TurboTax Tax Software Review,” *U.S. News & World Report*, February 2, 2022, available at <https://www.usnews.com/360-reviews/technology/tax-software/turbotax>, INTUIT-FTC-PART3-000606933.

²⁷⁹ Rosenberg, E., “TurboTax review: Not the cheapest online tax software, but good for complex situations,” *Insider*, March 24, 2022, available at <https://www.businessinsider.com/personal-finance/turbotax-review>, INTUIT-FTC-PART3-000607226.

²⁸⁰ Ward, C., “TurboTax Review In-Depth: Does Free Really Mean Free?” *Listen Money Matters*, available at <https://www.listenmoneymatters.com/turbo-tax-review/>, INTUIT-FTC-PART3-000607262. See also, Fiebert, A., “About Listen Money Matters,” *Listen Money Matters*, available at <https://www.listenmoneymatters.com/about/>, INTUIT-FTC-PART3-000606977.

²⁸¹ Steele, Jason, “Tax Software vs. an Accountant: Which is Right for You?” *Investopedia*, available at <https://www.investopedia.com/financial-edge/0212/tax-software-vs.-an-accountant-which-is-right-for-you.aspx>, INTUIT-FTC-PART3-000617243.

²⁸² “So customers who use the Free Edition product can use it for free. They can file their tax returns, their federal

MITRE Report found that only 27% of respondents expressed an unwillingness to pay for “products or services to help [them] file their taxes,” while 29% of respondents expressed a willingness to pay up to \$50 and another 44% of respondents expressed a willingness to pay more than \$ [REDACTED]

[REDACTED]

While some consumers may have a preference for (and therefore seek out) free options, others are willing to pay some amount in order to satisfy other preferences.

122. My Purchase Driver Survey identified similar themes in respondents’ open-ended responses as shown in Figure 17. Two independent coders reviewing the open-ended responses identified two distinct concepts of “price” as a factor in respondents’ choices: “affordability” and “free service.”²⁸⁷ As shown in Figure 18, while some respondents indicated a preference for a “free service” (18 respondents out of the 125 “Considerers and Switchers”, 14.4%),²⁸⁸ many more

tax returns, their state tax returns completely free with TurboTax. [...] They do have the option to add on additional benefits that we offer, the plus bundle which I mentioned earlier which includes Audit Defense, ID theft protection services, and some other benefits. That is not a requirement to using TurboTax Free Edition.” Deposition of Catherine C. Goode, October 23, 2020, CC-00003393, at 83:21-84:8. “[S]ome of our free customers do value the additional benefits we offer and do choose to add on the bundle.” Deposition of Catherine C. Goode, October 23, 2020, CC-00003393, at 85:11-13.

²⁸³ Patterson, J. et. al., “Final Report: Key Findings and Implications for the IRS Free File Program,” *The MITRE Corporation*, January 2022, INTUIT-FTC-PART3-000607669, Appendix F, tab a) Cost. In comparison, I understand that there are 37.8 million TurboTax customers who completed and filed their TY21 tax return with TurboTax, and more than 13.4 million TurboTax customers (approximately 35%) who filed their federal and state taxes for free. See, Deal Report, ¶¶ 98, 101.

²⁸⁴ [REDACTED] INTUIT-FFA-FTC-000139031-032.

²⁸⁵ [REDACTED] INTUIT-FTC-PART3-000490320, slide 5.

²⁸⁶ [REDACTED] INTUIT-FTC-PART3-000490320, slide 5.

²⁸⁷ See, **Appendix D-1**, Section C.ii for a discussion of the independent coding process.

²⁸⁸ For example, when asked about what product attributes were important to them, Purchase Driver Survey, INTUIT-FTC-PART3-000607560, Respondent ID 872 noted “that I could file for free. I could get help if [I] needed it.” Across all open-ended questions, there are a total of 18 out of 125 respondents (14.4%) who the independent coders coded as preferring a “free service”. Any respondent who indicated a preference for “affordability” in one set of questions but free service in a different set of questions is counted as preferring a “free service.” See, “Purchase

described the relative price or the cost of the service generally as a key consideration (54 out of 125 respondents, 43.2%).^{289,290} The remaining 53 out of 125 respondents (42.4%) did not mention either “affordability” or “free service” in their open-ended responses on important product attributes.²⁹¹

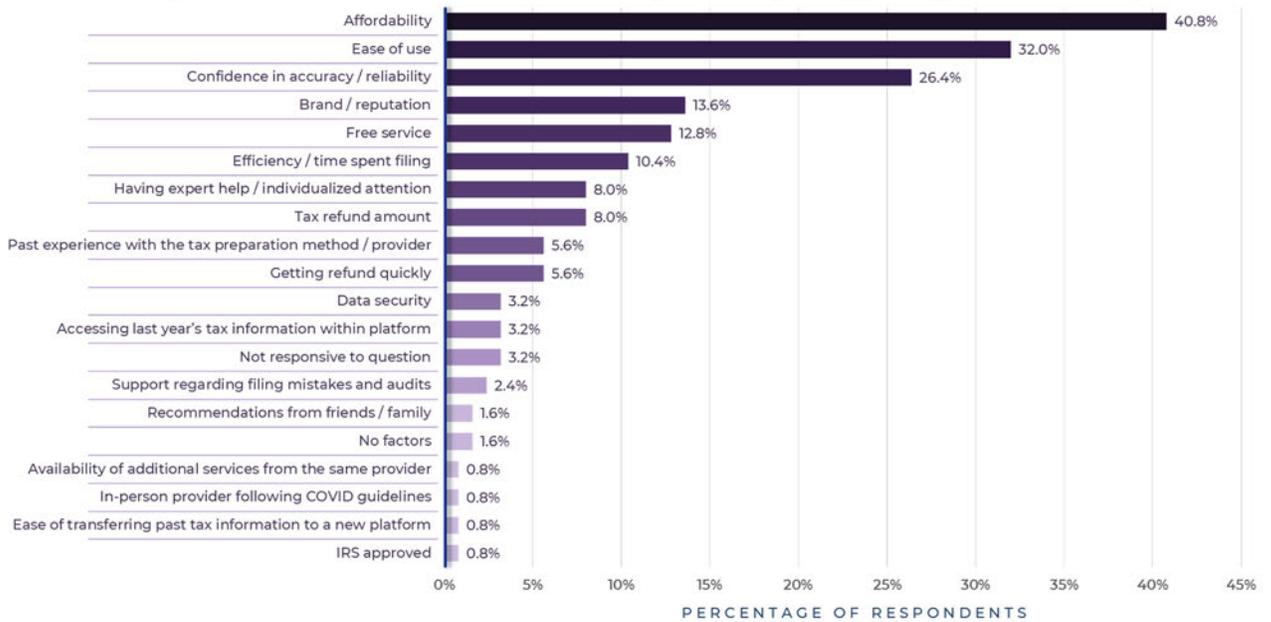
Driver Backup Calcs.xlsx.” See also, Exhibit 11b and Exhibit 13b for the count of respondents that prefer a “free service” by group of open-ended questions.

²⁸⁹ For example, when asked about what product attributes were important to them, Purchase Driver Survey, INTUIT-FTC-PART3-000607560, Respondent ID 767 noted “Easy; convenient and reasonably priced.” Purchase Driver Survey, INTUIT-FTC-PART3-000607560, Respondent ID 93 wrote “the cost of filing.” Across all open-ended questions, there are a total of 54 respondents (43.2%) who the independent coders coded as expressing a preference for “affordability.” Any respondent who indicated a preference for “affordability” in one set of questions but free service in a different set of questions is counted as preferring a “free service.” See, “Purchase Driver Backup Calcs.xlsx.” See also, Exhibit 11b and Exhibit 13b for the count of respondents that expressed a preference for “affordability” by group of open-ended questions.

²⁹⁰ The Second Novemsky Declaration takes issues with the two concepts of “price” (i.e., “affordability” and “free service”) that the two independent coders who reviewed open-ended responses identified. In particular, the Declaration claims that these concepts “[do] not take into account the colloquial understanding that consumers have of the term ‘affordability,’ which may include a consumer’s understanding that ‘free is affordable’ and that ‘affordability’ is a euphemism for the lowest available price (including no cost at all).” See, Second Novemsky Declaration, ¶ 31. The Second Novemsky Declaration seems to misunderstand how my survey results were analyzed. In my Purchase Driver Survey, respondents did not see the word “affordability.” This concept is a characterization made by the independent coders upon reviewing the open-ended answers.

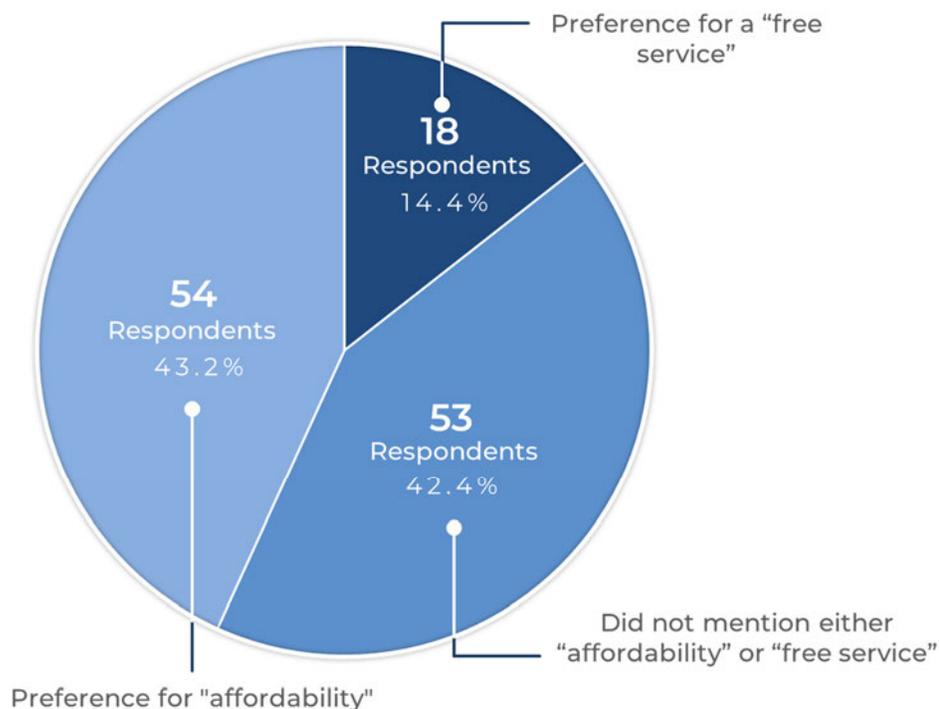
²⁹¹ See, “Purchase Driver Backup Calcs.xlsx.” Responses from these respondents include, for example: “I’d like something that is easy to understand, easy to use, helps me make sense of my taxes, and gets the job done accurately,” (Purchase Driver Survey, INTUIT-FTC-PART3-000607560, Respondent ID 84); “The ease of preparing, the accuracy of preparing, and making sure that I get the most out of my returns.” (Purchase Driver Survey, INTUIT-FTC-PART3-000607560, Respondent ID 28). This finding is consistent with the 2022 MITRE Report which explains that their “survey responses show clearly that the reasons for choosing filing methods are varied and cost is not always a factor. Many taxpayers, even if they’re aware of the program, will choose something different.” See, Patterson, J. et. al., “Final Report: Key Findings and Implications for the IRS Free File Program,” *The MITRE Corporation*, January 2022, INTUIT-FTC-PART3-000607669, p. 45.

Figure 17
Purchase Driver Survey: Categorized Responses to Open-Ended Important Factors Questions (Q7a, Q7b, Q11a, Q11b, Q14a, Q14b) and Anything Else (Q8, Q12, Q15)²⁹²



²⁹² See, Exhibit 13b.

Figure 18
Purchase Driver Survey: Comparison of Respondent Preferences for
“Affordability” and/or “Free Service”²⁹³



123. Overall, the evidence from my own research, scientific research, and publicly available materials demonstrates that consumers make trade-offs between price and other features in accordance with their own priorities and preferences, and that consumers will consider products that are not “free” if they believe they are receiving some value through other product attributes.

D. Consumers Are Generally Unlikely to Be “Locked In” to a Tax Preparation Provider

124. Complaint Counsel allege that taxpayers are lured in to using TurboTax by the allegedly deceptive advertising and, after filling in their personal and financial information, are forced to upgrade after facing a “Hard Stop” upgrade screen.²⁹⁴ The implication is that the inconvenience and burden of switching to a different provider in the middle of preparing one’s

²⁹³ See, “Purchase Driver Backup Calcs.xlsx.”

²⁹⁴ Complaint, ¶¶ 57-58.

tax returns would “lock” taxpayers into the TurboTax platform and coerce them into upgrading to paid products in order to complete their tax return.²⁹⁵ Multiple sources of evidence suggest that Complaint Counsel’s theory of “lock in” is inconsistent with consumer behavior in the marketplace.²⁹⁶

125. While my Purchase Driver Survey was not designed to focus specifically on customer actions after filling in their income and tax information, the data from that survey suggest the possibility that some customers will input their information simply as part of their research and purchase process and then voluntarily abandon their returns. In unaided open-ended questions, two respondents affirmatively reported that they had tried out tax preparation websites without filing to compare prices and refunds. For example, one respondent said “I went to tax act as well as hr block to see which place would get more money..[sic] I went to each site and filled in all my W2 info, and answered any questions given so I could find tax breaks, turbo tax was more thorough.”²⁹⁷ As shown in Figure 19, in aided closed-ended responses, 27 out of 125 “Considerers and Switchers” (21.6%) reported this sort of trial use.²⁹⁸ My own Purchase Driver Survey data are consistent with [REDACTED]

[REDACTED] The available evidence demonstrates that even after logging in or starting to enter personal information,

²⁹⁵ Although the Novemsky Report does not proactively address the theory of “lock in,” Professor Novemsky previously addressed the topic in the Second Novemsky Declaration, which I incorporate into my analysis that follows.

²⁹⁶ I understand that the Deal Report addresses low switching costs in the context of online DIY tax software. See, Deal Report, Section IV.B.4.

²⁹⁷ Purchase Driver Survey, INTUIT-FTC-PART3-000607560, Respondent ID 1722. See also, Purchase Driver Survey, INTUIT-FTC-PART3-000607560, Respondent ID 1138.

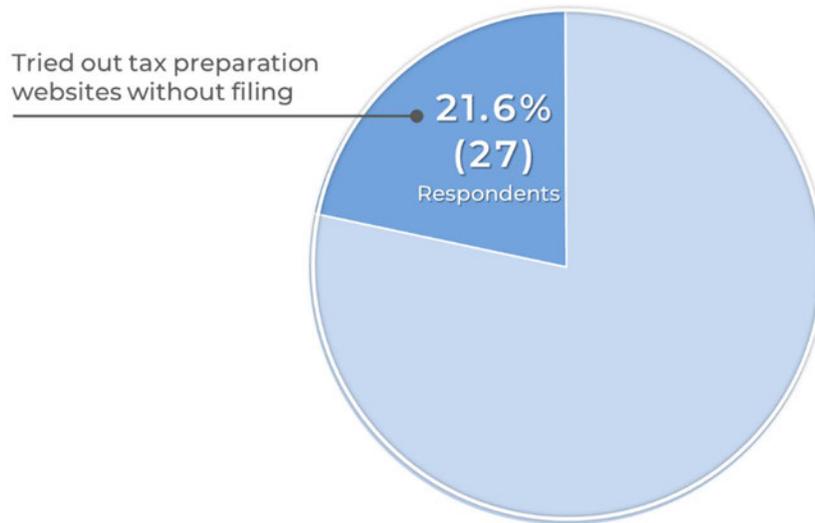
²⁹⁸ Exhibit 11a.

²⁹⁹ In [REDACTED] INTUIT-FTC-PART3-000602289, slide 25. The Second Novemsky Declaration misinterprets Intuit’s own data, arguing that “the fact that 30% of users who logged into TurboTax in 2019 did not ultimately file with a TurboTax product” means that “even if 30% of consumers had the wherewithal to overcome potential sunk costs of starting with TurboTax, 70% did not.” See, Second Novemsky Declaration, ¶ 32.

[REDACTED] The Intuit data do not state that the remaining respondents were locked in. The Second Novemsky Declaration’s argument implies, without evidence, that consumers that stay and do not abandon their TurboTax returns must be locked in—a strong and unfounded assumption.

many customers will abandon their returns³⁰⁰ and some of those customers do this as part of a “comparison shopping” process across online tax preparation providers.

Figure 19
Purchase Driver Survey: Respondents Reporting Trial Use as
Part of Their Research Process³⁰¹



126. Consumers who engage in trial usage demonstrate that they are willing to explore tax preparation services and abandon returns that don’t meet their expectations for any number of reasons. That some consumers will engage in this type of comparison shopping before filing their taxes both undermines Complaint Counsel’s claim that the sunk cost of tax filers’ time necessarily “locks” them into filing with TurboTax and the implied corollary that abandoned returns are in and of themselves as a signal of deception. To the contrary, to the extent that consumers are willing to engage in comparison shopping and abandon returns suggests that consumers are unlikely to be “locked in” to paying for TurboTax upgrades and that their abandoned returns are a signal of comparison shopping, rather than deception. Moreover, it also would not be reasonable to expect all consumers to engage in these trial usage practices, particularly consumers who are satisfied with their current tax preparation method / provider.³⁰²

³⁰⁰ See, for example, [REDACTED] INTUIT-FTC-PART3-000602247, slide 4.

³⁰¹ See, Exhibit 11a.

³⁰² The Second Novemsky Declaration notes the remaining “79% of consumers did *not* try another website, possibly indicating that those consumers did in fact feel locked in.” Second Novemsky Declaration, ¶ 32. This is a complete

For example, some consumers may have conducted their comparison shopping prior to starting a return and filling in their information, while others may have known in advance what product or service they wanted to use. It is not reasonable to simply assert the inverse (i.e., the 78.4% of Purchase Driver Survey respondents who did not report trial use) as a signal of lock-in.

127. Complaint Counsel imply that Intuit benefits from the alleged deception over the long run because Intuit's supposed "'freemium' strategy further involves 'brand loyalty,' or retention of consumers who previously filed their taxes for free in the 'freemium' version of TurboTax returning to TurboTax in subsequent years when they are no longer eligible for the 'freemium' version, and paying Intuit for a paid version of TurboTax."³⁰³ Consumers are loyal to TurboTax, in part because TurboTax provides a service they find valuable. Loyalty does not mean that consumers will repeatedly use a product if it no longer fulfills their needs or if it becomes more expensive. Repeatedly using a product may mean simply that the product remains the best choice for consumers based on the trade-offs consumers are willing to make among price and other factors. Consumers might consider switching and then decide not to switch.

128. To the extent consumers consider and switch to a different tax preparation method / provider across years, it is a reflection of consumers' willingness to change how they prepare their taxes and—inconsistent with Complaint Counsel's theory of harm—signals that they are not "locked in" to any one provider from one year to the next. My Purchase Driver Survey results find that many respondents will consider changing tax preparation methods / providers as needed to fit their needs each year, with 122 out of the 282 total respondents in my Main Analytical Sample (43.3%) reporting that they either used or considered using a different method / provider than they used in the previous year, as shown in Figure 20.³⁰⁴ The fact that such a large percentage of consumers are willing to consider switching year over year suggests that a larger percentage would be willing to consider switching over a longer period of time.³⁰⁵ Further, a high retention

misinterpretation of the Purchase Driver Survey data, as it simply assumes that all respondents who didn't indicate this type of trial use were "locked in" to TurboTax, regardless of whether they were TurboTax customers or not (e.g., someone who used a CPA). Moreover, the Second Novemsky Declaration simply assumes, without any evidence, that consumers who do not engage in this kind of comparison shopping are "locked in."

³⁰³ Complaint, ¶ 12.

³⁰⁴ Exhibit 9.

³⁰⁵ The Second Novemsky Declaration claims erroneously that the observed percentage of 43.3% of consumers switching or willing to switch in one year implies that many of the 57% may have felt locked in. Second Novemsky Declaration, ¶ 33. While my Purchase Driver Survey did not ask respondents what tax preparation method/provider

rate can be readily explained if consumers are satisfied with the service and price available at their current provider—a high retention rate is not evidence of any lock-in.³⁰⁶ The willingness to consider alternatives applies generally and to current TurboTax customers (as shown in Figure 21); of the 103 respondents who indicated that they used TurboTax to prepare and file their taxes in 2021, 44 (42.7%) indicated that they considered using a different method/provider in 2021 (but ultimately chose to use TurboTax again).³⁰⁷

respondents used in years prior to 2021, and because this percentage includes respondents who would consider switching, we can use standard retention rate calculations to extrapolate back multiple years. The “non-consideration/retention” rate is 55.7%, less than 57% because some consumers did not file their taxes in 2020. If the 55.7% non-consideration/retention were extrapolated for five years using a standard formula that assumes independence, $1 - r^t$, where r is the yearly non-consideration/retention rate and t is number of years, then the formula would imply that 94.6% of the respondents would have at least considered another tax preparation method/provider. I provide this calculation to demonstrate why the Second Novemsky Declaration’s reasoning is erroneous rather than to estimate a five-year switching rate. Appropriate calculations would require more data and assumptions and r includes non-consideration. A retention rate calculation would consider only actual switching. However, it is highly unlikely that appropriate calculations would be consistent with the assertion of 57%. The basic insight is that switching or potential switching over five years is more, perhaps substantially more, than switching in a single year.

³⁰⁶ Specifically, 11.0% of respondents “Used a different preparation method/provider in 2021” and 32.3% of respondents “Used the same preparation method/provider in 2021 and did consider using a different method/provider.” See, Exhibit 9. Similarly, the 2022 MITRE Report found that 49% of respondents “can see [themselves] switch[ing]” filing methods under certain circumstances. See, Patterson, J. et. al., “Final Report: Key Findings and Implications for the IRS Free File Program,” *The MITRE Corporation*, January 2022, INTUIT-FTC-PART3-000607669, Appendix F, tab “b) Other methods considered.”

³⁰⁷ See, “Purchase Driver Backup Calcs.xlsx.”

Figure 20
Purchase Driver Survey: Respondents' Willingness to Switch and Consider Switching Tax Preparation Methods / Providers³⁰⁸

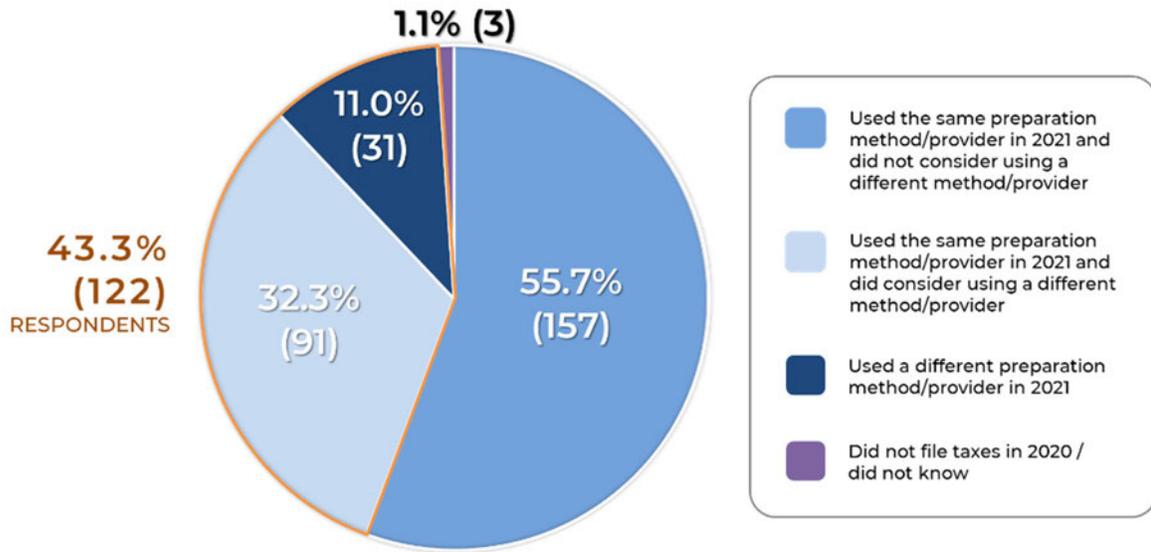
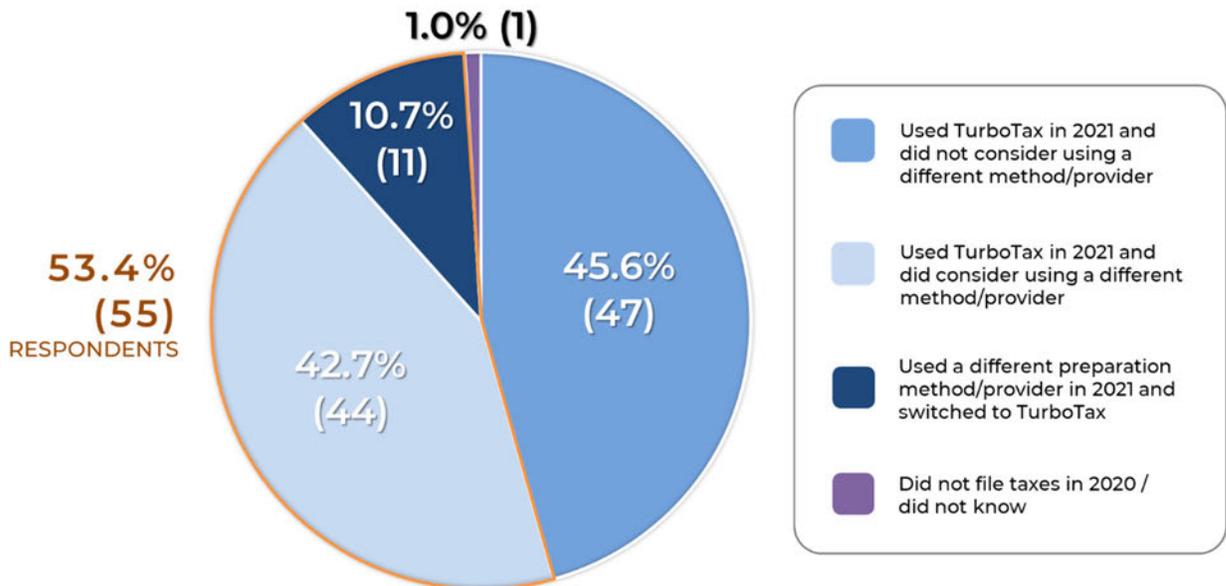


Figure 21
Purchase Driver Survey: TurboTax Users' Willingness to Switch and Consider Switching Tax Preparation Methods / Providers³⁰⁹



129. The majority of respondents in the Disclosure Efficacy Survey were willing to consider starting their taxes with Vertax as a disguised new tax preparation software provider. Across both the Original Disclosures Group and the Revised Disclosures Group, more than 75% of respondents indicated that they would consider starting their taxes on Vertax.³¹⁰ The rate of consideration is similarly high among respondents who had used TurboTax in the past 5 years.³¹¹ This percentage indicates that consumers are not automatically locked in to a provider—they are willing to consider an entirely new provider.³¹²

130. Not all consumers will consider a new tax preparation method / provider each and every year, and the absence of a consumer’s consideration to switch their tax preparation method / provider is not necessarily evidence of “lock in.”³¹³ Rather, some consumers may find that their tax situation has not changed significantly to warrant finding a new solution, or they may feel satisfied on a method / provider that works for them. To the extent some respondents in the Purchase Driver Survey did not consider switching away from their current tax preparation method / provider, including TurboTax,³¹⁴ these respondents generally reported that this was

³⁰⁸ See, Exhibit 9.

³⁰⁹ See, “Purchase Driver Backup Calcs.xlsx.”

³¹⁰ 77.7% of respondents (314) in the Original Disclosures Group and 75.9% of respondents (308) in the Revised Disclosures Group indicated that they would consider using Vertax. See, Exhibit 3.

³¹¹ Among respondents who indicated that they had used TurboTax in the past 5 years, 79.4% of respondents (204) in the Original Disclosures Group and 79.5% of respondents (201) in the Revised Disclosures Group indicated that they would consider starting their taxes using Vertax. See, Sensitivity 3a.

³¹² It is not appropriate to consider the remaining 25% as locked in. The other 25% may not believe that they have sufficient information from the stimuli in the Disclosure Efficacy Survey to consider Vertax or they may infer that Vertax is not likely to be better than their current provider. The 75% is indicative of a willingness to switch. Actual switching would depend upon the marketplace if Vertax were an actual provider.

³¹³ The Second Novemsky Declaration, when referring to “surveyed consumers”, claims that “[c]learly, 57% did not even consider switching and many of those who *considered* switching may have felt too locked in to ultimately switch.” See, Second Novemsky Declaration, ¶ 33. To the extent that the Second Novemsky Declaration is referring to all surveyed consumers, as implied by the sentence proceeding the quote, the stated percentage does not imply TurboTax consumers are locked in. The percentage applies to all consumers. Even if the Second Novemsky Declaration had referenced the subset of respondents who had used TurboTax, the observed willingness to switch is for a single year. The willingness to switch over multiple years could be substantially higher. At minimum, it is not consistent with the data to use the 57% result as used in ¶ 33.

³¹⁴ 47 out of 103 current TurboTax users, 45.6%, used TurboTax in the previous year and did not consider switching. The Second Novemsky Declaration claims that “even though 45% of prior-year TurboTax customers did not consider switching, the remaining 55% did.” See, Second Novemsky Declaration, ¶ 34. This is a mischaracterization of my survey data. My Purchase Driver Survey only asked respondents about their *current year* choice and whether it differed from the prior year. The data refer to a percentage of current TurboTax users, not a percentage of prior-year TurboTax users. For completeness, I provide the following percentages: 44 out of 103 current TurboTax users

because their current choice was familiar (96 out 157 respondents, 61.1%), satisfactory (76 out 157 respondents, 48.4%), and easy to use (35 out 157 respondents, 22.3%).³¹⁵ For example, respondents noted that they did not consider another method / provider because “I was pleased with the service in prior years,” “I have always used Turbo Tax for filing my taxes because of how easy it was and the easy layout,” and “I was satisfied with turbo tax and found it easy to use.”³¹⁶ Despite the Second Novemsky Declaration’s assertion that “familiarity with last year’s choice is precisely the issue that locks consumers into a product,” familiarity is generally considered a consumer benefit and one that accrues to a consumer from using a product multiple times.³¹⁷ The Second Novemsky Declaration asserts without providing any evidence or reasoning, that if consumers continue to use a product because it is familiar, that is a form of “lock-in.”³¹⁸ The more logical explanation is that consumers are familiar with, and like, the trade-offs among attributes provided by the product and have chosen rationally not to change their tax preparation method / provider.³¹⁹ Consumers are willing to abandon their returns within a given tax year, and willing to consider and even switch tax preparation providers, so to the extent TurboTax customers felt deceived or “locked in,” they would be unlikely to develop familiarity with the TurboTax product through repeat usage. The more logical explanation is that consumers like the product enough to continue using from one year to the next.³²⁰

(42.7%) used TurboTax in the prior year and considered switching to a different method (but ultimately didn’t), 11 out of 103 (10.7%) used a different method/provider in the prior year and switched to TurboTax, and 1 out of 103 (1.0%) selected that they did not file in the prior year. See, “Purchase Driver Backup Calcs.xlsx.”

³¹⁵ 157 respondents indicated that they used the same method / provider in 2021 and did not consider switching to another method / provider (Track 1). See, footnote 225.

³¹⁶ Purchase Driver Survey, INTUIT-FTC-PART3-000607560, Respondent IDs 395, 297, and 92.

³¹⁷ Second Novemsky Declaration, ¶ 34.

³¹⁸ Second Novemsky Declaration, ¶ 33.

³¹⁹ In my Purchase Driver Survey, 48.4% (76 out of 157) respondents who did not consider switching tax preparation methods/providers state that the choice is satisfactory, 22.3% (35 out of 157 respondents) state that the choice is easy to use, 20.4% (32 out of 157 respondents) state that the past year’s tax information is accessible, 15.3% (24 out of 157 respondents) state that the current choice is cost-effective. The percentages clearly add to more than 100%; the Second Novemsky Declaration does not acknowledge that consumers have multiple reasons for not considering another method/provider. See, Exhibit 10.

³²⁰ According to the Second Novemsky Declaration, “just because consumers are happy with the TurboTax product they used does not mean that they were not deceived in the process of selecting it, or that they would not have been happy with a different filing option they may have considered absent Intuit’s ‘free’ marketing.” See, Second Novemsky Declaration, ¶ 34. The Novemsky Declaration implies without evidence that consumers’ repeated use of TurboTax is simply the result of a “status quo bias.”

131. Tax preparation is what academics call a “repeated game.” Taxpayers must decide how to file their taxes each year and this decision is repeated year after year. Firms like Intuit rely heavily on repeat business from satisfied customers. In addition, firms often consider the “lifetime value of a consumer,” which depends upon the ability of the firm to retain its consumers year after year.³²¹ If consumers, as Complaint Counsel posit, felt deceived when they found they had to pay for a TurboTax product and *also* felt they could not reasonably change tax preparation methods at that point for that tax year, they would be less likely to return to TurboTax in future years and TurboTax would lose that stream of revenue. [REDACTED]

132. Drawing on evidence from my Disclosure Efficacy and Purchase Driver Surveys, Intuit’s own data, and publicly available research, I find that consumers are willing to change tax preparation providers, both within a given year and across years. The high retention rates and customer satisfaction of existing TurboTax customers demonstrate that TurboTax customers are satisfied with their choice of TurboTax. The high retention rates are not evidence of Complaint Counsel’s allegations that consumers are “locked in” to TurboTax.

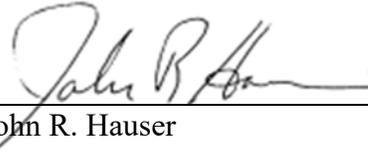
VII. CONCLUSIONS

133. The Novemsky Report does not reliably assess whether or not taxpayers who do not qualify to use TurboTax Free Edition have a misimpression that they can file for free with Free Edition. The Novemsky Report does not provide any data that Intuit’s advertising, website, or disclosures cause any misimpressions, if any exist. The Novemsky Survey does not reliably assess whether or not consumers have the misimpression that their returns meet TurboTax’s definition of a “simple U.S. return.” Each of the flaws individually would render the Novemsky Survey unsuitable for its stated purpose, but when taken together, the flaws render the Novemsky Survey completely unreliable.

³²¹ Lew, G., 2017. “The Importance of Customer Lifetime Value in Determining Their Profitability.” *The Business and Management Review*, 8(4), 24-30, INTUIT-FTC-PART3-000606056, p. 24.

³²² [REDACTED] INTUIT-FTC-PART3-000607561, slide 5. [REDACTED]

134. My Disclosure Efficacy Survey rejects Complaint Counsel's hypotheses that consumers, who were exposed to more prominent disclosures about the limitations to filing for free, would choose to start their taxes with TurboTax less frequently or would choose Free Edition less frequently. My Purchase Driver Survey provides evidence that consumers use many sources of information in addition to Intuit's advertisements and website. Consumers consider trade-offs among price and other features and are not necessarily driven to choose a tax preparation software provider simply because it is free. Consumers are not locked-in to a tax provider and are willing to switch among providers if the value proposition is favorable. Evidence from Intuit's own studies and from third-party sources is consistent with these results.



John R. Hauser

January 13, 2023

[Exhibits omitted]

[Appendices A-D omitted]

APPENDIX E
INDEPENDENT CODER INSTRUCTIONS

Survey Overview

- 1) You are being asked to be one of two coders of an online survey conducted for market research about tax preparation in 2022. In this research, respondents were asked several open-ended questions. We are asking you, in your role as a coder, to carefully review and categorize their responses.
- 2) Each respondent was asked a series of open-ended questions about their understanding of TurboTax online software, including:

Question(s)	
TAT220	What is your understanding about whether or not there is a cost to filing your own income taxes using TurboTax online software?
TAT230	You may have already said this above, but please tell us again, in your understanding, who, if anyone, can file their taxes for free using TurboTax online software?

- 3) You are being asked to review and code open-ended answers to the set of survey questions shown above related to **respondent understanding, if any, of TurboTax online software cost.**

Instructions

- 1) You will be responsible for coding open-ended answers to the survey questions above. More specifically, you are being asked to review responses to the set of open-ended questions above and assess respondents' understanding of filing their 2021 income taxes for free using TurboTax online software.
- 2) You will be given a single spreadsheet with the open-ended answer responses for the relevant open-ended questions.
- 3) Your job is to categorize each set of open-ended answers into relevant bucket(s) using either a "0" or a "1". To do so, you are instructed to follow the steps explained below to develop/code categories:

Development of Categories

- 1) Each coder will review the open-ended responses and provided categories and consider whether additional categories are needed to commonly describe responses. At this stage, each coder should categorize the first 100 responses accordingly.
- 2) For this exercise, you are being provided with the four initial categories below. Please review these categories and judge whether additional categories are needed.
 - a. I think I can file my 2021 income taxes for free using TurboTax online software
 - b. I don't think I can file my 2021 income taxes for free using TurboTax online software
 - c. I do not have enough information to say whether or not I can file my 2021 income taxes for free using TurboTax online software
 - d. I'm not sure
- 3) Once reviewed, coders will meet with each other to discuss their category lists. Ultimately, together, you will decide on one final list of categories.

Coding of Answers

- 1) Once the list of categories is confirmed, you will independently review both open-ended answers from each respondent and assign each respondent to the relevant category (or categories, if appropriate).
- 2) You will use the value of “1” to indicate that a respondent belongs in a particular category and a value of “0” to indicate that a respondent does not belong in a particular category. Use only one code (“0” or “1”) for each respondent and category.
- 3) A respondent should be assigned to the category (or categories, if appropriate) that best fit.
- 4) Do not rush – take your time. Read the question and answer twice before deciding on a code.
- 5) Respondents may misspell an answer. For example, a respondent might type “Bostan” when s/he meant “Boston.” You are to use your judgment of what the respondent meant when typing the answer.
- 6) Use your own judgment – do NOT consult with anyone else. This is very important.
- 7) After both coders have categorized the respondents using the agreed upon list of categories, you will meet to resolve (“tiebreak”) any differences in coding. In the case of disagreement, you will jointly recode the response in question while keeping track of each coder’s initial categorizations and the final categorizations.

APPENDIX F
INDEPENDENT CODER INSTRUCTIONS

Survey Overview

- 1) You are being asked to be one of two coders of an online survey conducted for market research about tax preparation in 2022. In this research, respondents were asked several open-ended questions. We are asking you, in your role as a coder, to carefully review and categorize their responses.
- 2) Each respondent was asked a series of open-ended questions about their understanding of TurboTax online software, including:

Question(s)	
TAT220	What is your understanding about whether or not there is a cost to filing your own income taxes using TurboTax online software?
TAT230	You may have already said this above, but please tell us again, in your understanding, who, if anyone, can file their taxes for free using TurboTax online software?
TAT250/260	You may have already said this above, but please tell us again <u>why you</u> [<i>think you can/don't think you can</i>] file your 2021 income taxes for free using TurboTax online software?
TAT270	You may have already said this above, but please tell us again <u>what information you need</u> to say whether or not you can file your 2021 income taxes for free using TurboTax online software?

- 3) You are being asked to review and code open-ended answers to the set of survey questions shown above related to **respondent understanding, if any, of criteria determining eligibility to use TurboTax for free, if any.**

Instructions

- 1) You will be responsible for coding open-ended answers to the survey questions above. On the pages that follow, you will see coding instructions and examples of how one might code responses.
- 2) You will be given a single spreadsheet with the open-ended answer responses for the relevant open-ended questions.
- 3) Your job is to categorize each set of open-ended answers into relevant bucket(s) using either a “0” or a “1”. To do so, you are instructed to follow the steps explained below to develop/code categories:

Development of Categories

- 1) Each coder will review the open-ended responses and provided categories and consider whether additional subcategories are needed to commonly describe responses. At this stage, each coder should categorize the first 100 responses accordingly.
- 2) For this exercise, you are being provided with the three initial categories below. Please review these categories and judge whether additional categories and/or subcategories are needed.
 - a. Respondent expresses understanding that there are criteria determining eligibility to use TurboTax for free
 - b. Respondent expresses understanding that there are not criteria determining eligibility to use TurboTax for free
 - c. Respondent does not express any understanding of whether or not there are criteria determining eligibility to use TurboTax for free
- 3) Once reviewed, coders will meet with each other to discuss their category lists. Ultimately, together, you will decide on one final list of categories.

Coding of Answers

- 1) Once the list of categories is confirmed, you will independently review both open-ended answers from each respondent and assign each respondent to the relevant category (and subcategory/subcategories, if appropriate).
- 2) You will use the value of “1” to indicate that a respondent belongs in a particular category and a value of “0” to indicate that a respondent does not belong in a particular category. Use only one code (“0” or “1”) for each respondent and category.
- 3) A respondent should be assigned to the category (and subcategory/subcategories, if appropriate) that best fit.

- 4) Do not rush – take your time. Read the question and answer twice before deciding on a code.
- 5) Respondents may misspell an answer. For example, a respondent might type “Bostan” when s/he meant “Boston.” You are to use your judgment of what the respondent meant when typing the answer.
- 6) Use your own judgment – do NOT consult with anyone else. This is very important.
- 7) After both coders have categorized the respondents using the agreed upon list of categories (and subcategory/subcategories), you will meet to resolve (“tiebreak”) any differences in coding. In the case of disagreement, you will jointly recode the response in question while keeping track of each coder’s initial categorizations and the final categorizations.

RX1345

**United States of America
Before the Federal Trade Commission**

In the Matter of:

Intuit Inc., a corporation.

Docket No. 9408

Rebuttal Expert Report of Nathan Novemsky, Ph.D.

January 27, 2023

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I. Summary

1. I provided an expert report in this matter on December 9, 2022 (“Opening Report”).¹ I have received and considered four expert reports—by Professor Hauser, Dr. Golder, Ms. Kirk Fair and Mr. Deal—submitted on behalf of Intuit in this matter.²

2. While Professor Hauser, Dr. Golder, Ms. Kirk Fair, and Mr. Deal have presented copious opinions and criticized various aspects of my Opening Report, the opinions contained therein, and the TurboTax Perception Survey I designed and implemented, none of the arguments they present are persuasive. After carefully reviewing the hundreds of pages contained in the four Intuit reports, my central opinions remain unchanged:

- A substantial portion of the taxpayers who do not qualify to use TurboTax Free Edition under Intuit’s criteria have the misimpression that they can file their income taxes for free using TurboTax.
- Intuit’s TurboTax advertisements and the TurboTax website are the two most common sources identified as playing a role in taxpayers forming the misimpression that they can file their income taxes for free using TurboTax. A vast majority of the mistaken taxpayers identified at least one of these two sources as playing a role in forming their misimpression
- A substantial portion of the taxpayers who are not eligible to use TurboTax Free Edition under Intuit’s criteria (and hence, do not have a “simple U.S. return,” as Intuit uses the term) nevertheless have the misimpression that their returns meet TurboTax’s definition of a “simple U.S. return.”
- The results of the TurboTax Perception Survey, [REDACTED] provide strong evidence that Intuit’s marketing is the most likely source of these consumer misperceptions.

3. Professor Hauser’s criticisms of my Opening Report and TurboTax Perception Survey are incorrect and baseless.

¹ GX303, Expert Report of Nathan Novemsky, Ph.D., December 9, 2022 (“Novemsky Opening Report”).

² RX1017, Expert Report of Professor John R. Hauser, SC.D., January 13, 2023 (“Hauser Report”); RX1018, Expert Report of Professor Peter N. Golder, Ph.D., January 13, 2023 (“Golder Report”); RX1016, Expert Report of Rebecca Kirk Fair, January 13, 2023 (“Kirk Fair Report”); RX1027, Expert Report of Bruce F. Deal, January 13, 2023 (“Deal Report”).

- While Professor Hauser incorrectly claims that my Opening Report and TurboTax Perception Survey do not provide any evidence that Intuit's TurboTax Free Edition advertisements, website, or disclosures were deceptive, the evidence does support my conclusions. The TurboTax Perception Survey [REDACTED] establishes the link between Intuit's advertising and website and consumers' misperceptions about their ability to use TurboTax for free. Moreover, neither Professor Hauser nor any other Intuit experts name or provide any evidence supporting a credible source for consumer misimpressions related to TurboTax, other than Intuit's marketing.
- Professor Hauser's coding of open-ended responses in my TurboTax Perception Survey, an attempt to undermine my survey results, is inaccurate and misleading. I note that, while Professor Hauser's coding methodology is flawed, the TurboTax Perception Survey results withstand scrutiny and support the conclusions in my Opening Report even accepting Professor Hauser's methodology and correcting only for obvious coding errors.
- Professor Hauser's criticisms about the design and implementation of the TurboTax Perception Survey are baseless and speculative. Professor Hauser claims that the TurboTax Perception Survey sample is biased, which is incorrect. Professor Hauser also fails to provide any evidence that such bias existed and fails to even propose how any purported bias he identifies would negate the results of my TurboTax Perception Survey. While Professor Hauser also claims that the Perception Survey suffers from a number of demand artifacts, including encouraging guessing and asking leading and unreliable questions, his claims fail since I used reliable survey methodology in designing the TurboTax Perception Survey, leading to reliable results.

4. Professor Hauser conducted two surveys, each of which suffers from design flaws, and neither of which support the conclusions he attempts to draw.

- Professor Hauser's Disclosure Efficacy Survey is flawed and changes none of the opinions in my Opening Report. At best, Professor Hauser's Disclosure Efficacy Survey results show that Professor Hauser's modified stimuli are no less deceptive than the original stimuli (based on actual TurboTax marketing). This survey cannot be used provide evidence as to how deceptive either of the two sets of stimuli are.
- Contrary to his claims, Professor Hauser's revised stimuli do not account for the deceptive aspects of TurboTax marketing materials he modified.

- Professor Hauser’s Disclosure Efficacy Survey also suffers from substantial demand artifacts, rendering the survey results and related conclusions unreliable.

5. Professor Hauser’s Purchase Driver Survey is similarly flawed and changes none of the opinions in my Opening Report.

- Professor Hauser’s conclusions that: (i) most consumers do not rely solely on advertisements and instead conduct substantial research when selecting a tax preparation method/provider; (ii) consumers consider a variety of factors important when selecting a tax preparation method / provider and that consumers are willing to make trade-offs between price and other features; and (iii) consumers are unlikely to feel “locked in” to a tax preparation provider are unsupported by the Purchase Driver Survey, and are largely irrelevant to the claims at issue in this matter.
- One very important flaw with Professor Hauser’s conclusions is that his report of the results of the Purchase Driver Survey are based on less than half of respondents (only those that considered switching or actually switched tax preparation providers), leading to inflated results and unreliable conclusions.
- Professor Hauser’s Purchase Driver Survey suffers from additional design flaws, including several demand artifacts. Finally, even disregarding the serious design flaws, the results of the Purchase Driver Survey tend to support the conclusions I draw in my Opening Report.

6. Dr. Golder’s report offers unconvincing opinions and criticisms of my Opening Report, based on indirect evidence and speculation.

- Dr. Golder fails to show that positive customer reviews and high customer retention are inconsistent with a substantial number of consumers being deceived and relies on incomplete and unpersuasive data sets in reaching his conclusions.
- Dr. Golder relies on logical fallacies to draw a number of conclusions about consumers and consumer psychology.
- Dr. Golder’s supposed evidence that some customers try multiple online tax preparation providers or switch providers does not rule out substantial lock-in or high switching costs, and Dr. Golder’s analysis of Intuit’s rate of complaints to third parties is not evidence of lack of deception.

- Dr. Golder’s assessment that Intuit’s disclosures align with “Industry Standard Disclosures” is wholly irrelevant, as is his opinion that “free” TurboTax ads benefit consumers overall.
- Dr. Golder’s conclusions about the effectiveness of Intuit’s TurboTax disclosures are speculative and unsupported. Another unsupported and speculative conclusion Dr. Golder draws, that consumers in the tax preparation industry make involved purchase decisions and do not rely solely on advertisements, is also irrelevant, and claims by both Dr. Golder and Professor Hauser that consumers are generally skeptical of free product offers is incorrect and refuted by the evidence, including evidence cited by both experts.
- Dr. Golder’s claim that the TurboTax website “provides information in a clear and timely manner” ignores that misperceptions may drive traffic to the website in the first place and that “simple returns” language is not well understood by consumers.

7. The opinions in Ms. Kirk Fair’s report are flawed and change none of the opinions in my Opening Report. Ms. Kirk Fair relies on a survey she conducted to support her opinions about the extent to which providing consumers with more or less information about alternative methods of filing their taxes affects consumers’ decisions about tax preparation solutions. However, her survey does not support her opinions.

- The Kirk Fair Disclosure Survey suffers from several methodological and design flaws, including: (i) improper sample selection; (ii) failing to ask respondents whether they thought they could file taxes for free using TurboTax online software; (iii) requiring respondents to entertain a hypothetical scenario; (iv) failing to replicate sunk costs experienced by consumers actually using TurboTax; and (v) failing to account for switching costs.
- The results and conclusions from the Disclosure Survey are irrelevant and uninformative. While Ms. Kirk Fair claims that her survey rebuts the implication that consumers who are not eligible for TurboTax Free Edition upgrade to TurboTax paid products because they do not have a choice, Ms. Kirk Fair does not elaborate any further on her claim or provide any justification as to how the findings of her survey contradict the results of my TurboTax Perception Survey.

- Ms. Kirk Fair's responses to criticisms of her Disclosure Survey from my Second Declaration are not persuasive and misinterpret my earlier criticism.

8. As with Intuit's other experts, Mr. Deal's opinions about the relevant population of deceived consumers relies on faulty assumptions, vastly undercounting the consumers who may have been deceived by Intuit's advertising. His criticism of my survey methodology and the opinions in my report are unpersuasive and unfounded.

9. As noted above, after considering the expert reports submitted by Intuit, the opinions I expressed in my Opening Report remain unchanged.

II. Qualifications and Assignment

10. My qualifications and assignment have been outlined in my Opening Report.³ For purposes of this rebuttal report, I have considered the materials submitted by Professors Hauser and Golder and Ms. Kirk Fair and Mr. Deal and respond to arguments made in those materials. A list of the materials I have relied upon in this report and in forming my opinions is attached as Appendix A.

III. Professor Hauser's Criticisms of My Opening Report and TurboTax Perception Survey Are Incorrect and Baseless

11. In my Opening Report, I concluded that "[t]he results of the TurboTax Perception Survey, [REDACTED] provide strong evidence that Intuit's marketing is the most likely source of these consumer misperceptions."⁴ Professor Hauser disputes my findings and puts forth criticisms of my survey and Opening Report in three main areas. First, Professor Hauser objects to the structure of the TurboTax Perception Survey. Because it does not utilize a test-control methodology and does not test consumer perceptions of specific TurboTax advertisements, he reaches the conclusion that the TurboTax Perception Survey (and, indeed, my whole Opening Report) does not provide any evidence of consumer deception likely caused by TurboTax advertisements and website.⁵ I address these claims in Section III.A. Second, Professor Hauser criticizes the results of the TurboTax Perception Survey, claiming that he identified multiple inconsistencies between open-ended and closed-ended results.⁶ I address these claims in Section III.B. Third, Professor Hauser criticizes the questionnaire design and

³ GX303, Novemsky Opening Report, Section II.

⁴ GX303, Novemsky Opening Report, ¶11.

⁵ RX1017, Hauser Report, ¶15.

⁶ RX1017, Hauser Report, ¶¶53-55, ¶¶68-74.

sampling, claiming the TurboTax Perception Survey results are biased and unreliable.⁷ I address these claims in Section III.C.

12. Professor Hauser's critique of the opinions in my Opening Report and the TurboTax Perception Survey lacks merit. His claim that the "Novemsky Report and Novemsky Survey do not provide any evidence that Intuit's TurboTax Free Edition advertisements, website, or disclosures were deceptive" is incorrect.⁸ Professor Hauser's analysis of the open-ended responses: (i) does not contradict the conclusions in my Opening Report; (ii) is flawed and unreliable; and (iii) is consistent with the results and conclusions presented in my Opening Report when errors present in Professor Hauser's analysis are corrected. Professor Hauser's criticisms of my survey design and implementation are baseless. As a result, all of the results and conclusions from my TurboTax Perception Survey and Opening Report still stand and my opinions are unchanged in light of Professor Hauser's criticisms.

13. In Section IV, I discuss Professor Hauser's Disclosure Efficacy Survey and show that this survey cannot support Professor Hauser's conclusion that "Intuit's marketing was unlikely to deceive consumers into starting their returns with TurboTax Free Edition."⁹

14. In Section V, I discuss Professor Hauser's Purchase Driver Survey and show that this survey cannot support Professor Hauser's conclusions.

A. Professor Hauser's claim that the "Novemsky Report and Novemsky Survey do not provide any evidence that Intuit's TurboTax Free Edition advertisements, website, or disclosures were deceptive" is incorrect

15. In my Opening Report, I presented multiple pieces of evidence establishing the link between Intuit's advertising and website and consumers' misperceptions about their ability to use TurboTax for free.

- Using a test / control setup, Intuit's own marketing research established that exposure to a single one of Intuit's "free, free, free" advertisements caused a statistically significant increase in consumer perception regarding being allowed to file taxes for free using TurboTax (compared to a control group).¹⁰
- Intuit undertook a long-running and pervasive marketing campaign where the free-themed ads (including those mentioned above that were shown to have an impact on consumer perception, or those substantially similar to them) were

⁷ RX1017, Hauser Report, ¶¶39-67.

⁸ RX1017, Hauser Report, ¶15.

⁹ RX1017, Hauser Report, ¶14.

¹⁰ GX303, Novemsky Opening Report, ¶97.

shown repeatedly, with a yearly concentration during the tax filing season.¹¹ Marketing science tells us that repeat advertising reinforces marketing messages, compounding their impact and mitigating decay of impact.¹²

- TurboTax Perception Survey results establish the extent of misperceptions by showing that “a substantial portion of the taxpayers who do not qualify to use TurboTax Free Edition under Intuit’s criteria have the misimpression that they can file their income taxes for free using TurboTax.”¹³
- TurboTax Perception Survey results also link the misperceptions to TurboTax’s marketing by showing that “Intuit’s TurboTax advertisements and the TurboTax website are the two most common sources identified as playing a role in taxpayers forming the misimpression that they can file their income taxes for free using TurboTax.”¹⁴

16. This evidence is further supported by the lack of credible explanations as an alternate source (unrelated to Intuit) for the identified misperceptions. Professor Hauser’s and other Intuit experts’ claim that the misperceptions could have been caused by “likely alternative explanations” is purely speculative, as these experts do not show any evidence that some other source caused any misperception related to TurboTax, let alone the substantial amount of misimpressions identified in the TurboTax Perception Survey.¹⁵

1. The TurboTax Perception Survey has the appropriate structure to address the issues of interest in this case.

17. As I explained in my Opening Report, when I designed the TurboTax Perception Survey, I concluded that a test / control framework would be inappropriate for the objectives of the survey—the first of which was to measure the extent of taxpayers’ opinions and beliefs as to whether they can file their taxes for free using TurboTax online software.¹⁶ This is because a test / control framework would not be appropriate when there is no suitable control group, or when the nature of the deception cannot realistically be replicated in the survey environment. Intuit’s long-running and pervasive marketing campaigns in which the allegedly deceptive messages were communicated to consumers repeatedly and over various communication

¹¹ GX303, Novemsky Opening Report, ¶¶2-3, footnote 125. [REDACTED]

[REDACTED] *ee*,
Workpaper 1.

¹² GX303, Novemsky Opening Report, ¶31.

¹³ GX303, Novemsky Opening Report, ¶8.

¹⁴ GX303, Novemsky Opening Report, ¶9.

¹⁵ RX1017, Hauser Report, ¶¶28, 38.

¹⁶ GX303, Novemsky Opening Report, ¶6, 30.

channels, and were further reinforced over time, across different tax seasons, presented problems on both of these fronts.¹⁷

18. First, the limited nature of a survey stimulus cannot capture the full and cumulative impact of Intuit's allegedly deceptive practices. It is not realistic to replicate Intuit's extensive and repeated marketing efforts in a survey setting, and testing the incremental impact of a single or a few allegedly deceptive Intuit advertisements is not appropriate for measuring the extent of misperceptions related to TurboTax. Second, as Professor Hauser admits, in a test / control design, "the control group serves as a proxy for the but-for world, where consumers are not exposed to the allegedly deceptive claims and/or are provided with more information."¹⁸ Given the wide reach of TurboTax marketing, it is likely not possible to find a control group untouched by Intuit's marketing.¹⁹

19. Having established that the test / control framework was not appropriate in this context, I proceeded to design the TurboTax Perception Survey employing a three-pronged approach to the survey structure, as discussed in my Opening Report. I first asked whether or not the respondents (none of whom are eligible to use TurboTax Free Edition) think they can file their 2021 income taxes for free using TurboTax online software. I then presented an open-ended question, asking the respondents to explain why they think (or do not think) they can file their 2021 income taxes for free using TurboTax online software (this question serves as a prelude to the next question). Third, I asked the respondents which sources played a role in them forming their impression regarding their ability to use TurboTax online software for free.²⁰

20. The first prong of this structure was designed to assess taxpayers' existing opinions and beliefs in the marketplace. Once this question was answered, the follow-up prongs then investigated the factors that played a role in forming these misimpressions. To the extent that follow-up questions identified information provided by Intuit as a factor in forming misimpressions, combined with evidence from Intuit's own research on the impact of its marketing, the survey results provide strong evidence that Intuit's marketing is the most likely source of consumer misimpressions.²¹

21. With this context in mind, it is difficult to understand the criticisms of Professor Hauser regarding the structure of my survey. In certain places of his report, Professor Hauser accurately describes what TurboTax Perception Survey can (and, indeed, was designed to) accomplish. For example, Professor Hauser states that "[w]ithout stimuli, the Novemsky

¹⁷ GX303, Novemsky Opening Report, ¶30–32; RX1018, Golder Report, Section X.

¹⁸ Hauser Declaration, ¶35.

¹⁹ GX303, Novemsky Opening Report, ¶30–32.

²⁰ GX303, Novemsky Opening Report, ¶28.

²¹ GX303, Novemsky Opening Report, ¶29.

survey is simply an unaided test of respondents' impressions at the time of the survey."²² This is accurate, and was precisely my goal. As stated in my Opening Report, the purpose of the Novemsky Survey was "to measure the extent of taxpayers' opinions and beliefs as to whether they can file their taxes for free using TurboTax online software."²³ It was also important for the reliability of the survey not to bias the respondents by showing a stimulus such as a TurboTax free advertisement.

22. In other places, Professor Hauser appears to misunderstand the purpose of my TurboTax Perception Survey, and the allegations in this matter. For example, Professor Hauser states that "the Novemsky Report does not test consumer impressions as they relate to any specific TurboTax advertisement."²⁴ This is a puzzling criticism, as that is a main feature of my survey design, as I explained above and in my Opening Report. Measuring the incremental impact of one specific TurboTax advertisement does not fully capture the impact Intuit's long-running, extensive marketing on consumer perceptions. Moreover, [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED].²⁵

23. Along the same lines, Professor Hauser claims that my TurboTax Perception Survey "could have controlled for the influence of other advertising and website stimuli respondents may have viewed in the past by using an appropriate disguise"²⁶ However, the purpose of the TurboTax Perception Survey is not to eliminate the "influence of other advertising and website stimuli," as Professor Hauser suggests.²⁷ Instead, the purpose is to *evaluate* the influence of the wide-ranging and long-running marketing campaign undertaken by Intuit.²⁸ In fact, interpreting advertisements in the context of other advertisements and marketing communications—rather than in an artificial survey setting—is representative of how consumers absorb advertising messages in the marketplace.²⁹ Artificial ads with an artificially blank slate in consumers' minds prior to viewing the ad cannot replicate the effect an ad would have in the context of an existing brand, nor can it replicate the effect of a coordinated marketing campaign that consumers would encounter multiple times and in multiple locations. Professor Hauser does not articulate how a test/control survey design

²² RX1017, Hauser Report, ¶28.

²³ GX303, Novemsky Opening Report, ¶30.

²⁴ RX1017, Hauser Report, ¶15.

²⁵ GX460, p.28

²⁶ RX1017, Hauser Report, ¶32.

²⁷ RX1017, Hauser Report, ¶32.

²⁸ GX303, Novemsky Opening Report, ¶31.

²⁹ RX560, Kotler, P. and Keller, K., 2016. "Marketing Management 15th Ed." Pearson Education, INTUIT-FTC-PART3-000597494, pp. 559-560, 563, 571.

would *account for* a multitude of marketing messages, such as that which exists for TurboTax.

24. Professor Hauser appears to dismiss out of hand the notion that using a single survey stimulus would be inappropriate given the claims in this matter. In particular, Professor Hauser claims that “[t]he Novemsky Report’s claim that using survey stimuli would ‘severely underrepresent’ the relationship between Intuit’s marketing and consumer impressions is not consistent with any evidence presented in this case.”³⁰ Professor Hauser is mistaken when he claims that this view is inconsistent with academic research regarding long-running advertising campaigns. In fact, the academic research demonstrates that test/control studies are particularly ill-suited to studying their effects and effectiveness.³¹ And, many academics hold the view that the effect of repetitive exposure to long-running advertising campaigns increases customer responses to advertising.³²

25. Professor Hauser also claims that it is impossible to disentangle biases in the survey, such as survey noise, demand artifacts, and guessing, from the results of the TurboTax Perception Survey without a test/control design,³³ the use of structural equation modelling, or the use of a quasi-experiment.³⁴ If this claim were true in general, it would have meant that any consumer study that does not involve one of the methodologies Professor Hauser endorses would automatically be unreliable. This is not the case. Consumer surveys that do not involve these methodologies are routinely performed and have been found to be reliable.³⁵ Professor Hauser’s own Purchase Drivers Survey, which was designed to “study the process of consumers’ tax preparation information acquisition” does not use a test and control group, or any of the other methodologies he named.³⁶

26. Survey practitioners and academics have developed a number of best practices to avoid the types of concerns Professor Hauser lists. I employed these best practices in my design and implementation of the TurboTax Perception Survey, took appropriate measures to avoid such biases, and discussed them in my Opening Report.³⁷ The questions I asked, the answer choices I presented, and the instructions I provided were clear, and pretests verified that the respondents had no difficulty understanding my TurboTax Perception Survey and were able

³⁰ RX1017, Hauser Report, ¶31.

³¹ See, e.g., S. Schmidt and M. Eisend, “Advertising Repetition: A Meta-Analysis on Effective Frequency in Advertising,” *Journal of Advertising*, 2015, Vol. 44 (4), pp. 415-428.

³² See, e.g., S. Schmidt and M. Eisend, “Advertising Repetition: A Meta-Analysis on Effective Frequency in Advertising,” *Journal of Advertising*, 2015, Vol. 44 (4), pp. 415-428.

³³ RX1017, Hauser Report, ¶28.

³⁴ RX1017, Hauser Report, ¶34.

³⁵ See, e.g., Diamond, Shari S., “Reference Manual on Scientific Evidence Third Edition,” *Federal Judicial Center*, 2011, pp. 363–367.

³⁶ RX1017, Hauser Report, ¶103; See also Appendix D-1, ¶¶2–3.

³⁷ GX303, Novemsky Opening Report, ¶¶57-60.

to answer the questions without difficulty.³⁸ Further, to avoid the possibility of respondents guessing, I presented a clear set of choices and included options such as “I do not have enough information,” and “[o]ther,” and quasi-filters “[d]on’t know / [n]ot sure” or “I’m not sure” in my closed-ended questions.³⁹ In addition, respondents were explicitly directed not to guess when they did not know an answer or have an opinion as part of the instructions to my TurboTax Perception Survey and were required to provide an explicit agreement with those instructions before proceeding with the survey.⁴⁰ I note that these are substantially the same as, if not more thorough than, measures Professor Hauser employed in his Purchase Drivers Survey.⁴¹

27. In my Opening Report, I described the results of a preliminary study I fielded to empirically investigate the extent of potential respondents’ pre-existing misimpressions about their ability to file taxes for free using TurboTax.⁴² As I describe in my Opening Report, a critical component of a test / control framework is the ability to identify a control group that has not been exposed to the allegedly deceptive claims so that their perceptions are not tainted by the very claims being tested in my TurboTax Perception Survey.⁴³ Professor Hauser argues that “the small-sample study [described in my Opening Report] suggests only that consumers had existing beliefs, not that control stimuli are not feasible,”⁴⁴ apparently not realizing that determining whether or not consumers had existing beliefs was exactly the purpose of my preliminary study. Professor Hauser goes on to criticize the preliminary study for—among other things—not presenting any stimuli, and for not utilizing a test / control design.⁴⁵ These criticisms are essentially the same criticisms Professor Hauser makes about the TurboTax Perception Survey, and are similarly irrelevant.

28. I conclude that my TurboTax Perception Survey has the appropriate structure to address the issues of interest in this case and Professor Hauser’s criticisms of the structure of my TurboTax Perception Survey are baseless.

2. 

29. In my Opening Report, 

³⁸ GX303, Novemsky Opening Report, ¶¶57-60.

³⁹ GX303, Novemsky Opening Report, ¶¶57-60.

⁴⁰ GX303, Novemsky Opening Report, ¶¶57-60.

⁴¹ RX1017, Hauser Report, Appendix D-2.

⁴² RX1017, Novemsky Opening Report, ¶33.

⁴³ RX1017, Novemsky Opening Report, ¶30.

⁴⁴ RX1017, Hauser Report, ¶33.

⁴⁵ RX1017, Hauser Report, ¶28.

[REDACTED]

[REDACTED] .46 [REDACTED]

[REDACTED]

[REDACTED] ??47 [REDACTED]

[REDACTED]

[REDACTED] .48 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] ??49 [REDACTED]

30. Professor Hauser claims that [REDACTED]

[REDACTED]

[REDACTED] .50 This claim is incorrect. Professor Hauser points to [REDACTED]

[REDACTED] Professor Hauser also claims that the [REDACTED]

[REDACTED] This is also incorrect, in light of [REDACTED]

[REDACTED]

[REDACTED] .51 [REDACTED]

31. I discuss these criticisms below, but for the sake of clarity, I first want to summarize the relevant facts, [REDACTED] :52

- [REDACTED] ;
- [REDACTED]
[REDACTED]
[REDACTED] ;
- [REDACTED]
[REDACTED] ;

⁴⁶ GX303, Novemsky Opening Report, ¶ 97.

⁴⁷ See GX 460, [REDACTED] INTUIT-FTC-PART3-000490565, p. 28.

⁴⁸ See GX 460, [REDACTED] INTUIT-FTC-PART3-000490565, p. 8.

⁴⁹ See GX 460, [REDACTED] INTUIT-FTC-PART3-000490565, pp. 9–10.

⁵⁰ GX1017, Hauser Report, ¶19.

⁵¹ As discussed above, many academics hold the view that the effect of repetitive exposure to long-running advertising campaigns increases customer responses to advertising. See, e.g., S. Schmidt and M. Eisend, “Advertising Repetition: A Meta-Analysis on Effective Frequency in Advertising,” *Journal of Advertising*, 2015, Vol. 44 (4), pp. 415-428.

⁵² GX 460, “TY20 Campaign Copy Testing,” INTUIT-FTC-PART3-000490565; GX160, Deposition of Jack Rubin, November 29, 2022. .

- [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED];
 - [REDACTED]
[REDACTED]
- » [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] and
- » [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED].⁵³

32. These facts are consistent with [REDACTED] in my Opening Report.⁵⁴ None of Professor Hauser’s claims refutes these facts or the conclusions I draw from them. [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]⁵⁵

33. In my Opening Report, I stated [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]⁵⁶ Professor Hauser states that he agrees with this statement,⁵⁷ but then goes on to make claims that dismiss the very premise to which he agreed. The salient point here is that since TurboTax undertakes pervasive marketing campaigns year after year, putting its free-themed ads in heavy rotation across the country, exposing consumers to the exact same or very similarly themed ads repeatedly, reinforcing its marketing message, the incremental impact of individual ads reinforce one another and with

⁵³ GX 460, p. 28.
⁵⁴ Novemsky Opening Report, ¶¶97-98.
⁵⁵ GX 460, p. 28.
⁵⁶ Novemsky Opening Report, fn. 128.
⁵⁷ Hauser Report, ¶77.

each successive exposure, resulting in accumulated impact.⁵⁸ TurboTax focuses its free-themed ads in a short time period in the tax season, ensuring that the consumers are faced with the most intense exposure when they are most likely to pick a tax preparation service.⁵⁹

34. Ignoring these well-established facts, Professor Hauser argues that [REDACTED]

[REDACTED] .⁶⁰ He also claims that [REDACTED]

[REDACTED]

[REDACTED] ⁶¹

[REDACTED] .⁶² Professor Hauser presents no evidence that an advertisement that changes impressions in the short run cannot change perceptions in the long run especially when repeated both as the identical advertisement and as a thematically identical advertisement over a period of time. His speculation that [REDACTED]

[REDACTED], is baseless. This objection is also undermined by the fact that the test/control stimulus-based survey Professor Hauser is advocating to study this question would presumably elicit the same criticism from him, yet he strongly advocates its use in this case. Moreover, Professor Hauser’s Disclosure Efficacy Survey only measures the short-term impact of the various disclosures on consumers. Professor Hauser’s criticism when applied to his own survey would lead to the conclusion that his survey results are not reflective of long-term effects on consumers and are limited to very short-term effects because that is all that was directly measured.

35. Professor Hauser’s second objection [REDACTED]

[REDACTED]

[REDACTED] ⁶³ This is a misleading claim. First, as Professor Hauser himself later explains, [REDACTED]

⁵⁸ In fact, [REDACTED] . See, Figure 4 backup.

⁵⁹ Novemsky Opening Report, fn. 125 ([REDACTED]); see also GX 436 and 437 [REDACTED]). In fact, TurboTax [REDACTED] . See, [REDACTED] Workpaper 1.

⁶⁰ RX1017, Hauser Report, ¶77.

⁶¹ RX1017, Hauser Report, ¶80.

⁶² Curtis P. Haugtved et al., "Advertising Repetition and Variation Strategies: Implications for Understanding Attitude Strength", *Journal of Consumer Research*, Vol. 21, No. 1, Jun., 1994, pp. 176–189 (“Attitudes formed as a consequence of exposure to three repetitions of the ad will display less decay after a one week period than attitudes formed via a single exposure. ... Attitudes formed as a consequence of exposure to substantive repetition strategies will be more resistant in the face of attack when compared to attitudes formed via a single exposure or other repetition strategies.”); Sridhar Moorthy and Scott A. Hawkins, “Advertising repetition and quality perception”, *Journal of Business Research* 58, 2005, pp. 354–360 (“Our results show ... substantial support for ad repetition influencing perceived quality through attitude toward the ad.”).
⁶³ RX1017, Hauser Report, ¶82.

[REDACTED] .64 [REDACTED]

[REDACTED] .65

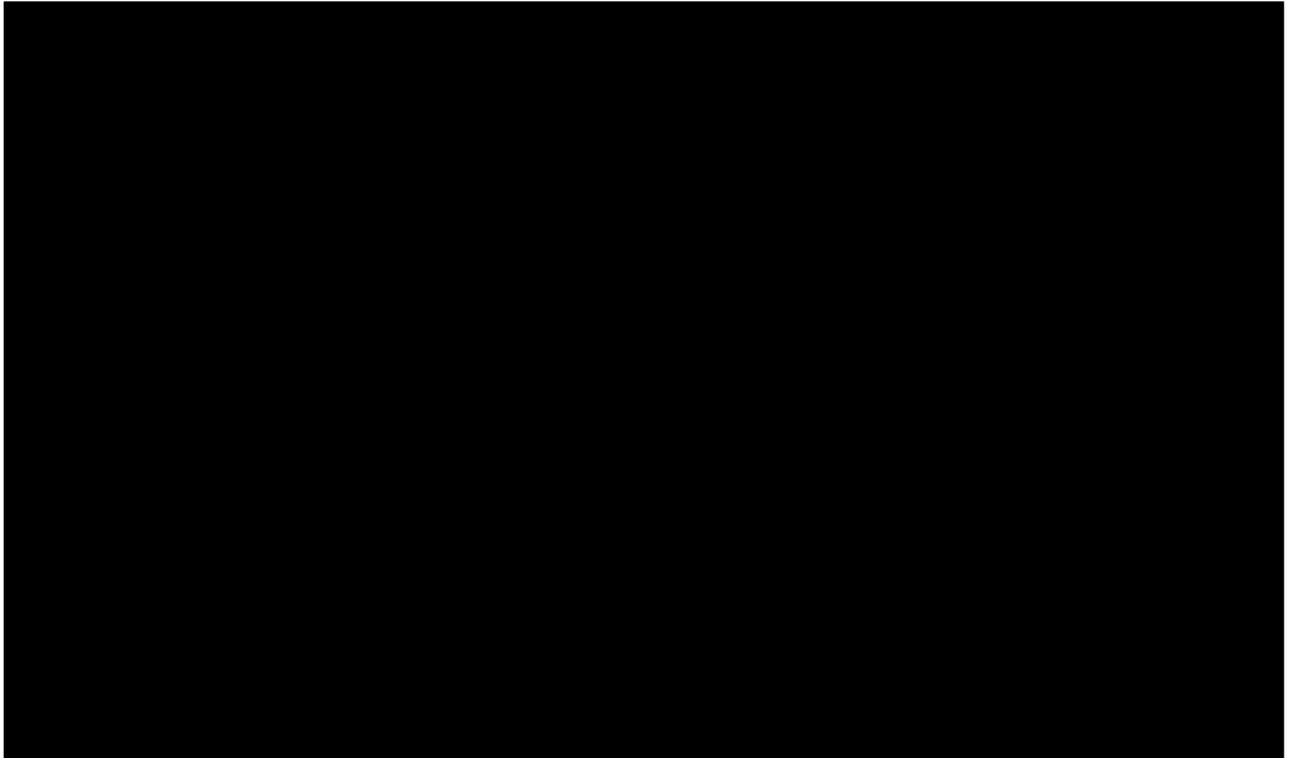
[REDACTED]

[REDACTED] .66 [REDACTED]

[REDACTED]

[REDACTED]

FIGURE 1



Source: GX460, p.28

36. [REDACTED]

[REDACTED]

[REDACTED] .67 [REDACTED]

[REDACTED]

[REDACTED]

⁶⁴ RX1017, Hauser Report, ¶82.

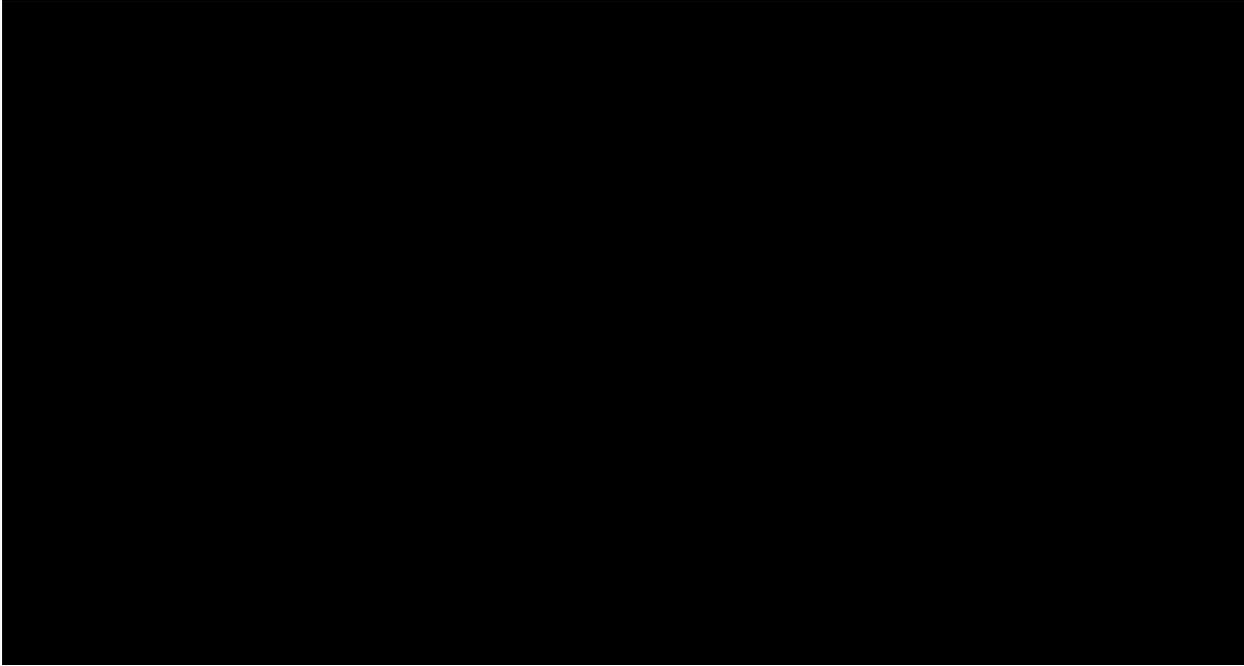
⁶⁵ See GX 460, p.8.

⁶⁶ GX160, Deposition of Jack Rubin, November 29, 2022; RX1017, Hauser Report, ¶82. [REDACTED]

⁶⁷ RX1017, Hauser Report, ¶82; GX 160, p. 89.

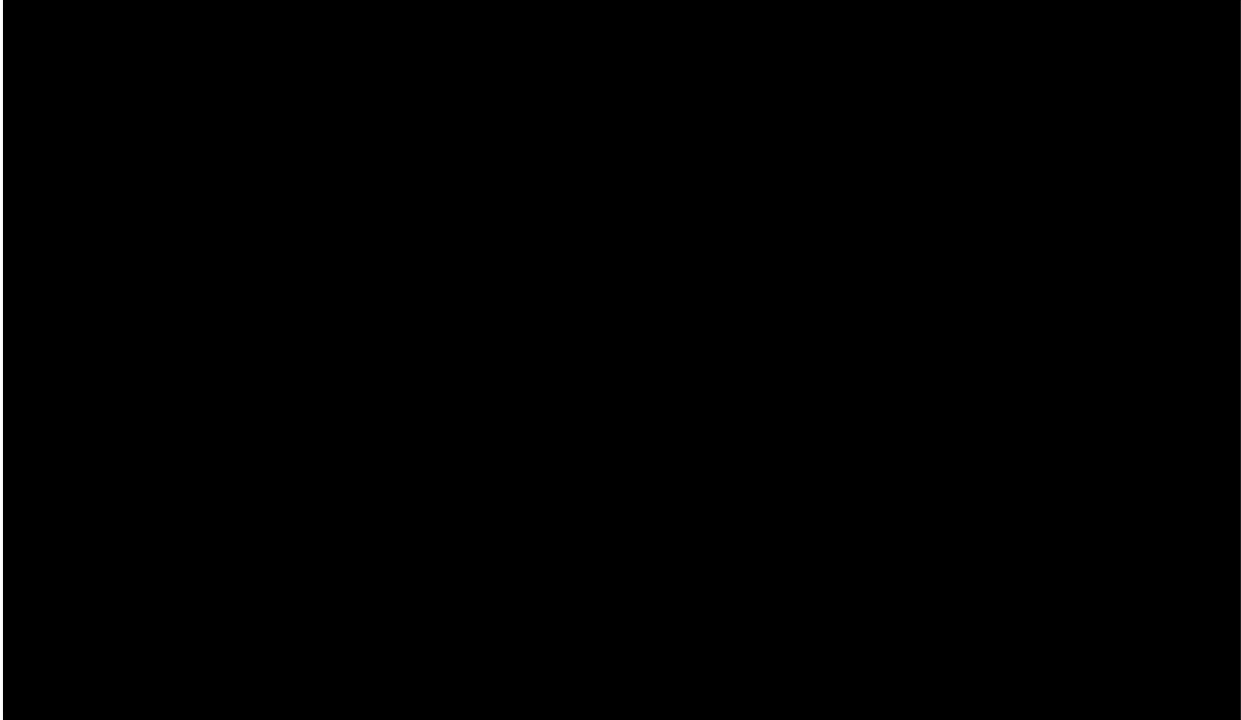


FIGURE 2



Source: GX460, pp. 3-5

FIGURE 3



Source: GX460, p 6

37. [REDACTED] 68 [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

38. Professor Hauser argues that [REDACTED]
[REDACTED]
[REDACTED] 69 [REDACTED]
[REDACTED]
[REDACTED]

[REDACTED] Professor Hauser repeats this “logic” at various points in his report, where he

⁶⁸ GX 460, p. 28.
⁶⁹ RX1017, Hauser Report, ¶83.

concludes that since a minority of consumers do one thing, that is evidence that there is not a substantial number of consumers doing the opposite. Of course, if, say, 30% of consumers are skeptical of free claims, that leaves 70% who are not, and the existence of some consumers showing skepticism is *not* inconsistent with claims that there are substantial numbers of consumers who do not show skepticism about free claims. Yet, Professor Hauser nonsensically claims that it is.⁷⁰

39. Professor Hauser also [REDACTED]
[REDACTED]
[REDACTED] ⁷¹ However,
[REDACTED] ⁷²
[REDACTED] ⁷³
[REDACTED] ⁷⁴

40. Professor Hauser also claims that [REDACTED]
[REDACTED]
[REDACTED] ⁷⁵
[REDACTED] ⁷⁶

⁷⁰ RX1017, Hauser Report, ¶83.

⁷¹ RX1017, Hauser Report, ¶107.

⁷² See GX 460, p. 28.

⁷³ See GX 460, p. 27.

⁷⁴ See GX 460, p. 28.

⁷⁵ Hauser Report, ¶83.

⁷⁶ See GX 460 p. 28.

[REDACTED]

[REDACTED]

41. Professor Hauser also states that [REDACTED]
 [REDACTED]
 [REDACTED] ⁷⁷ Professor Hauser then [REDACTED]
 [REDACTED] ⁷⁸ This is a pointless
 observation. [REDACTED] because, (i) [REDACTED]
 [REDACTED]; and (ii) the impact of Intuit’s marketing on consumers’ perception about
 their ability to use TurboTax for free *is* the issue relevant in this matter. Professor Hauser
 concludes by saying that [REDACTED]
 [REDACTED] ⁷⁹ but he is wrong. [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]

42. Professor Hauser [REDACTED]
 [REDACTED]
 [REDACTED] ⁸⁰ [REDACTED]
 [REDACTED]
 [REDACTED]. In fact, TurboTax aired least
 35,194 television advertisements nationwide in those two years, reaching an estimated 12.5
 billion views,⁸¹ [REDACTED]
 [REDACTED]
 [REDACTED] Moreover, during that same period Intuit reinforced the messaging in its
 television advertisements through search ads, Internet banner ads, social media, radio, and its
 own website. [REDACTED] the TurboTax Perception
 Survey captures the cumulative effect of all the marketing communications to which
 consumers were exposed. [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]

⁷⁷ RX1017, Hauser Report, ¶84.
⁷⁸ RX1017, Hauser Report, ¶84.
⁷⁹ RX1017, Hauser Report, ¶84.
⁸⁰ RX1017, Hauser Report, ¶79.
⁸¹ iSpot.tv. I note that iSpot.tv defines views as impressions.

3. Neither Professor Hauser nor other Intuit experts provide credible evidence of a source other than Intuit's marketing of consumer misimpressions related to TurboTax

43. Professor Hauser criticizes the conclusions in my Opening Report by saying that the misimpressions I have identified with my TurboTax Perception Survey may be caused by other sources besides Intuit marketing.⁸² This claim is wholly speculative as Professor Hauser can only name a few alternatives as potential sources of consumers' misimpressions about whether or not they can file for free using TurboTax online software, and he fails to present evidence that any of these sources actually causes misimpressions about TurboTax, let alone misimpressions to the degree identified in this case. Indeed, not one of Professor Hauser's speculations is credible.

44. For one, Professor Hauser speculates that "advertising from competing tax preparation providers" may be the source of consumers' misimpressions about their eligibility for using TurboTax for free.⁸³ To support this claim, he states that there are other free digital DIY offerings, naming four TurboTax competitors.⁸⁴ In Professor Hauser's hypothetical, these TurboTax competitors would advertise, their advertising would highlight free offerings, consumers would be exposed to the competitors' free-themed ads rather than (or to a larger degree than) TurboTax's, and the consumers would take away from competitor's ads the perception that TurboTax is free. Professor Hauser has not established that, or even investigated whether, any of these steps happened in reality and caused misperceptions. In fact, other than one advertisement from one competitor, he has not even pointed to actual advertising from any of the TurboTax competitors that supposedly misled consumers into thinking TurboTax is free.⁸⁵

45. Actual data about tax preparation companies' television advertising and the content of that advertising refute Professor Hauser's speculative claims.⁸⁶ TurboTax holds a large share of voice compared to its competitors. For example, I use estimated impressions for all TV advertisements as measured by iSpot.tv⁸⁷ to proxy for share of voice and find that, from 2018 to 2022, TurboTax advertisements comprised over 50% of advertising where free messaging was emphasized in all years, reaching up to 99% of advertising in 2021, as shown in Figure 4

⁸² RX1017, Hauser Report, ¶¶28, 56.

⁸³ RX1017, Hauser Report, ¶58.

⁸⁴ RX1017, Hauser Report, fn. 111.

⁸⁵ RX1017, Hauser Report, fn. 112.

⁸⁶ RX1017, Hauser Report, ¶58.

⁸⁷ iSpot.tv is a commercially available service used by many advertisers to monitor and measure the performance of advertisements across linear and streaming TV. See <https://www.ispot.tv/about> (last visited Jan. 27, 2023).

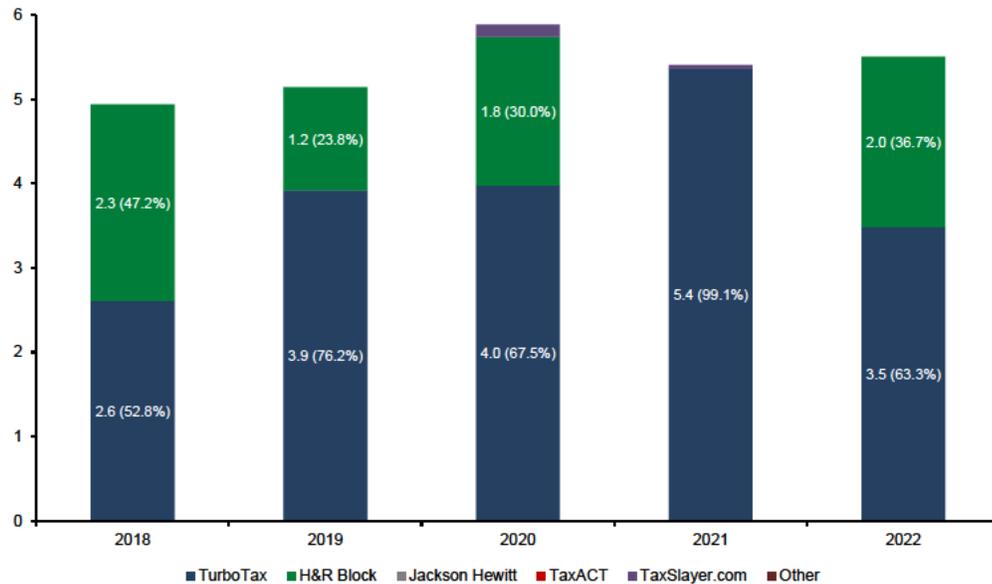
below.⁸⁸ On average between 2018 and 2022, TurboTax accounted for 72% of impressions related to “free” tax preparation messaging. It is extremely implausible that the 72% of impressions from TurboTax did not cause the substantial misimpressions measured in my survey, but the 28% of remaining impressions did (especially since those 28% of impressions were coming from competitor advertising, and supposedly falsely attributed to TurboTax). This is rendered even more implausible by the observation that many of the TurboTax advertising impressions involved ads where “free” was the main or the only aspect of TurboTax that was included in the ad. For example, in many TurboTax television ads close to the only word spoken over a 30 second TV ad was “free.” By contrast, competitors’ ads were much less focused on communicating that their products were free. Moreover, the competitors’ ads of course focused on the competitors’ own products, while TurboTax ads were focused on TurboTax products and brand, making the latter much more likely to leave an impression about TurboTax than the former.⁸⁹

⁸⁸ Note that I have also analyzed TV ad spend and number of airings as alternative proxies for share of voice. In addition, I have also analyzed impressions, TV ad spend, and number of airings as proxies for share of voice among advertising where free advertising is mentioned, not only emphasized. In each of these sensitivities, the finding that TurboTax accounts for a plurality of share of voice in each year. *See* Workpaper 2.

⁸⁹ *See* GX 340 [REDACTED]

FIGURE 4

Number of Impressions for TV Advertisements for TurboTax and Other Tax Filing Service Providers for Advertisements where Free Messaging Was Emphasized, 2018-2022 (in billions)



Source: iSpot.tv

Note:

[1] Impressions are reported directly by iSpot.tv and represent the total number of times an ad was played on TV devices across the U.S..

[2] Numbers of impressions in each year are reported for each full calendar year.

[3] All TV advertisements are categorized into two categories. If the main message of an ad is that consumers can file their taxes for free using the provider's products, the ad is flagged as "Free Emphasized"; otherwise, it is flagged as "Not Free Emphasized". An H&R Block advertisement has been removed from iSpot.tv at the request of the advertiser and is not included in this analysis. Some of the advertisements included in the iSpot.tv data are Spanish-language ads. I understand that an investigator at the FTC reviewed and categorized these Spanish-language ads.

[4] Data labels for any tax filing service providers representing less than 5% of total number of impressions in a given time period are not shown.

46. Professor Hauser suggests that respondents may obtain information from other sources due to independent research that they conduct when selecting a tax service or provider. Professor Hauser relies on the results from his Purchase Driver Survey to support this claim. However, as discussed below in Section V, Professor Hauser's Purchase Driver Survey contains many methodological errors, and the results concerning the extent to which consumers conduct independent research are especially subject to those errors. In particular, many of the activities Professor Hauser includes as response options for respondents to select as "research" for their tax service or provider are likely to derive their factual basis from Intuit's marketing. For example, use of search engines, product websites, marketing emails,

and word of mouth could all plausibly have their content influenced by TurboTax marketing, making them proxies for the very source he is claiming they supplant.

47. Finally, Professor Hauser argues that demand artifacts from the design of my TurboTax Perception Survey may inform respondents' answers about whether they believe they can file for free.⁹⁰ As evidence of this, Professor Hauser points to six respondents in my TurboTax Perception Survey who indicated in their open-ended responses that elements of the survey influenced their responses.⁹¹ I note that this constitutes less than 1% of the total sample of respondents in my TurboTax Perception Survey, and excluding the six respondents Professor Hauser identifies from my analysis would have no material effect on the conclusions I draw in my Opening Report. Professor Hauser argues that these six respondents may be indicative of a "more-pervasive set of respondents who are affected by demand artifacts," however this is pure speculation on Professor Hauser's part. There is no reason to believe that the results of my TurboTax Perception Survey are biased as a result of demand artifacts based on an observation about less than 1% of my sample.

48. Finally, Professor Hauser argues that guessing might also be another confounding factor.⁹² However, this is purely speculative on Professor Hauser's part, and as discussed below in Section III.C.2, my TurboTax Perception Survey was specifically designed to discourage respondents from guessing. Moreover, even if one were to assume that some respondents did guess, (and there is no evidence of this happening at a level that can generate a substantial impact on the results), there is no evidence that the impact would be in favor of any particular option. If one were to accept the premise that some respondents did guess, one would expect those guesses to be evenly distributed among the answer options (note that the order of the options were randomized across respondents), and not concentrated on any of the options presented such as TurboTax advertisements or the website.⁹³ Thus, any guessing that did occur would not bias the results of my TurboTax Perception Survey.

B. Professor Hauser's coding of open-ended responses in my TurboTax Perception Survey is inaccurate and misleading

49. Professor Hauser argues that the open-ended responses to my TurboTax Perception Survey do not provide strong evidence of consumer deception, based on his own coding and analysis of those responses.⁹⁴ In particular, Professor Hauser purports to show that an analysis of the open-ended responses reveals inconsistencies in respondents' answers to related closed-ended questions about whether consumers believe they can file their taxes for

⁹⁰ RX1017, Hauser Report, ¶44.

⁹¹ RX1017, Hauser Report, ¶44.

⁹² RX1017, Hauser Report, ¶57.

⁹³ GX313, Novemsky Second Declaration, ¶11.

⁹⁴ RX1017, Hauser Report, ¶69.

free using TurboTax online software.⁹⁵ He claims that respondents with inconsistencies in their open-ended responses are unreliable and that their responses should not be included in an analysis of whether and the extent to which consumers believe they can file for free using TurboTax online software.⁹⁶ Professor Hauser argues that removing these inconsistent respondents reduces the percentage of respondents who had a misimpression that they could file for free.⁹⁷ Separately, Professor Hauser also argues that the open-ended responses to my TurboTax Perception Survey provide evidence that respondents understand eligibility criteria for using TurboTax for free, and that, therefore the results of my TurboTax Perception Survey do not provide evidence that consumers have a misimpression about what constitutes “simple U.S. returns.”⁹⁸

50. However, Professor Hauser’s analysis of the open-ended responses (i) does not contradict the conclusions from my Opening Report, (ii) is flawed and unreliable, and (iii) is consistent with the results and conclusions presented in my Opening Report when errors present in Professor Hauser’s analysis are corrected.

1. Professor Hauser’s coding of respondent beliefs about whether they can file for free is inaccurate and misleading

51. Professor Hauser stated that he directed two independent coders “to review the responses to the Novemsky Survey’s two open-ended questions related to respondents’ understanding of their ability to file their 2021 income taxes for free with TurboTax” and “categorized respondents according to the response options provided as part of TAT240.”⁹⁹ Based on this coding, Professor Hauser identified 267 inconsistent respondents, accounting for 44% of the total sample, and that excluding inconsistent respondents, only 16.8% of respondents in my TurboTax Perception Survey believe they can file their 2021 income taxes for free using TurboTax online software.¹⁰⁰

52. First, setting aside the many methodological errors with this analysis, it is important to note that Professor Hauser concedes that *at least 16.8%* of consumers have a misimpression that they can file for free using TurboTax online software, which the finder of fact in this case may determine is a significant minority of TurboTax customers, and which likely represent millions of consumers. I also note that it is inappropriate for Professor Hauser to report these results for Group A and Group B respondents combined since they are distinct populations

⁹⁵ RX1017, Hauser Report, ¶69.

⁹⁶ RX1017, Hauser Report, ¶69.

⁹⁷ RX1017, Hauser Report, ¶69.

⁹⁸ RX1017, Hauser Report, ¶¶71–72.

⁹⁹ RX1017, Hauser Report, ¶¶53–54.

¹⁰⁰ RX1017, Hauser Report, Table 1.

that should not be combined with one another.¹⁰¹ As discussed in my Opening Report, the more relevant group for understanding how many consumers have misimpressions about whether they can file their taxes for free using TurboTax online software is Group A because they are more likely to be Intuit's advertising target.¹⁰² According to Professor Hauser's backup, 22.5%, or nearly a quarter, of respondents in Group A believe they can file for free using TurboTax, even after incorporating his flawed exclusions based on erroneous coding.¹⁰³

53. Second, Professor Hauser's conclusions based on the supposed inconsistencies among certain TurboTax Perception Survey responses are incorrect. The inconsistencies Professor Hauser claims to have identified are artifacts of a faulty procedure, which included a disconnect between the specific instructions Professor Hauser provided to his coders and the manner in which he interpreted the coding results. As a result, for many of the respondents Professor Hauser declared as having "inconsistent" answers, there is no evident inconsistency when open-ended and closed-ended answers are read in tandem.

54. A primary category of respondents erroneously classified as inconsistent by Professor Hauser are those who indicated in open-ended responses to two questions (TAT220 and TAT 230) their perception that "simple returns" are free.¹⁰⁴ Professor Hauser's coders classified many such responses under their "I'm not sure" category, presumably because the criteria they were given by Professor Hauser asked them identify whether the answers to only these two questions can be categorized as "I think [I don't think] I can file my own 2021 income taxes for free using TurboTax online software," and the coders did not find an explicit answer.¹⁰⁵ Professor Hauser then, formulaically, takes his coders' "I'm not sure" coding, and declares an inconsistency if the respondent later says "I think I can file for free," (even when the respondent also explains his reasoning that he believes his taxes are simple).¹⁰⁶

55. Clearly, there is nothing inconsistent about a respondent believing that having simple returns is associated with being able to use TurboTax for free, then saying he can file for free because he thinks his returns are simple. The respondent cannot actually use TurboTax for free because his understanding of "simple returns" is different than how TurboTax defines "simple returns," but there is nothing inconsistent about his survey responses. In fact, this is a clear, well-reasoned example of misperception about TurboTax's free eligibility criteria.

56. Professor Hauser attempts to bolster his analysis in his deposition, again erroneously claiming that his analysis identifies "basically people who either say in the open-ended

¹⁰¹ Novemsky Opening, Report, ¶7.

¹⁰² Novemsky Opening Report, ¶7.

¹⁰³ RX1017, Hauser Report, Table 1.

¹⁰⁴ Hauser Backup Independent Coding (Free).xlsx. *See, e.g.*, ID 1147, 1291.

¹⁰⁵ Hauser Backup Independent Coding (Free).xlsx. *See, e.g.*, ID 1147, 1291; Hauser Report, Appendix E.2.

¹⁰⁶ Hauser Report, Table 1, fn 1.

[question] I don't think I can file or vice versa. They say I think I can file in the open-ended [question] and I don't think I can file in the closed-ended [question]."¹⁰⁷ This is a misleading representation of his analysis, the results of which are an artifact of the instructions Professor Hauser provided to his independent coders.

57. Figure 5 below shows some of the open-ended responses for respondents who indicated they think they can file for free in closed-ended responses to my TurboTax Perception Survey that were coded by Professor Hauser as inconsistent, without any clear inconsistency, because they believe simple filings are free.

FIGURE 5

Respondents Who Indicated They Think They Can File for Free in Closed-Ended Responses to my TurboTax Perception Survey and Coded by Professor Hauser as Inconsistent Because They Stated Simple Filings Are Free

Respondent's Open-Ended Answers to the Novemsky Survey			
Group	Based on your current information and understanding, what can you tell us about whether there is a cost to filing your taxes with TurboTax?	Based on your current information and understanding, who, if anyone, is eligible to file taxes for free with TurboTax?	You may have already said this above, but please tell us again why you think you can file your 2021 income taxes for free with TurboTax
A	Free but if anything more than a basic filing is needed there will be a charge	Anyone	I would be using only the very basic of services
A	I believe a simple tax return would be free and a more complex tax return may incur a fee.	Yes. A simple tax return would be filed for free.	It is advertised as such. Free tax return filing for a simple tax return.
A	Some filings are free	Anyone with a simple return.	I have just simple income forms.
A	It's free for simple returns and cost for more complex	It must be a simple return for it to be free	It's free if your tax return is simple and from one job
A	Free in simplest form.	Anyone with reasonably uncomplicated tax status.	Out tax liability is straight forward.
B	no cost for simple returns	yes for simple returns	I have a simple return

Source: Hauser Backup Independent Coding (Free).xlsx

Note:

[1] Professor Hauser considers inconsistent respondents to be any respondents 1) who answer "I think I can file my 2021 income taxes for free with TurboTax" to question TAT240, but whose open-ended responses were not coded as "I think I can file my 2021 income taxes for free" or "non-responsive", or 2) who answer "I don't think I can file my 2021 income taxes for free with TurboTax" to question TAT240, but whose open-ended responses were not coded as "I don't think I can file my 2021 income taxes for free" or "non-responsive." Based on my review, some responses to open-ended questions were not truly inconsistent with the closed-ended responses as Professor Hauser identified.

58. There are several other types of responses given by respondents to my TurboTax Perception Survey that are not actually inconsistent with their answers in the closed-ended questions that Professor Hauser classified as inconsistent as an artifact of the instructions he gave to coders. As shown in Figure 6 below, there were many respondents who indicated that they or anyone could file for free, and therefore were not inconsistent with their closed-ended answer that they could file for free.

¹⁰⁷ Hauser Dep. Tr. 173:14–19, Jan. 25, 2023 (Rough Transcript).

FIGURE 6

Respondents Who Indicated They Think They Can File for Free in Closed-Ended Responses to my TurboTax Perception Survey Coded by Professor Hauser as Inconsistent Because They Believe They or Everyone Can File for Free

Respondent's Open-Ended Answers to the Novemsky Survey			
Group	Based on your current information and understanding, what can you tell us about whether there is a cost to filing your taxes with TurboTax?	Based on your current information and understanding, who, if anyone, is eligible to file taxes for free with TurboTax?	You may have already said this above, but please tell us again why you think you can file your 2021 income taxes for free with TurboTax
A	There is no cost for turbo tax if you use the basic program	Only if you use their basic program	I have seen ads stating you can file for free using the turbo tax basic software plan
A	I believe they have a free filing option but that you can pay for more options.	I believe everyone can as long as their income is under a certain threshold.	I think my income would be under the threshold which would allow me to use their free file option.
A	under a certain income level there is no. cost to file	not anyone but under an income level	because my income is under the level
B	Depends on the complexity of the return.	Anyone.	Advertising.
B	Only if you need forms not available through free filing	Basic file no special forms	Because it's basic forms and low income

Source: Hauser Backup Independent Coding (Free).xlsx

Note:

[1] Professor Hauser considers inconsistent respondents to be any respondents 1) who answer "I think I can file my 2021 income taxes for free with TurboTax" to question TAT240, but whose open-ended responses were not coded as "I think I can file my 2021 income taxes for free" or "non-responsive," or 2) who answer "I don't think I can file my 2021 income taxes for free with TurboTax" to question TAT240, but whose open-ended responses were not coded as "I don't think I can file my 2021 income taxes for free" or "non-responsive." Based on my review, some responses to open-ended questions were not truly inconsistent with the closed-ended responses as Professor Hauser identified.

59. As shown in Figure 7 below, there were many respondents who indicated that federal filings are free and their closed-ended answer was that they could file for free, yet classified by Professor Hauser as inconsistent, despite the lack of an obvious inconsistency.

FIGURE 7

Respondents Who Indicated They Think They Can File for Free in Closed-Ended Responses to my TurboTax Perception Survey Coded by Professor Hauser as Inconsistent Because They Believe Federal Filings Are Free and Are Therefore Not Inconsistent

Respondent's Open-Ended Answers to the Novemsky Survey			
Group	Based on your current information and understanding, what can you tell us about whether there is a cost to filing your taxes with TurboTax?	Based on your current information and understanding, who, if anyone, is eligible to file taxes for free with TurboTax?	You may have already said this above, but please tell us again why you think you can file your 2021 income taxes for free with TurboTax
A	Federal is free. state is not.	Yes.	My income is less \$600 with no itemized deductions.
A	I believe there is only a cost to file state returns	Anyone not itemizing deductions	My taxes are simple income input
A	Federal is free but State costs money	Anyone	Federal is free
A	I understand that you are able to file a federal return for free, but their may be additional fees to file your state taxes.	Everyone should be able to file the federal taxes online using turbotax.	I beleive that i can file my taxes online because i was self employed and received a 1099 NEC form.
B	Fed no state yes	Everyone	All in one on federal forms

Source: Hauser Backup Independent Coding (Free).xlsx

Note:

[1] Professor Hauser considers inconsistent respondents to be any respondents 1) who answer "I think I can file my 2021 income taxes for free with TurboTax" to question TAT240, but whose open-ended responses were not coded as "I think I can file my 2021 income taxes for free" or "non-responsive", or 2) who answer "I don't think I can file my 2021 income taxes for free with TurboTax" to question TAT240, but whose open-ended responses were not coded as "I don't think I can file my 2021 income taxes for free" or "non-responsive." Based on my review, some responses to open-ended questions were not truly inconsistent with the closed-ended responses as Professor Hauser identified.

60. As shown in Figure 8 below, there were many respondents who indicated that some filings are free, and therefore were not clearly inconsistent with their closed-ended answer that they could file for free.

FIGURE 8

Respondents Who Indicated They Think They Can File for Free in Closed-Ended Responses to my TurboTax Perception Survey Coded by Professor Hauser as Inconsistent Because They Believe Some Filings Are Free and Are Therefore Not Inconsistent

Respondent's Open-Ended Answers to the Novemsky Survey			
Group	Based on your current information and understanding, what can you tell us about whether there is a cost to filing your taxes with TurboTax?	Based on your current information and understanding, who, if anyone, is eligible to file taxes for free with TurboTax?	You may have already said this above, but please tell us again why you think you can file your 2021 income taxes for free with TurboTax
A	I believe that it was free for a certain income bracket and a fee after that	People making less than a certain amount of money	I fall into the income bracket who can use it for free
A	Believe it is free, at least for a while.	Anyone who takes the std deduction.	TV commercial.
A	Free based on income then pay more as income increases	Up to certain income level	Based on advertising
A	My understanding is it depends on what kind of form you need to file and what software you use	Self	Because its a pretty basic tax return
A	not in some circumstances	people who meet income guidelines	low income
B	I believe there is a small fee if you want someone to help you file your taxes.	Anyone can. If they want help from a person from turbo tax they have to pay.	Because I'm doing them myself and not having anyone from TurboTax help me.

Source: Hauser Backup Independent Coding (Free).xlsx

Note:

[1] Professor Hauser considers inconsistent respondents to be any respondents 1) who answer "I think I can file my 2021 income taxes for free with TurboTax" to question TAT240, but whose open-ended responses were not coded as "I think I can file my 2021 income taxes for free" or "non-responsive", or 2) who answer "I don't think I can file my 2021 income taxes for free with TurboTax" to question TAT240, but whose open-ended responses were not coded as "I don't think I can file my 2021 income taxes for free" or "non-responsive." Based on my review, some responses to open-ended questions were not truly inconsistent with the closed-ended responses as Professor Hauser identified.

61. My review of the purported 267 “inconsistencies” claimed by Professor Hauser revealed that at 161 of them were inaccurately categorized as an inconsistency, similar to the examples I provided above. Correcting these mistakes in Professor Hauser’s analysis, reveals that 46% of respondents in Group A believe they can file for free, as shown in Figure 9. This is consistent with the opinions in my Opening Report.¹⁰⁸

¹⁰⁸ GX303, Novemsky Opening Report, ¶8. Note that I originally calculated the portion of Group A respondents who believe they can file for free to be 52.7%. This is more in line with the adjusted finding of 46% as shown in Figure 9, compared to the 16.8% calculated by Hauser. See RX1017, Hauser Report, Table 1.

FIGURE 9*Table 1 of Professor Hauser's Report with Corrected Open-Ended Response Coding^[1]*

Adjusted Response to TAT240 ^[2]	Group A		Group B	
	N	%	N	%
I think I can file my 2021 income taxes for free with TurboTax	153	46.1%	31	18.3%
I don't think I can file my 2021 income taxes for free with TurboTax	99	29.8%	117	69.2%
I do not have enough information	61	18.4%	14	8.3%
I'm not sure	19	5.7%	7	4.1%
Total Respondents^[3]	332		169	

Source: Hauser Backup for Table 1; Hauser Backup Independent Coding (Free).xlsx

Note:

[1] Professor Hauser considers inconsistent respondents to be any respondents 1) who answer "I think I can file my 2021 income taxes for free with TurboTax" to question TAT240, but whose open-ended responses were not coded as "I think I can file my 2021 income taxes for free" or "non-responsive", or 2) who answer "I don't think I can file my 2021 income taxes for free with TurboTax" to question TAT240, but whose open-ended responses were not coded as "I don't think I can file my 2021 income taxes for free" or "non-responsive." Based on my review, some responses to open-ended questions were not truly inconsistent with the closed-ended responses as Professor Hauser identified.

[2] This table tabulates respondents' answers to question TAT240 after taking into consideration their open-ended responses.

[3] Potentially inconsistent respondents are identified by reviewing the open-ended responses of respondents who either answered "I think I can file my 2021 income taxes for free with TurboTax" or "I don't think I can file my 2021 income taxes for free with TurboTax." Based on my review of inconsistent respondents that were identified by Professor Hauser, I excluded 106 potentially inconsistent respondents (72 from Group A and 34 from Group B) from the total respondents.

2. Professor Hauser's coding of the source of respondents' beliefs about whether they can file for free is specious

62. Professor Hauser argues that my TurboTax Perception Survey does not provide "strong evidence" of misimpressions as a result of Intuit advertisements or website.¹⁰⁹ As evidence of this claim, Professor Hauser analyzes the set of 262 respondents who selected "I think I can file for free" in response to TAT240.¹¹⁰ He argues that only 31.3% or 190 respondents selected either TurboTax advertisements or TurboTax website when asked the source of their beliefs.¹¹¹

¹⁰⁹ RX1017, Hauser Report, ¶68.

¹¹⁰ RX1017, Hauser Report, Table 2.

¹¹¹ RX1017, Hauser Report, Table 2.

63. Respondents who do not select TurboTax ads or the TurboTax website and who select other options like word of mouth, may have formed their misimpressions indirectly through TurboTax's ads or website to the extent that the information contained in other sources is based on TurboTax advertising and the TurboTax website. Thus, 73% is a conservative measure of the number of consumers with a misimpression who formed that misimpression based on Intuit marketing.

64. Professor Hauser further argues that, of the 190 respondents who selected that either TurboTax advertisements or the TurboTax website was a source that played a role in forming their impression about whether or not they could file for free using TurboTax online software and who believed they could file for free, only 74 did not provide inconsistent responses to the open-ended questions in my TurboTax Perception Survey and should not be excluded as a result.¹¹² However, as described above, Professor Hauser's analysis of inconsistent responses in my TurboTax Perception Survey contains many errors. Even taking the coding at face value, correcting for those obvious errors shows that, in fact, at least 132 of the 190 relevant respondents were not inconsistent and should not be excluded.

65. Finally, Professor Hauser argues that only 34 respondents considered *only* TurboTax advertisements or the TurboTax website as a source in forming their impressions, but whether these sources were the *only* source respondents consulted is entirely irrelevant. Even if respondents considered other sources, the TurboTax advertisements and website would still have played a role in informing consumers misimpressions that they could file for free using TurboTax. Moreover, as noted above, it is likely that the information contained in other sources like word of mouth is based on TurboTax advertising and the TurboTax website.

66. Thus, even giving credence to Professor Hauser's coding exercise, there remain 132 respondents out of 262 who have the misimpression that they can file for free, representing 50% of respondents in Group A.

3. Professor Hauser's Coding of Respondents' Understanding of TurboTax Eligibility Criteria is Inaccurate and Misleading

67. In my Opening Report, I established that taxpayers have misimpressions about whether their return constitutes a "simple U.S. return" based on results from closed-ended answers to my TurboTax Perception Survey.¹¹³ To supplement these findings, I provided some examples from open-ended responses of consumers who indicated that they felt confusion about what constitutes a "simple U.S. return."¹¹⁴ Professor Hauser argues that the examples I provided

¹¹² RX1017, Hauser Report, ¶69.

¹¹³ GX303, Novemsky Opening Report, ¶10.

¹¹⁴ GX303, Novemsky Opening Report, ¶90.

were cherry-picked.¹¹⁵ To support this claim, Professor Hauser directed two independent coders to review all four open-ended responses in my TurboTax Perception Survey for information about eligibility criteria.

68. First, I have never made claims about whether people believe there to be criteria to use TurboTax for free. This is, in fact, irrelevant to the question of whether or not consumers were misled or have misimpressions about what constitutes a “simple U.S. return.” Even if consumers understand there to be eligibility criteria, they may not know or understand what those criteria are, or they may have an incorrect understanding about whether they qualify under those criteria. As discussed below, the open-ended responses to my TurboTax Perception Survey provide evidence that this is, in fact, the case. While a number of respondents are aware of eligibility criteria for using TurboTax to file their taxes for free, either they do not understand what exactly the criteria are. However, the more relevant question is whether consumers have a misimpression about whether or not they can file for free and what constitutes a “simple U.S. return,” regardless of whether they understand that there are eligibility criteria to file for free with TurboTax.

69. Professor Hauser purports to find that 52% of consumers do indicate there are qualification criteria to file with TurboTax and only 12% indicate that there are not qualification criteria to file with TurboTax.¹¹⁶ I note that, setting aside methodological errors, Professor Hauser concedes that 12% of consumers do not believe there are qualification criteria; these consumers hold a misimpression about whether they can file for free. Moreover, many of the respondents included in the 52% figure have open-ended responses that clearly demonstrate the respondents have a misimpression about what the criteria for filing for free actually are. Even if respondents indicate that there are specific criteria to file for free, if they are wrong about what that criteria are, or don’t know what they are, they still have a misimpression. Respondents included in Professor Hauser’s flawed coding include people who (i) indicate they don’t know why they can or cannot file for free, (ii) identify incorrect criteria for why they think they can file for free, or (iii) indicate that they think anyone can file for free.

70. In a related analysis, Professor Hauser also reports that 38% of respondents indicated that qualification to file for free relates to the simplicity or complexity of tax returns.¹¹⁷ Professor Hauser identifies those 38% of respondents as having identified correct eligibility criteria, meaning that the remaining 62% have either identified incorrect criteria, or have given no indication of being aware of any criteria.¹¹⁸ Moreover, 38% is also not necessarily the

¹¹⁵ RX1017, Hauser Report, ¶71.

¹¹⁶ RX1017, Hauser Report, Table 3.

¹¹⁷ RX1017, Hauser Report, Table 3.

¹¹⁸ RX1017, Hauser Report, Table 3.

accurate number of those who had the criteria right since respondents may not have an understanding of what a “simple” or “complex” tax filing means in the context of Intuit’s eligibility criteria. In fact, “simple returns only” is the disclaimer employed by Intuit, which my TurboTax Perception Survey demonstrates is insufficient to cure consumer misimpressions about whether they can file for free. For consumers to parrot the disclaimer that only simple returns are free does not say anything about whether they understand what constitutes a simple return, and more importantly whether they have correct beliefs about whether they have a simple return. The results of my survey suggest that a substantial number of consumers do not understand how to apply this simplicity related criterion to their own taxes.

71. In sum, contrary to Professor Hauser’s claims, the results of the TurboTax Perception Survey do not indicate a large group of respondents are aware of the correct eligibility criteria for using TurboTax for free.

C. Professor Hauser’s criticisms about the design and implementation of My TurboTax Perception Survey are baseless and speculative

1. Professor Hauser fails to demonstrate that the TurboTax Perception Survey sample is biased, and that the potential biases he claims without evidence would negate the survey results

72. Professor Hauser identifies three groups of consumers, one of which is not included in the TurboTax Perception Survey sample by legal requirement (those who were informed that the survey was commissioned by a federal agency and chose to opt-out); one of which may be part of the sample (those who may be aware of litigation); and one which was not part of the target population (those who filed their 2021 taxes before the survey was conducted).¹¹⁹ Based on the existence of these consumers, Professor Hauser claims my TurboTax Perception Survey “relies on a biased and unrepresentative sample.”¹²⁰ Professor Hauser’s claim is wholly speculative. He does not provide any evidence that the categories he identified results in any bias, or impacts the conclusions I reached.

73. With respect to the first group he identified, Professor Hauser claims that “[t]here is **significant potential** for selection bias resulting from respondents being able to opt-out of the survey after completion”¹²¹ First, I note that Figure 1 of Professor Hauser’s report presents no information that was not included in my opening report.¹²² Additionally, Professor Hauser has no basis or evidence for the notion that opt-out respondents may be

¹¹⁹ RX1017, Hauser Report, ¶¶39–42.

¹²⁰ RX1017, Hauser Report, ¶15.

¹²¹ RX1017, Hauser Report, ¶41.

¹²² GX303, Novemsky Opening Report, ¶¶50-51.

systematically different from remaining respondents in a way that would impact the results of the TurboTax Perception Survey. In fact, Professor Hauser does not even appear to propose a reason why such an impact would exist. All he provides on this point is the speculation that “respondents with more positive views of TurboTax may have exited the survey after learning that the survey was designed to be used against TurboTax.”¹²³ This is completely baseless fantasy. One can equally well make up a different story that those people are more likely to stay in to make sure their responses help TurboTax, but that would be speculation as well. Ultimately, there is no evidence of any of this, and most importantly, there is no evidence (or even a claim) that this hypothetical characteristic would systematically affect consumers’ perception as to whether they can use TurboTax for free.

74. Further, as discussed in my Opening Report, presuming all respondents who opted out of my TurboTax Perception Survey fell within Group A (an unrealistic assumption) and none of them had any misimpressions (another unrealistic assumption), my TurboTax Perception Survey results would still show that 37.5% of consumers who did not use TurboTax in the last three years were under the misimpression that they could use TurboTax for free. Professor Hauser claims that, under his hypothesis, “an appropriately conservative sensitivity analysis would be an analysis assigning all ‘opt-out’ respondents to Group B.”¹²⁴ Such an analysis would leave the results from Group A respondents, the main group that I evaluate, unchanged.

75. Second, Professor Hauser claims that “the potential inclusion of ‘litigation aware’ respondents and respondents who are likely to be informed on the ‘free’ issue” suggests that the sample is not representative.¹²⁵ However, there is no basis to believe that litigation aware respondents would systematically differ from the others with respect to the extent of their misperceptions about TurboTax, and there is no reason to think that their existence would bias or negate the results of my TurboTax Perception Survey.

76. Finally, Professor Hauser criticizes the TurboTax Perception Survey for not including those consumers who filed their 2021 taxes before the survey was conducted. In my Opening Report, I explained why this was appropriate and discussed historical data suggesting that those who have not filed their taxes around the time of the TurboTax Perception Survey amounted to approximately 40 percent of tax filers.¹²⁶ As an initial matter, even if one were to assume that the rate of misimpressions was dramatically lower in the group of tax payers who file earlier (there is no evidence to show that, and Professor Hauser provides none), the TurboTax Perception Survey results still support the overall conclusion that a substantial

¹²³ RX1017, Hauser Report, ¶41.

¹²⁴ RX1017, Hauser Report, fn. 71.

¹²⁵ RX1017, Hauser Report, ¶43.

¹²⁶ GX303, Novemsky Opening Report, footnote 20.

portion of the taxpayers who do not qualify to use TurboTax Free Edition under Intuit's criteria have the misimpression that they can file their income taxes for free using TurboTax. Second, while Professor Hauser argues that "discrepancies in demographics" he purports exist between late filers and other earlier filers "*suggests* [sic] that the Novemsky Survey's respondents ... were not representative," he provides no evidence that the claimed differences bias the survey results in any way.¹²⁷

2. Professor Hauser fails to demonstrate that my TurboTax Perception Survey questions suffer from demand artifacts

77. Professor Hauser claims that "several elements in the screening and main questionnaire of my TurboTax Perception Survey are likely to create demand artifacts and lead respondents into providing certain responses favorable to Complaint Counsel's position."¹²⁸

78. As evidence of these claims, Professor Hauser identifies six respondents that suggested in their open-ended responses that their belief of whether they can file their taxes for free was influenced by the language in my TurboTax Perception Survey. These six respondents constitute less than 1% of my TurboTax Perception Survey sample (6 out of 607), and the fact that this response was elicited in an answer to an explicit question indicates that their existence is not indicative of more substantial number of respondents with the same thought. I also note that there is an inherent contradiction in Professor Hauser's argument that respondents may have been influenced into believing they could file for free using TurboTax online software by my TurboTax Perception Survey, which says the word "free" 13 times, but that consumers were not influenced by Intuit's marketing campaign based on free-messaging which often exclusively repeats the word "free" more than 40 times over the period of a 30-second advertisement.

79. In the following sections, I respond to Professor Hauser's claims that: (i) the question in my Perception Survey asking respondents to indicate whether they can file their taxes for free using TurboTax online software encourages guessing and is unreliable; (ii) the questions in my TurboTax Perception Survey regarding the source of respondents' beliefs about whether they believe they can file for free using TurboTax online software are unreliable and are inconsistent with academic literature; and (iii) the question in my TurboTax Perception Survey on respondents' understanding of "simple U.S. returns" is leading and unreliable.

a) Professor Hauser's claims that the question in my Perception Survey asking respondents to indicate whether they can file their taxes for free using TurboTax online

¹²⁷ RX1017, Hauser Report, ¶40.

¹²⁸ Hauser Report, ¶44.

software encourages guessing and is unreliable are nonsensical and contradict his own arguments about Intuit's marketing

80. In my TurboTax Perception Survey, I ask respondents what their understanding is of whether they can file for free, in a closed-ended format.¹²⁹ Professor Hauser claims that the framing of this question encourages respondents to guess if the respondent is unsure.¹³⁰ However, his claims are nonsensical and contradict his own arguments.

81. As an initial matter, Professor Hauser's argument does not make any sense. Respondents were not only presented with the response options "I think I can file my 2021 income taxes for free using TurboTax online software" and "I don't think I can file my 2021 income taxes for free using TurboTax online software," they were also provided with the response options "I do not have enough information..." and "I'm not sure." If respondents were highly uncertain about their beliefs, they would likely have chosen one of the latter two options. Additionally—as in Professor Hauser's own surveys¹³¹—respondents were instructed at the beginning of my TurboTax Perception Survey not to guess.¹³² In fact, we went further in our survey and required them to explicitly agree to this instruction not to guess before they could continue with the survey, a step that has been shown to increase compliance.

82. Second, Professor Hauser ignores that consumers act on their own understanding and on what they think, therefore whether consumers "think" they can or cannot file for free is a relevant standard to determine whether consumers might act on their beliefs. In particular, Professor Hauser claims that "guessing in a survey context ... is not equivalent to having a distinct 'misimpression' that they can file for free as a result of Intuit's advertising and marketing, and then acting on that 'misimpression' to consider or choose TurboTax."¹³³ However, he offers no support for this statement, nor does he acknowledge academic research illustrating that consumers often act on uncertain beliefs in the marketplace.¹³⁴

¹²⁹ See Novemsky Opening Report, Appendix E Question TAT240. "TAT240. You may have already said this above, but please tell us again, which of the following best describes your understanding of filing your 2021 income taxes for free using TurboTax online software?" The response options in the survey were: (1) "I think I can file my 2021 income taxes for free using TurboTax online software;" (2) "I don't think I can file my 2021 income taxes for free using TurboTax online software;" (3) "I do not have enough information to say whether or not I can file my 2021 income taxes for free using TurboTax online software;" and (4) "I'm not sure."

¹³⁰ Hauser Report, ¶46.

¹³¹ RX1017, Hauser Report, Appendix C-2 and Appendix D-1.

¹³² GX303, Novemsky Report, Appendix E.

¹³³ Hauser Report, ¶49.

¹³⁴ See, e.g., H. Allcot and C. Knittel, "Are Consumers Poorly Informed about Fuel Economy? Evidence from Two Experiments," *American Economic Journal Economic Policy*, 2019, Vol. 11 (1), pp. 1-37 at p. 1 ("Consumers constantly choose products under imperfect information. Most goods people buy have many attributes, and it is difficult to pay attention to and learn about all of them. This opens the door to the possibility that people might make mistakes ... either due to imperfect information about costs and benefits or by failing to pay attention to some attributes.").

83. Third, Professor Hauser suggests that my TurboTax Perception Survey should have included the criteria by which consumers qualify for free filing in the survey.¹³⁵ This suggestion is absurd and would entirely undermine the purpose of my TurboTax Perception Survey. In particular, the criteria by which consumers qualify for free filing (i.e., describing what constitutes a “simple U.S. return”) is not readily available to consumers in Intuit’s marketing campaigns—it is not included in TV advertisements, nor is it included in online banner ads or social media ads, and when it appears on the TurboTax website, it appears behind a hyperlink or in small font at the bottom of a webpage. Professor Hauser is essentially suggesting that providing this clarifying language is necessary for consumers to indicate whether or not they believe they can file for free using TurboTax online software in my TurboTax Perception Survey. This underscores the fact that, by not providing that same clarifying language in its own marketing, Intuit is not providing consumers with sufficient information to understand whether they can file for free using TurboTax online software.

84. The motivated reasoning that would lead people to say “yes” on a survey would also lead people to consider or choose TurboTax to start filing their taxes. In other words, contrary to Professor Hauser’s claims, this is not a survey effect, but an effect that would influence marketplace behavior, and can be measured in the survey. Motivated reasoning is constrained by reality and needs something to operate on and allow it to influence perceptions. In this case, the fodder for motivated reasoning is Intuit’s marketing conveying the clear message that filing with TurboTax is free. This could—with or without motivated reasoning—allow consumers to come away with the misimpression that they can file for free.

85. Professor Hauser argues that “guessing bias” will bias the results of my TurboTax Perception Survey in favor of the FTC.¹³⁶ However, in order to make that claim he has to adopt the idea that consumers are not inherently skeptical that a product can be free, in contrast to the claims in his prior declaration and in this report that consumers generally expect products *not* to be free.¹³⁷ Professor Hauser fails to provide any empirical evidence in either direction, and his willingness to argue both sides of this point illustrate that absent evidence regarding the expectations of potential taxpayers, there is no reason to predict systematic bias in one direction or the other in my TurboTax Perception Survey.

86. In addition, Professor Hauser’s claims are inconsistent with the results discussed in the Novemsky Opening Report, that respondents reported their belief regarding whether they could file for free was influenced by TurboTax’s ads and website.¹³⁸ Professor Hauser dismisses these results, claiming that the Novemsky Report “does not offer any evidence”

¹³⁵ RX1017, Hauser Report, ¶48.

¹³⁶ RX1017, Hauser Report, ¶50.

¹³⁷ RX1017, Hauser Report, Section IV.D.1, ¶50; RX 402 Hauser Declaration, August 30, 2020, ¶75.

¹³⁸ GX303, Novemsky Opening Report, Figure 2.

that respondents' misimpressions are a result of Intuit's advertising.¹³⁹ This is false, and entirely ignores the result presented in Figure 2 of my Opening Report that 72.3% of respondents in my TurboTax Perception Survey indicated that either TurboTax advertisements or the TurboTax website was the source of their beliefs about whether or not they could file their taxes for free using TurboTax online software.¹⁴⁰ I address Professor Hauser's criticisms of these results in further detail in the next section.

87. Professor Hauser purports to offer evidence from my TurboTax Perception Survey to support his claims of guessing bias. However, none of this evidence is relevant or convincing, or distinguishable from the effect of Intuit's pervasive marketing campaigns.

88. First, Professor Hauser suggests that the relatively small share of respondents in Group A who indicated "do not have enough information" or are "not sure" is evidence of the guessing bias he asserts because such respondents do not have recent experience with TurboTax.¹⁴¹ However, he has no evidence to suggest that this relatively small share of respondents is a result of guessing bias, and not an outcome of Intuit's marketing campaigns. In fact, this is unlikely given that, on average between 2018 and 2022, TurboTax accounted for 72% of total impressions from TV advertisements emphasizing free messaging among tax filing service providers. See Section IV.A.

89. Second, Professor Hauser claims that "the Novemsky Report also fails to acknowledge that the repeated use of the word 'free' in the Novemsky Survey itself could have led these respondents to answer as they did, rather than Intuit's advertisements, website, or disclosures."¹⁴² This claim is entirely contradictory to the notion advanced by Professor Hauser that consumers would not be misled by Intuit's marketing.¹⁴³ Professor Hauser offers no explanation for why the use of the word "free" 13 times in my TurboTax Perception Survey would lead respondents to believe they could file with TurboTax for free, but Intuit's ads which may include the word "free" as many as 50 times in a 30 second period, would not.

b) Professor Hauser's claims that the questions in my TurboTax Perception Survey regarding the source of respondents' beliefs about whether they believe they can file for free using TurboTax online software are unreliable are

¹³⁹ RX1017, Hauser Report, ¶52.

¹⁴⁰ GX303, Novemsky Opening Report, Figure 2.

¹⁴¹ RX1017, Hauser Report, ¶51.

¹⁴² RX1017, Hauser Report, ¶52.

¹⁴³ RX1017, Hauser Report, ¶116

**inconsistent with academic literature, and are unsupported
by any evidence of survey biases**

90. Professor Hauser claims that questions asking respondents directly about the source of their impressions regarding TurboTax¹⁴⁴ “are at best a memory test and do not establish causality,” and “are unusable to establish the origin of respondents’ perceptions.”¹⁴⁵ Professor Hauser’s arguments on this point are split into two types: arguments suggesting respondents cannot be relied on to pinpoint the source of their beliefs and impressions, and flaws in my TurboTax Perception Survey. Professor Hauser’s arguments on the first point are inconsistent with academic literature, while his arguments on the second point are unsupported by any evidence of survey biases.

91. Professor Hauser argues that respondents are likely to suffer from “source amnesia,” and thus are not likely to recall the source of their impressions.¹⁴⁶ Professor Hauser offers no evidence for the scope of this supposed issue, particularly in light of a long-running, pervasive marketing campaign such as is at issue in this matter. While it is certainly true some respondents might not remember the source of their impressions, Professor Hauser has not offered any evidence that such respondents would not know that they could not remember the source of their impressions. In fact, psychologists regularly ask respondents to record the source of their beliefs or impressions and respondents are able to indicate when they do not remember the source of their impressions in these studies. Further, as discussed in Section III.A.3, none of the alternative sources of consumer misimpressions Professor Hauser posits as an alternative to Intuit marketing are plausible.

92. Professor Hauser further argues that flaws in my TurboTax Perception Survey would bias respondents towards indicating that TurboTax is the source of their impressions. Professor Hauser offers no evidence that any of the biases he describes are a more plausible explanation for the results of my TurboTax Perception Survey than Intuit’s marketing activities.

93. First, Professor Hauser claims that the source questions would be subject to a demand artifact.¹⁴⁷ As noted in my opening report, I designed my survey in accordance with best practices, including framing the questions in a way that was clear and not leading.¹⁴⁸ I instructed respondents not to guess, included a clear set of choices including options such as “I do not have enough information” and “Other,” and used quasi-filters to reduce guessing.¹⁴⁹ Pretests showed that respondents were unable to guess the sponsor or purpose of the survey,

¹⁴⁴ GX303, Novemsky Opening Report, Appendices E, TAT255 and TAT265.

¹⁴⁵ RX1017, Hauser Report, ¶56.

¹⁴⁶ RX1017, Hauser Report, ¶59.

¹⁴⁷ RX1017, Hauser Report, ¶57.

¹⁴⁸ Novemsky Opening Report, ¶19.

¹⁴⁹ Novemsky Opening Report, ¶58.

further reducing the potential for demand artifacts. Although Professor Hauser dismisses the use of such measures,¹⁵⁰ he also followed each best practice in designing his own surveys.¹⁵¹

94. Second, Professor Hauser claims that the phrasing of the question, combined with the claimed incompleteness of the response options, will lead respondents to select from one of the options on the list, which he hypothesizes would have led to the answers to the question being “substantially different.”¹⁵² However, Professor Hauser’s suggestion that this would lead respondents to bias their answers towards TurboTax ads and the TurboTax website is baseless. Moreover, because response options were randomized, to the extent that respondents did guess, one would expect those guesses to be evenly distributed among the answer options, and not concentrated on any of the options presented such as TurboTax advertisements or the website.¹⁵³ Thus, any guessing that did occur would not bias the results of my TurboTax Perception Survey.

95. Professor Hauser claims that because websites of other specific tax preparation services are not listed, respondents will choose the “TurboTax website” as a source of their impressions, regardless of whether that impression was of filing for free with TurboTax or a competitor. As an initial matter, this claim is incorrect: “Information online not from TurboTax,” which includes information from “websites” *is* explicitly included in the list of response options.¹⁵⁴ Additionally, respondents are unlikely to mistake marketing messages from competitors as coming from TurboTax because—as discussed above—TurboTax holds a large share of voice compared to its competitors.

96. Professor Hauser specifically notes that respondents’ own experience is “egregiously” missing from the list of response options to this question.¹⁵⁵ However, pretests showed that respondents (including those who qualified for Group B) did not have any trouble answering the question.¹⁵⁶ In light of this evidence (which Professor Hauser ignores), it is not that clear respondents would not interpret existing options to include their own experience. For example, a response of the “TurboTax website” could encompass a respondents’ prior filing on the website.

97. Third, Professor Hauser criticizes my TurboTax Perception Survey for not offering a “TurboTax advertisements” option that is not specific to the allegedly deceptive advertisements.¹⁵⁷ However, this argument illustrates that Professor Hauser misunderstands

¹⁵⁰ RX1017, Hauser Report, fn. 123.

¹⁵¹ RX1017, Hauser Report, Appendices C-2, D-2.

¹⁵² RX1017, Hauser Report, ¶58.

¹⁵³ GX313, Novemsky Second Declaration, ¶11.

¹⁵⁴ Novemsky Opening Report, Appendix E, TAT255, TAT265.

¹⁵⁵ RX1017, Hauser Report, ¶58.

¹⁵⁶ GX303, Novemsky Opening Report, Appendix G.

¹⁵⁷ RX1017, Hauser Report, ¶60.

the nature and scope of the FTC's challenge to Intuit's marketing activities. Complaint counsel's main allegation is that "[s]ince at least 2016, Intuit has promoted TurboTax through advertising that represents that consumers can file their taxes for free using TurboTax."¹⁵⁸ Thus, it is appropriate for my TurboTax Perception Study to study respondents' overall beliefs about whether or not they believe they can file for free using TurboTax online software based on any TurboTax advertising.

98. Finally, Professor Hauser claims that these flaws may compound and interact with each other.¹⁵⁹ This claim is entirely speculative, particularly considering he has failed to offer any evidence on the magnitude or direction of any of the specific biases he outlines.

c) Professor Hauser's claims that the question in my TurboTax Perception Survey on respondents' understanding of "simple U.S. returns" is leading and unreliable are unsupported and ignore the context in which consumers would encounter the phrase

99. Professor Hauser claims that the question in my TurboTax Perception Survey asking respondents whether their own tax returns qualify as "simple U.S. returns" is leading and unreliable because it is not a two-sided question (i.e., asked in a format of "do you or do you not think...").¹⁶⁰ Professor Hauser's claims are unsupported, and ignore the context in which consumers would encounter the phrase "simple U.S. returns."

100. Professor Hauser claims that "without the kind of information about what constitutes a simple return that is normally available in the marketplace, and faced with a one-sided question favoring 'yes,' respondents in my TurboTax Perception Survey will be more prone to guessing."¹⁶¹ However, Professor Hauser's claim ignores that the information in the marketplace readily available to consumers in Intuit's marketing is exactly this, that only that individuals with "simple U.S. returns" can file for free. Professor Hauser argues that, in the marketplace, consumers would have incentives and resources to search out and use additional information. However, as discussed above in Section III.C.2, consumers regularly make decisions in the face of uncertain beliefs without conducting additional research. Relatedly, and as discussed in Section VI.D, consumers are cognitive misers who are unlikely to conduct additional research, especially in complex or costly situation like tax filing. Respondents to my TurboTax Perception Survey will react as consumers in the marketplace

¹⁵⁸ Complaint, ¶21.

¹⁵⁹ RX1017, Hauser Report, ¶61.

¹⁶⁰ RX1017, Hauser Report, ¶63. It is important to note that even though Professor Hauser asserts that "stating the negative explicitly can reduce positive responses by almost half," he acknowledges in the accompanying footnote that "[o]ther examples might not be as large," and declines to propose a potential magnitude of the alleged issue in my TurboTax Perception Survey. RX1017, Hauser Report, footnote 122.

¹⁶¹ RX1017, Hauser Report, ¶64.

will because they are left with a misimpression from a TurboTax ad (or other marketing material), they are left to react to some degree of uncertainty, and with some degree of motivated reasoning.

101. Professor Hauser’s claims that consumers will be motivated to conduct research and seek out the information they need are entirely unsupported.¹⁶² I note that the specific source Professor Hauser cites in support of this statement discusses business-to-business marketing and sales, and thus is irrelevant to the context of individual consumer decisions.¹⁶³ Setting this aside, however, as discussed in Section VI.D consumers are cognitive misers who are unlikely to conduct substantial additional research, especially in highly complex settings like filing taxes. Even if some consumers were motivated to conduct further research, Professor Hauser provides no evidence whatsoever that *all* consumers would do such research before starting their taxes. Simple availability of information—which is all Professor Hauser’s sources specific to tax preparation support—does not imply that consumers will search for, find, process, or act on that information, nor does it imply that they will be immune from deception.

102. Professor Hauser suggests that adding control groups or control questions can be a solution to control for one-sided questions, but this suggestion is misleading.¹⁶⁴ Even Professor Hauser appears to acknowledge that adding a control group or control question is not the *only* solution to control for one-sided questions, and Professor Hauser fails to suggest the potential magnitude of the issue prior to concluding the results “are very likely inflated in Complaint Counsel’s favor.”¹⁶⁵ Professor Hauser claims that the quasi-filter included in the question (one such alternative solution to controlling for one-sided questions) would be “unlikely to correct for the one-sided nature of the question,” but fails to offer any support or justification for his assertion.¹⁶⁶

IV. Professor Hauser’s Disclosure Efficacy Survey Is Flawed and Changes None of the Opinions in My Opening Report

103. Professor Hauser’s claim that “consumers were unlikely to be deceived by Intuit’s advertisements, website, and disclosures into starting their tax preparation with TurboTax Free Edition” is baseless, and is not supported by the results of Professor Hauser’s Disclosure Efficacy Survey.

¹⁶² RX1017, Hauser Report, ¶67.

¹⁶³ RX1017, Hauser cited to Kotler, P. and Keller, K., 2016. “Marketing Management 15th Ed.” Pearson Education, INTUIT-FTC-PART3-000597494, pp. 195-196, which doesn’t discuss individual consumer decisions at all.

¹⁶⁴ Hauser Report, ¶65.

¹⁶⁵ Hauser Report, ¶65.

¹⁶⁶ Hauser Report, footnote 123.

104. In the Hauser Disclosure Efficacy Survey, the respondents were shown stimuli (a video advertisement and webpages) about a fictitious company called Vertax (a disguised brand name for TurboTax) and asked questions about their consideration of starting their tax preparation with Vertax, as well as their choice of Vertax products.¹⁶⁷ Professor Hauser states that he presented one group of respondents with stimuli that are based on “Intuit’s marketing materials,” and the other group with stimuli “that include more prominent disclosures.”¹⁶⁸ Based on the survey, Professor Hauser has concluded:

“Contrary to Complaint Counsel’s claims, I find that consumers were unlikely to be deceived by Intuit’s advertisements, website, and disclosures into starting their tax preparation with TurboTax Free Edition. Respondents to my Disclosure Efficacy Survey who reviewed an advertisement and webpages that include more prominent disclosures exhibited no decrease in consideration of starting their taxes with Vertax (a disguised brand name for TurboTax), no decrease in their selection of Free Edition, and no decrease in their likelihood of starting their taxes with Free Edition, compared to respondents who reviewed an allegedly deceptive Vertax advertisement and webpage.”¹⁶⁹

105. Professor Hauser’s Disclosure Efficacy Survey is plagued with demand artifacts, and as a result, is fundamentally flawed and unreliable. Due to these flaws, Professor Hauser’s Disclosure Efficacy Survey cannot reliably assess whether consumers in either of its two groups would start their taxes with Vertax, or any other online tax preparation software, rendering the comparison between the two groups meaningless.

106. Even if one were to ignore these flaws, and take the survey results at face value, Professor Hauser’s Disclosure Efficacy Survey still would not support Professor Hauser’s claim that “consumers were unlikely to be deceived by Intuit’s advertisements, website, and disclosures into starting their tax preparation with TurboTax Free Edition.”¹⁷⁰ A test / control setup is designed to measure the impact of one set of stimuli in relation to the other, so Professor Hauser’s Disclosure Efficacy Survey results cannot show whether or not either of Professor Hauser’s original or revised stimuli deceived respondents. The only conclusion one can draw from Professor Hauser’s results would be that the stimuli he modified to include “more prominent disclosures” are no less deceptive than the original stimuli he based on actual TurboTax “free free free” ads and webpages.

¹⁶⁷ Hauser Report, ¶¶16, 86.

¹⁶⁸ Hauser Report, ¶¶16, 87.

¹⁶⁹ Hauser Report, ¶16.

¹⁷⁰ Hauser Report, ¶16.

107. Furthermore, Professor Hauser fails to offer any empirical evidence showing that either the original or his revised stimuli prevent consumers from being misled by the free claims contained in both stimuli. While Professor Hauser claims that his revised stimuli “account for revisions previously advocated for by Complaint Counsel,” his revisions do not address the deception left by Intuit’s long-running, multi-channel, “free” advertising campaigns and does not even address the deceptive elements Professor Hauser identified based on his reading of the Complaint and listed in his report.¹⁷¹

A. Summary of Professor Hauser’s Disclosure Efficacy Survey

108. Professor Hauser’s Disclosure Efficacy Survey relied on a test / control design with two groups, in which the “groups differed only by the advertisement and website pages (‘stimuli’) presented to them.”¹⁷² Professor Hauser claims that he used the test / control design in order to “isolate the impact, if any, that Intuit’s allegedly misleading advertisements, website, and disclosures would have had on a) consumers’ consideration of starting their taxes on TurboTax, b) the specific TurboTax product that consumers select to start their taxes with, and c) their likelihood of starting their taxes with their selected product relative to an advertisement and website with revised written and verbal disclosures.”¹⁷³

109. Professor Hauser states that he presented one group of respondents (“Original Disclosures Group”) with stimuli that he states are based on “Intuit’s marketing materials used in Tax Year 2021,” and the other group (“Revised Disclosures Group”) with stimuli that he claims “account for revisions previously advocated for by Complaint Counsel ... and consistent with Intuit’s agreement with the state attorneys general.”¹⁷⁴ He also “replaced the Intuit and TurboTax brands with a disguised brand name, Vertax, in all stimuli.”¹⁷⁵

B. At best, Professor Hauser’s Disclosure Efficacy Survey results show that Professor Hauser’s modified stimuli are no less deceptive than the original stimuli based on actual TurboTax marketing, but cannot provide evidence as to how deceptive either of the two stimuli are.

110. As I explained in my Opening Report, in a test / control design, like Professor Hauser’s Disclosure Efficacy Survey, the goal is not to measure the level of response (to survey questions), but instead “the difference between the response level of the experimental group

¹⁷¹ Hauser Report, Appendix C-1, ¶5.

¹⁷² Hauser Report, ¶86.

¹⁷³ Hauser Report, ¶86.

¹⁷⁴ Hauser Report, ¶90.

¹⁷⁵ Hauser Report, ¶87, ¶90; Appendix C-1, ¶¶ 7, 10, 16. (“Specifically, Professor Hauser disguised the stimuli by various methods, which included “[r]eplacing the TurboTax logo and color scheme with a Vertax logo and color scheme,” “[r]eplacing TurboTax written disclosure text with Vertax written disclosure text,” “[r]eplacing TurboTax verbal disclosures with Vertax verbal disclosures,” “[replacing] references of TurboTax to Vertax,” and “[r]emoving the red check mark logo on the computer screen image in the ‘More Details’ section under ‘Deluxe.’”).

and the control group.”¹⁷⁶ I understand that Professor Hauser also confirmed repeatedly in his deposition that his test / control study could only measure the difference in consumer response between the two sets of stimuli.¹⁷⁷ Specifically, the comparison between the test and control groups only measures the impact resulting from the differences in the two sets of stimuli included in the survey.¹⁷⁸

111. In the case of Professor Hauser’s Disclosure Efficacy Survey, Professor Hauser used two different stimuli, finding that respondents who reviewed Professor Hauser’s Revised Disclosures “exhibited no decrease in consideration of starting their taxes with Vertax, no decrease in their selection of Free Edition, and no decrease in their likelihood of starting their taxes with Free Edition, compared to respondents who reviewed an allegedly deceptive Vertax advertisement and webpage.”¹⁷⁹ This is (appropriately) a comparative statement, and does not include any measurement of whether, and to what extent, consumers were deceived by Intuit’s actual advertisements and website (proxied by the group viewing Professor Hauser’s revised stimuli) in absolute terms.

112. Importantly, Professor Hauser fails to establish that consumers in either the test or control group were not deceived, and so cannot conclude that consumers were not deceived by the original or revised stimuli, and also cannot conclude that the comparison between the test and control group in Professor Hauser’s Disclosure Efficacy Survey somehow implies that consumers would not be deceived by TurboTax’s advertising, website, and disclosures. In other words, Professor Hauser cannot rule out the possibility that his original and revised stimuli are *equally deceptive*, and that the revisions made are insufficient to cure the deception inherent in the original TurboTax marketing materials.

113. Professor Hauser’s description of the results of his Disclosure Efficacy Survey illustrate that he is aware of this limitation. Specifically, he notes that the survey results show that the “*more prominent disclosures* related to Free Edition eligibility, *as tested in the Disclosure Efficacy Survey*, are unlikely to have a material impact on consumers’ consideration of using TurboTax to start their tax return” (emphasis added).¹⁸⁰ That is, Professor Hauser describes the results as arising from the difference in having the “more prominent disclosures” in the

¹⁷⁶ Novemsky Opening Report, 30; Diamond, Shari S., “Reference Manual on Scientific Evidence Third Edition,” *Federal Judicial Center*, 2011, p. 399.

¹⁷⁷ Hauser Dep. Tr. 70:18–23, 77:11–21, 128:8–19, Jan. 25, 2023 (Rough Transcript).

¹⁷⁸ Novemsky Opening Report, ¶32. [Randall S. Brown and Margaret Harrigan, “The Comparability of the Treatment Control Groups at Randomization,” *U.S. Department of Health and Human Services*, October 27, 1983, available at <https://aspe.hhs.gov/sites/default/files/private/pdf/73976/compares.pdf>.]

¹⁷⁹ Hauser Report, ¶16.

¹⁸⁰ Hauser Report, ¶ 91. *See*, also Hauser Report, ¶16 (“Respondents to [the Disclosure Efficacy Survey Survey] who reviewed an advertisement and webpages that include more prominent disclosures exhibited no decrease in consideration of starting their taxes with Vertax ... no decrease in their selection of Free Edition, and no decrease in their likelihood of starting their taxes with Free Edition, compared to respondents who reviewed an allegedly deceptive Vertax advertisement and webpage.”)

revised stimuli only, without any mention of whether respondents were deceived or not deceived by the original or revised stimuli. However, Professor Hauser then abandons this disciplined approach and makes an unsupported logical leap to present hypotheses for the results of Professor Hauser's Disclosure Efficacy Survey. Specifically, he claims that:

- “If it were true that Intuit’s advertisements and website served simply as ‘door openers,’ one would expect that respondents in the Revised Disclosures Group, who were exposed to expanded disclosures about the limitations to filing for free, would be substantially less likely than respondents in the Original Disclosures Group to consider starting their taxes with Vertax.”¹⁸¹
- “If these allegations were true, one would expect that respondents in the Revised Disclosures Group, who were exposed to more prominent disclosures about the limitations to filing for free, would choose to start their taxes with Free Edition less frequently than respondents in the Original Disclosures Group.”¹⁸²

114. Implicit in each of these hypotheses is the strong assumption that any possible deception consumers would experience from the original stimuli would be “cured” by the “more prominent” or “expanded” disclosures included in the revised stimuli. However, Professor Hauser provides no evidence for this assumption which underlies his conclusions based on the Disclosure Efficacy Survey results.

115. Professor Hauser then makes a further logical leap to conclude that the results of Hauser Disclosure Efficacy Survey “contradict Complaint Counsel’s allegations that consumers were deceived into starting their tax returns with TurboTax Free Edition based on Intuit’s allegedly deceptive advertisements and website.”¹⁸³ Even if the Hauser Disclosure Efficacy Survey results were reliable and represent the real TurboTax marketing that consumers see in the marketplace (which, as I discuss below, they are not), claiming that actual TurboTax ads and website are not deceptive necessitates proving the control stimuli created by Professor Hauser do not deceive consumers into starting their taxes with TurboTax. Professor Hauser does not make any such claim in his report. Indeed, he cannot, because nowhere in his report does he undertake any analysis to establish such a claim, nor does he ask any question in his Disclosure Efficacy Survey that would allow him to establish whether respondents were in fact deceived by the stimuli they reviewed. The Hauser Disclosure Efficacy Survey data does not even include information that could be used to determine whether or to what extent respondents interacted with the stimuli—for example, how long respondents reviewed each

¹⁸¹ Hauser Report, ¶ 91.

¹⁸² Hauser Report, ¶ 94.

¹⁸³ Hauser Report, ¶ 100.

of the stimuli, or whether respondents clicked on hyperlinks to examine the qualification criteria for filing for free.

116. In the absence of any affirmative analyses showing that respondents were not deceived by Professor Hauser's revised stimuli, his conclusion that "consumers were unlikely to be deceived by Intuit's advertisements, website, and disclosures into starting their tax preparation with TurboTax Free Edition" is completely baseless and unsupported.¹⁸⁴

C. Contrary to his claims, Professor Hauser's revised stimuli do not account for the deceptive aspects of TurboTax marketing materials he modified.

117. As I discussed in the previous section, Professor Hauser does not present any analysis demonstrating that his revised stimuli would not create misperceptions and deceive consumers who are not eligible to use the advertised product for free into thinking that they can. Instead, Professor Hauser explains his revised stimuli by stating that the Complaint "outline[s] specific reasons why Intuit's advertisements and website allegedly mislead consumers," lists a number of quotes from the Complaint, and claims that his revised stimuli are designed to "account for revisions previously advocated for by Complaint Counsel as described above and consistent with Intuit's agreement with the state attorneys general."¹⁸⁵

118. Professor Hauser seems to be implying that that by meeting these two criteria, he ensured that his revised stimuli are not deceptive, yet I have not been able to identify any statement in the Hauser Report that explicitly makes this claim. If that is indeed the claim Professor Hauser attempts to convey, he is incorrect.

119. To begin with, whether or not a specific stimuli (in this case, Professor Hauser's revised ad and webpage) is deceptive is an empirical question about how actual consumers perceive the stimuli. Scientifically, this can only be answered by providing evidence about whether and to what extent consumers are deceived by Professor Hauser's revised stimuli. Whether or not the stimuli is consistent with, say, a legal document is not the subject of empirical inquiry of how actual consumers perceive the stimuli.

120. Second, while I have no opinion on the parameters of Intuit's agreement with state attorneys general, and whether or not Professor Hauser's revised stimuli is consistent with said agreement, I understand Complaint Counsel's position to be that the agreement is inadequate in preventing Intuit's deception.¹⁸⁶ The fact that there is disagreement about the

¹⁸⁴ [Diamond, Shari S., "Reference Manual on Scientific Evidence Third Edition," *Federal Judicial Center*, 2011, p. 373.]

¹⁸⁵ Hauser Report, ¶¶88–90.

¹⁸⁶ See Complaint Counsel's Motion for Summary Decision, at p. 36.

agreement's effectiveness indicates that it cannot be used as a metric for evaluating whether a certain stimuli is deceptive.

121. Third, a review of the Complaint and Professor Hauser's revised stimuli illustrate that, contrary to his claims, Professor Hauser's revised stimuli do not "account for revisions previously advocated for by Complaint Counsel."¹⁸⁷ My understanding, based on the plain reading of the Complaint, is that the Complaint does not advocate for a specific set of revisions to Intuit's advertising and marketing, but rather seeks prohibitions against Intuit misleading the consumers, among other things, about the cost of its goods and services.¹⁸⁸ I understand the Complaint to contain examples of Intuit's allegedly deceptive practices, but not a full list of requested revisions. Moreover, my review of Professor Hauser's report and his revised stimuli illustrated that his revisions do not even account for numerous aspects of TurboTax marketing materials identified in the Complaint as misleading, including those Professor Hauser himself listed. For example, Professor Hauser states:

"For the advertisements, Complaint Counsel claim that:

'[F]ree is essentially the only word spoken by the actors in the commercials;'

'[The disclaimers] [a]re disproportionately small compared to the prominent text emphasizing that the service is free;'

'[The disclaimers] [a]pppear for just a few seconds;' and

'[The disclaimers] [a]re in writing only, often in font color similar to the background color, and are not read by a voiceover.'¹⁸⁹

122. A review of Professor Hauser's revised stimuli illustrate that he implemented changes to address some of these points, such as adding voiceover and changing the size and the color of disclosures.¹⁹⁰ Yet, there were no changes to account for others, or the change was implemented in a way that does not address the misleading elements highlighted in the Complaint. For example, consider the following elements Professor Hauser listed:

- "[The disclaimers] [a]pppear for just a few seconds:"

¹⁸⁷ Hauser Report, ¶¶88–90.

¹⁸⁸ Complaint, Notice of Contemplated Relief, at p. 26.

¹⁸⁹ Hauser Report, ¶88.

¹⁹⁰ Hauser Report, C-1-6.

123. In his revised stimuli, Professor Hauser shows this disclaimer for eight seconds rather than 5 seconds in the original stimulus. He provides no evidence that this is a meaningful change that would have an impact on consumer misimpressions.

- “[F]ree is essentially the only word spoken by the actors in the commercials.”

124. In the revised stimuli, five sentences are spoken (before the disclosure), two of which are “at least your taxes are free,” and the other three are filler sentences that do not relate to any other aspect of TurboTax.¹⁹¹ Professor Hauser appears to claim in his deposition testimony that filing for free was not the main message of—or was one of many messages in—the “fishing” ad used in his control stimulus.¹⁹² However, the central message communicated in the Hauser Revised Stimuli is still that TurboTax can provide free services. No other attributes of TurboTax products are mentioned. Professor Hauser provides no evidence that this advertisement would not mislead consumers and cause misperceptions.

- “[The disclaimers] are disproportionately small compared to the prominent text emphasizing that the service is free;”¹⁹³

125. In Professor Hauser’s revised stimuli, the font of the disclaimer is slightly larger than the font in the original stimuli. However, the disclosure text remains substantially smaller than the text emphasizing that the service is free, which is still much more prominent. Professor Hauser provides no evidence that this adjustment is meaningfully different and would generate a different reaction from the consumers. In fact, his results suggest that these changes were not effective, he was not able to observe any differences in reactions to these modified stimuli compared to the control stimuli.

126. Moreover, the Complaint also lists the following aspects of Intuit marketing that may suggest to taxpayers that they can file their taxes for free using TurboTax online software:

- “[The campaign] informed consumers ‘at least your taxes are free;”¹⁹⁴

127. Professor Hauser does not mention this aspect of the Complaint in his discussion of revisions. In fact, the revised stimuli he created contains this exact phrase, which, as I noted above, is spoken twice in his revised stimuli. Indeed, Professor Hauser appears to agree in

¹⁹¹ Hauser Report, C-1-6; *See*, also Hauser Report, backup materials, “Revised Disclosures Group Video.mp4.” The three sentences are: “Oh, man. It’s my lucky shirt,” “What happened?” “It’s his lucky shirt.” I also note that the phrase “at least your ads are free,” is an aspect of Intuit’s marketing that Complaint Counsel alleges may cause consumer misimpressions. *See*, Complaint, ¶24.

¹⁹² Hauser Dep. Tr. 93:2–94:12, Jan. 25, 2023 (Rough Transcript).

¹⁹³ RX260, Complaint, ¶29.

¹⁹⁴ Complaint, ¶24.

his deposition that both the ads used in his test and control stimulus are included in the Complaint as examples of at-issue ads,¹⁹⁵ that his intention was to test the “strongest parts of the complaint” and the ads that were “most at issue.”¹⁹⁶

- “What ‘simple’ means can be a matter of interpretation and Intuit’s definition of ‘simple’ has changed over time;”¹⁹⁷

128. Professor Hauser’s original stimuli include the phrase “for simple U.S. returns only,” and his revised stimuli includes the phrase “[f]or simple returns only.” The revised stimuli do not include any more indication as to what should be understood by “simple” (as used by TurboTax).

129. Since Professor Hauser does not include these elements as part of his survey design, the marketing he shows to his revised stimuli group does not include revisions to correct all of the elements advocated by Complaint Counsel as he claims. Thus, he fails to correct for the allegedly deceptive elements highlighted as examples in the Complaint.

130. Similarly, with respect to the website, Professor Hauser purports that he makes revisions to correct several deceptive aspects described by Complaint Counsel, but his actual revisions are minimal. He also does not justify or provide any evidence that those minimal revisions would successfully cure any misimpressions taxpayers may have about whether they can file their taxes for free using TurboTax online software. Specifically, Professor Hauser lists the following Complaint elements in his report, yet fails to address them adequately, if at all.

- “Intuit’s current website page emphasizes ‘FREE,’ ‘\$0,’ and ‘File for \$0’;”¹⁹⁸

131. In his revised stimuli, these phrases are still present and emphasized. Professor Hauser makes no adjustment at all to these elements of the website.

- “‘Simple tax returns only’ is not understood by many consumers;”¹⁹⁹

132. Professor Hauser makes no change to this disclaimer in his revised stimuli and does not include any additional information that could clarify what “simple tax returns only” means.

¹⁹⁵ Hauser Dep. Tr. 61:15–19, Jan. 25, 2023 (Rough Transcript).

¹⁹⁶ Hauser Dep. Tr. 70:1-12, 75:5-17, Jan. 25, 2023 (Rough Transcript).

¹⁹⁷ Complaint, ¶¶31.

¹⁹⁸ Hauser Report, ¶89.

¹⁹⁹ Hauser Report, ¶89.

- “‘Simple tax returns only’ is hyperlinked to more detailed terms and conditions...and consumers who assume they have a ‘simple tax return’ are not likely to click to read more:”²⁰⁰

133. In Professor Hauser’s revised stimuli, the hyperlink is placed on the phrase “see if you qualify.” Professor Hauser provides no evidence that this would make consumers more likely to click the hyperlink and read more, particularly if they assume they have a “simple tax return.” Importantly, Professor Hauser does not report how many, if any, respondents clicked on the hyperlink, and importantly whether his revisions increased the number of consumers clicking on the hyperlink to review terms and conditions. Professor Hauser confirmed that he did not capture any data on whether respondents clicked on the hyperlinks to “see if they qualify” to file for free.²⁰¹

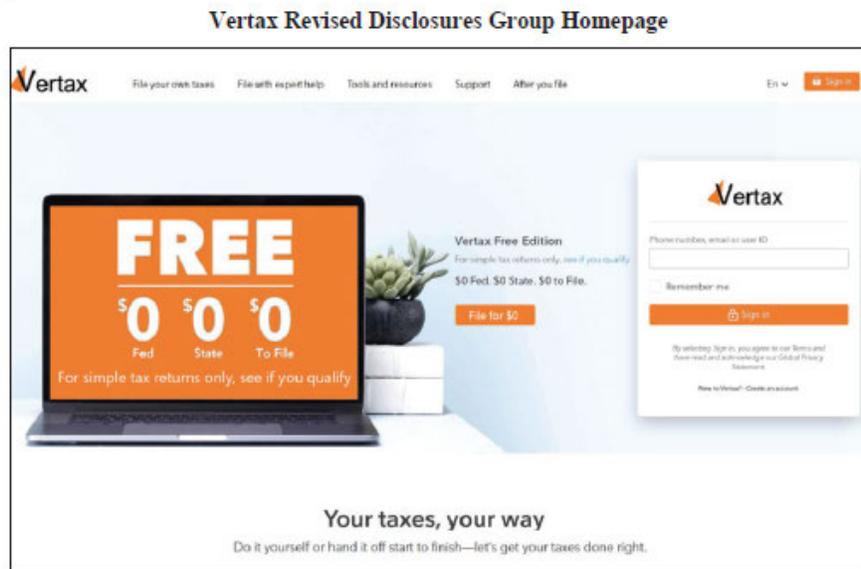
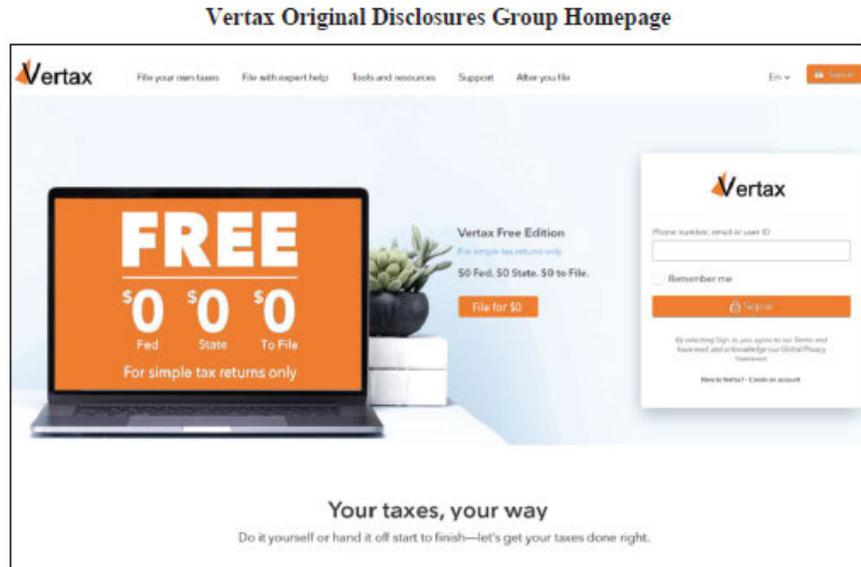
134. In Figure 10 below, I reproduced the two “Homepage Stimuli” used by Professor Hauser.²⁰² The figure demonstrates how Professor Hauser has failed to address the misleading elements highlighted as examples in the Complaint. The only difference between the two stimuli is the additional “see if you qualify” text. As a result, the page displayed in the revised stimuli still emphasizes a “free” claim, does not explain the definition of “simple returns only,” and the terms and conditions page are still only available through a hyperlink.

²⁰⁰ Hauser Report, ¶89.

²⁰¹ Hauser Dep. Tr. 166:19–22, Jan. 25, 2023 (Rough Transcript).

²⁰² Hauser Report, Appendix C-1-10—11.

FIGURE 10



Source: RX1017, Hauser Report, Appendix C-1-11

135. Similarly, there were also very minimal changes made to the next two pages of stimuli regarding the products and pricing page as shown below.²⁰³

²⁰³ Hauser Report, C-1-21.

FIGURE 11

Vertex Original Disclosures Group Products & Pricing Page

The screenshot shows the Vertex Original Disclosures Group Products & Pricing Page. At the top, it says "You can do it". Below this, there are four columns representing different product tiers: Free Edition, Deluxe, Premier, and Self Employed. Each tier has a price point, a "Start for Free" button, and a star rating. The Free Edition is priced at "\$0 Fed, \$0 State, \$0 to File" and has a 5-star rating. The Deluxe tier is priced at "\$249" and has a 5-star rating. The Premier tier is priced at "\$399" and has a 4.5-star rating. The Self Employed tier is priced at "\$1299" and has a 5-star rating. Below the tier information, there is a section titled "File for \$0 with Free Edition" with a large "FREE" graphic and "0'0'0'" icons. This section includes a list of benefits and a "See if you qualify for Free Edition" link. At the bottom, there are four columns of benefits for each tier, starting with "Everything in Free Edition plus" for the Deluxe, Premier, and Self Employed tiers.

Vertex Revised Disclosures Group Products & Pricing Page

The screenshot shows the Vertex Revised Disclosures Group Products & Pricing Page. The layout is similar to the original version, showing four product tiers: Free Edition, Deluxe, Premier, and Self Employed. Each tier has a price point, a "Start for Free" button, and a star rating. The Free Edition is priced at "\$0 Fed, \$0 State, \$0 to File" and has a 5-star rating. The Deluxe tier is priced at "\$249" and has a 5-star rating. The Premier tier is priced at "\$399" and has a 4.5-star rating. The Self Employed tier is priced at "\$1299" and has a 5-star rating. Below the tier information, there is a section titled "File for \$0 with Free Edition" with a large "FREE" graphic and "0'0'0'" icons. This section includes a list of benefits and a "See if you qualify for Free Edition" link. At the bottom, there are four columns of benefits for each tier, starting with "Everything in Free Edition plus" for the Deluxe, Premier, and Self Employed tiers.

Source: RX1017, Hauser Report, Appendix C-1-21

136. In sum, contrary to his claims, Professor Hauser’s revised stimuli do not address numerous elements that the FTC claims contribute to the deceptive nature of Intuit’s marketing campaigns, including the elements Professor Hauser listed himself. He neither collects any data nor presents any evidence that the changes he made to the disclosures could or did lead to a difference in consumer beliefs about their ability to file for free with Vertax (or any other online tax software). That is, Professor Hauser neither collects nor presents any evidence that consumers were not deceived by the original stimuli or his revised stimuli. Even if his finding that “the more prominent disclosures” tested in Professor Hauser’s Disclosure Efficacy Survey are unlikely to influence whether consumers start their tax returns with TurboTax²⁰⁴ is correct, this finding does not support his subsequent conclusion that “consumers were **unlikely to be deceived** by Intuit’s advertisements, website, and disclosures into starting their tax preparation with TurboTax Free Edition.”²⁰⁵ Professor Hauser’s results are consistent with the interpretation that both the original and the revised stimuli used in the survey are equally ineffective in curing the deceptive impression left by the “free” claims left in both stimuli.

D. Professor Hauser’s Disclosure Efficacy Survey suffers from substantial demand artifacts

137. Professor Hauser comments at length in his report about the importance of avoiding demand artifacts, and enumerates many ways in which he claims the TurboTax Perception Survey introduces potential demand artifacts.²⁰⁶ He quotes a source as explaining that demand artifacts may be introduced by “all aspects of the experiment which cause the subject to perceive, interpret, and act upon what he [or she] believes is expected or desired of him [or her] by the experimenter.”²⁰⁷ However, Professor Hauser fails to acknowledge or address that his own Disclosure Efficacy Survey likely suffers from substantial demand artifacts introduced by the use and description of the made-up product “Vertax.”

138. Professor Hauser claims to have introduced the brand name “Vertax” to avoid demand artifacts related to TurboTax in his survey.²⁰⁸ He also notes that “[n]o respondents identified

²⁰⁴ Hauser Report, ¶ 91.

²⁰⁵ Emphasis added. Hauser Report, ¶ 16.

²⁰⁶ Hauser Report, § IV.D.

²⁰⁷ Hauser Report, ¶ 44, quoting [Sawyer, Alan G., “Artifacts in Laboratory Experiments in Consumer Research” *Journal of Consumer Research*, Vol. 1(4), March 1975, <http://www.jstor.org/stable/2488704>, pp. 20—30.]. See also Shimp, Terence A., et al. “A Critical Appraisal of Demand Artifacts in Consumer Research.” *Journal of Consumer Research*, vol. 18, no. 3, 1991, pp. 273–83.

²⁰⁸ Hauser Report, ¶87.

the purpose or sponsor of the survey.”²⁰⁹ Presumably by this Professor Hauser means that no respondents guessed that the sponsor of the survey was Intuit or TurboTax, and no respondents guessed that the purpose of the survey was to evaluate “the impact of Intuit’s advertisements and website on consumers’ consideration of TurboTax and their likelihood of starting their return with Free Edition.”²¹⁰ However, in this survey, the demand artifacts would not be a result of the respondents thinking that the sponsor of the survey is Intuit or that the purpose of the survey is to evaluate whether Intuit’s ads are deceptive, but rather because respondents likely assume that the sponsor of the survey is *Vertax*, and the purpose of the survey is to evaluate the viability of their new online tax preparation software. Respondents believing they are taking a survey about Vertax products, conducted by or on behalf of Vertax, is precisely the type of flaw that causes demand artifacts.

139. Professor Hauser did not take the necessary precautions to prevent these demand artifacts. He explicitly informs respondents that they have been selected to participate in a survey about a “new online tax preparation service,” and repeatedly instructs them to assume they are considering using this new product.²¹¹ The survey then asks respondents whether they would “consider starting” their taxes using this new product. Vertax is presented to respondents as “a new online tax preparation service” at the beginning of the main questionnaire.²¹² Subsequent to this information, respondents are repeatedly instructed to assume they are interested in Vertax.²¹³ The survey then confirms respondents were able to review the advertisement and webpages,²¹⁴ and are aware of the brand advertised by the marketing materials.²¹⁵ The Disclosure Efficacy Survey terminates any respondents who are not attentive to the brand used in the stimuli, only allowing respondents who answer Vertax to continue to the main questions of the survey. Finally, each of the subsequent questions in the survey instructs respondents to answer the questions “[b]ased on their review of the advertisement and webpages.”²¹⁶ Importantly, respondents are only provided options of Vertax products when asked what product they would be most likely to start their taxes with.”²¹⁷

²⁰⁹ Hauser Report, Appendix C-7, p. C-7-1.

²¹⁰ Hauser Report, ¶85.

²¹¹ RX1017, Hauser Report, Appendix C-1, Q7.

²¹² Hauser Report, p. C-2-5.

²¹³ For example, prior to reviewing the video stimulus: “Please review the following advertisement as you would if you were considering your tax preparation options;” prior to reviewing the website homepage stimulus: “Please assume that upon seeing the prior advertisement, you choose to learn more through the company’s website. Please explore the following website as you would if you were considering your tax preparation options;” prior to reviewing the product page stimulus: “Please assume that upon seeing the company’s website, you choose to learn more about its products. Please explore the following website as you would if you were considering your tax preparation options.” (Hauser Report, Appendix C-2, Q2, Q3, Q4.)

²¹⁴ Hauser Report, Appendix C-2, Q5.

²¹⁵ Hauser Report, Appendix C-2, Q6.

²¹⁶ Hauser Report, Appendix C-2, Q7–Q9.

²¹⁷ Hauser Report, Appendix C-2, Q7.

140. All these measures collectively ensure that respondents understand the survey is about Vertax, and likely give respondents the impression that the sponsor of the survey is interested in the potential success of Vertax. Indeed, Professor Hauser's own pretest results confirm that "[r]espondents indicated they believed the purpose of the survey was related to market research, product strategy, or website testing."²¹⁸ Importantly, as Professor Hauser himself notes, demand artifacts arise from respondents' beliefs about what the researcher desires or expects. In this case, it is clear respondents understood the purpose of the survey to have something to do with evaluating Vertax as a new product, biasing them to agree that they would consider starting their taxes with Vertax products. Professor Hauser does not report in the results of his pretest *who* respondents thought the sponsor of the survey was. To the extent respondents indicated that "Vertax" was the sponsor of the survey, that would be evidence they were substantially influenced to indicate that they would consider starting their taxes with Vertax.

141. In addition, both the original and revised product page stimuli that respondents can review while answering these questions explicitly state that respondents can "Start for Free" any of the three Vertax paid products (Deluxe, Premium, and Self-Employed).²¹⁹ This element of the stimuli, combined with the phrasing of the question (asking respondents about "starting" their taxes, rather than filing their taxes) likely means that respondents are less likely to think carefully about the answers to the questions asked, and instead will offer the responses they think the survey researcher wants from them. Importantly, this renders Professor Hauser's assertion that his Disclosure Efficacy Survey "confirm[s] that consumers are indeed willing" to make trade-offs between price and other features entirely unsupported.²²⁰ Respondents to Professor Hauser's Disclosure Efficacy Survey are not required to make *any* trade-offs between price or any other feature, because with all products they can "Start for Free."

142. Professor Hauser himself notes that accurate estimates of the comparison between a test and control group can only be obtained if the stimuli and questions are otherwise reliable and not biased.²²¹ The substantial demand effects that exist in both groups indicate the results are biased, and there is no reason to expect that the bias will affect the same groups in the exact same manner. The unreliability of the results of each of the two groups render meaningless any conclusion based on the differences between groups.

²¹⁸ Hauser Report, Appendix C-7, fn. 1.

²¹⁹ RX1017, Hauser Report, p. C-1-21.

²²⁰ Hauser Report, ¶119.

²²¹ Hauser Declaration, ¶ 37.

143. Finally, if Professor Hauser’s Disclosure Efficacy survey results are considered reliable, they actually illustrate the persuasive power of the TurboTax’s free-themed ads in getting the consumers to start trying the advertised product for free. Specifically, Professor Hauser’s results find that over 75% of respondents indicate that they “would consider starting” their taxes with Vertax;²²² almost all of such respondents selected a Vertax product that they “would be most likely to start with;”²²³ and most incredibly, respondents reported that on average it would be between “probable” and “very probable” that they *will* start their taxes with a Vertax product.²²⁴

144. While Professor Hauser claimed that these results are not to be relied on, except for the difference between them, he also argued the opposite in his report by claiming that these high levels of consumer preference for Vertax is evidence that consumers “are not automatically locked in to a provider—they are willing to consider an entirely new provider.”²²⁵ However, this “entirely new provider” is a fictitious company. Consumers cannot possibly have prior experience with the company, or know anything about the company, except for what Professor Hauser shows them. Based solely on an advertisement video that promotes the service as free, and a few webpages, most of which prominently display free claims, respondents state they will choose the company’s product. If these results are to be believed, they illustrate the power of TurboTax’s free-themed marketing.

E. Professor Hauser’s “typo” actually illustrates that the survey is unreliable and subject to demand artifacts.

145. Professor Hauser includes appendices in his report describing a “post-test” of his Disclosure Efficacy Survey. There is only one mention of the post-test in his report in a footnote explaining that the purpose of the post-test is to evaluate whether a typo in the survey instrument is relevant to Professor Hauser’s findings or opinions.²²⁶ The typo in question is a mismatch between the survey stimuli and the response options offered to respondents: the survey stimuli describe a “Vertax Premier” product, while the survey questions ask respondents if they would likely start their taxes with “Vertax Premium.”²²⁷ Professor Hauser interviewed 10 respondents, and concluded that because respondents recalled “Vertax Premier” and “Vertax Premium” interchangeably, and because no respondent recalled both products, these interviews are sufficient for him to conclude that “the typo ... is small and not material to my findings or opinions.”²²⁸

²²² Hauser Report, Exhibit 3.

²²³ Hauser Report, Exhibit 4a.

²²⁴ Hauser Report, Exhibit 5a.

²²⁵ Hauser Report, ¶129.

²²⁶ Hauser Report, fn. 204.

²²⁷ Hauser Report, Appendix C-9, p. C-9-1.

²²⁸ Hauser Report, Appendix C-9, p. C-9-1.

146. The “typo” that Professor Hauser minimizes is actually informative in a few aspects. First, it illustrates that respondents of the Professor Hauser’s Disclosure Efficacy Survey were not in fact reviewing the stimuli and answering the questions carefully. A total of 36 respondents in the original disclosures group, and 32 respondents in the revised disclosures group indicated that they would “most likely” start their taxes with “Vertax Premium,” with a high degree of likelihood.²²⁹ Yet, the product they chose was not even included as an option in the stimuli. If Disclosure Survey respondents were paying attention and thinking carefully, you would expect that few respondents would select an option not available in the stimuli when instructed to select a product “[b]ased on [their] review of the advertisement and websites.”²³⁰ This issue is particularly salient because respondents had the product page available to them to review while they were answering the relevant questions.²³¹

147. The “typo” also highlights a fundamental flaw in Professor Hauser’s hypotheses regarding his revised stimuli. Professor Hauser proposes that if the allegations in the case were true, he would expect respondents reviewing the revised stimuli, with “more prominent disclosures about the limitations to filing for free” to consider starting their taxes with Vertax, and would choose the Free Edition less often.²³² Yet, Professor Hauser’s supposedly “more prominent” disclosures are presented in small font below more prominent design elements on the homepage and product page websites. Professor Hauser expects these smaller text to have a material impact on respondents, yet at the same time claims that the “typo,” which is actually the wrong product name being presented in large font, near the top of the product page, does not materially change his opinion regarding whether his survey is reliable. If Professor Hauser is correct about the impact of his typo, then his conclusions about the disclosures are further suspect.

V. Professor Hauser’s Purchase Driver Survey Is Flawed and Changes None of the Opinions in My Opening Report

148. Professor Hauser states that he conducted a survey he refers to as the “Purchase Driver Survey” in order to “study the process of consumers’ tax preparation information acquisition.”²³³ From this survey Professor Hauser draws several conclusions, including that “most consumers do not rely solely on advertisements and instead conduct substantial

²²⁹ Hauser Report, Exhibit 5a.

²³⁰ Hauser Report, Appendix C-2, Q8.

²³¹ Hauser Report, Appendix C-2-7 (“A STATIC VERSION OF THE TAX WEBSITE PRODUCT PAGE SHOWN TO THE RESPONDENT SHOULD BE AVAILABLE TO THE RESPONDENT FOR THE REMAINING MAIN QUESTIONS (Q7-Q9) IN THE FORM OF A CLICKABLE THUMBNAİL ABOVE THE QUESTION TEXT. IF THE THUMBNAİL IS CLICKED, A STATIC IMAGE OF THE TAX WEBSITE PRODUCT PAGE SHOULD APPEAR IN A FULL-SCREEN POP-UP WINDOW. IMMEDIATELY BELOW THE THUMBNAİL, INSERT THE INSTRUCTION”); *See*, also Hauser Report, C-1-30.

²³² Hauser Report, ¶¶91, 94.

²³³ Hauser Report, ¶103.

research when selecting a tax preparation method/provider;²³⁴ “consumers consider a variety of factors important when selecting a tax preparation method / provider and that consumers are willing to make trade-offs between price and other features;”²³⁵ and consumers are unlikely to feel ‘locked in’ to a tax preparation provider.”²³⁶

149. Professor Hauser’s conclusions from the Purchase Driver Survey are unsupported by the survey itself, and in several cases are irrelevant to the claims in this matter. The structure of and questions asked in the Purchase Driver Survey do not support Professor Hauser’s claims regarding whether consumers rely on advertising, and whether they conduct substantial research. In addition, in order to draw this conclusion, Professor Hauser appears to make an entirely unsupported assumption that individuals could not be misled by TurboTax’s advertising unless they relied solely on advertising in researching tax preparation providers, because any other sources of information (including word of mouth from family and friends, or reading articles from third-party sources) would not be influenced by TurboTax’s marketing, and would completely correct any misimpression about one’s ability to file for free.

150. Professor Hauser’s conclusion that “consumers are willing to make trade-offs between price and other features” is entirely unsupported by his Purchase Driver Survey, because he fails to ask respondents any questions that would address how they weigh factors such as price, ease of use, or security against one another, instead just asking respondents to select the “important factors.”²³⁷ This approach ignores that individuals make decisions in a variety of ways, and consequently that different factors enter individuals’ decisions in a variety of ways. Because Professor Hauser failed to ask respondents about how they weigh “important factors” against one another, the results of his Purchase Driver Survey cannot be used to evaluate how price is traded off against other factors. To the extent Professor Hauser’s Purchase Driver Survey can evaluate the role of price, it shows that affordability is the most common factor listed as an important factor in consumers’ decisions. In addition, Professor Hauser’s related conclusion that “‘free’ is not a universal priority”²³⁸ is irrelevant, and yet another example of Intuit experts’ setting up absurd, extreme positions, seemingly, just so they can knock them down. Clearly “free” need not be a *universal* priority in order for it to influence perceptions of a substantial number of consumers, or for a number of consumers to be materially misled by Intuit’s marketing messages advertising the ability to file for free.

151. Professor Hauser has little basis for using the results of the Purchase Driver Survey to support his conclusion that “consumers are generally unlikely to be ‘locked in’ to a tax

²³⁴ Hauser Report, ¶104.

²³⁵ Hauser Report, ¶104.

²³⁶ Hauser Report, ¶104.

²³⁷ Hauser Report, ¶104; Figure 16, D-1-9..

²³⁸ Hauser Report, ¶122.

preparation provider.”²³⁹ Indeed, Professor Hauser himself acknowledges that the survey is not designed to evaluate whether consumers feel “locked in” to a product.²⁴⁰ And in fact, the results of the Purchase Driver Survey illustrate that TurboTax customers are more likely to consider switching products, but then stay with TurboTax, compared with respondents who use other tax preparation services or methods. Contrary to Professor Hauser’s claims, this pattern of results is consistent with TurboTax users being *less* satisfied with the product than users of other tax preparation methods, yet still unlikely to switch methods. That is, the results of the Purchase Driver Survey are consistent with TurboTax users feeling “locked-in” to the product, an interpretation Professor Hauser neither evaluates nor rules out.

152. Finally, the main analyses of the Purchase Driver Survey are based on less than half of respondents, as Professor Hauser asked the underlying questions (such as what factors the respondents considered important) only to those respondents who considered switching tax preparation methods or products. As a result, Professor Hauser’s conclusions that consumers are not influenced by advertising, conduct substantial research, are willing to make trade-offs between price and other factors, and do not consider “free” to be a universal priority are based on only 43.3% of the tax filers that qualified for and completed the Purchase Driver Survey. This group of respondents was self-selected by indicating that they would consider switching tax preparation methods and therefore are not a random sample from the larger pool of respondents. Any conclusions drawn about this group of respondents cannot be generalized to the remaining 56.7% of respondents. It is possible that the other 56.7% of respondents to Professor Hauser’s Purchase Driver Survey are influenced by advertising, may not have conducted any research, and may have different priorities over features of tax preparation methods. These respondents were not asked any questions relevant to any of these issues. This omission renders Professor Hauser’s conclusions misleading, and unsupported.

A. Summary of Purchase Driver Survey

153. Professor Hauser stated that he conducted the Purchase Driver Survey in order to “study the process of consumers’ tax preparation information acquisition.”²⁴¹ He targeted a population of “tax filers irrespective of their tax preparation method or provider.”²⁴² Respondents who qualified for the survey were split into four tracks based on their responses to questions regarding whether they used the same or a different tax provider in 2021 as they

²³⁹ Hauser Report, § VI.D.

²⁴⁰ Hauser Report, ¶125.

²⁴¹ Hauser Report, ¶103.

²⁴² Hauser Report, ¶103.

used in 2020,²⁴³ and if they did use the same provider, whether or not they considered using a different provider in 2021 as they used in 2020.²⁴⁴

- Track 1 (55.7% of respondents): Respondents who used the same provider in 2020 and in 2021, and did not consider switching providers.²⁴⁵
- Track 2 (32.3% of respondents): Respondents who used the same provider in 2020 and in 2021, and did consider using a different provider.²⁴⁶
- Track 3 (11.0% of respondents): Respondents who used a different provider in 2020 and in 2021.²⁴⁷
- Track 4 (1.1% of respondents): Respondents who filed taxes in 2021, but did not file taxes in 2020, or did not know whether they used the same provider in 2020 as in 2021.²⁴⁸

154. Respondents in Track 1 (who did not consider switching tax preparation providers) were asked why they did not consider using another tax preparation provider, and then skipped to the final module of the survey.²⁴⁹

155. Respondents in Tracks 2, 3, and 4 were first asked open-ended questions regarding the research they conducted into tax preparation providers, then were asked a closed-ended question regarding the activities they undertook when researching tax preparation providers.²⁵⁰ Respondents were then asked (in an open-ended format followed by a closed-ended format) what factors were important to them when choosing a tax preparation provider.²⁵¹ After these questions, respondents were moved to the final module of the survey.

156. All respondents were asked a series of follow-up questions at the end of the survey, including whether they paid to file their taxes in 2021, which websites or software they used to file their taxes within the past 5 years, whether they were aware of any litigation regarding a tax preparation website or software provider, and what the respondents' total household income was in 2020.²⁵²

²⁴³ Hauser Report, Appendix D-2, Q2; Appendix D-1, ¶¶15–16.

²⁴⁴ Hauser Report, Appendix D-2, Q3; Appendix D-1, ¶¶15–16.

²⁴⁵ Hauser Report, Appendix D-1, Figure 1.

²⁴⁶ Hauser Report, Appendix D-1, Figure 1.

²⁴⁷ Hauser Report, Appendix D-1, Figure 1.

²⁴⁸ Hauser Report, Appendix D-1, Figure 1.

²⁴⁹ Hauser Report, Appendix D-1-6, ¶17; Appendix D-2, Q4a and Q4b.

²⁵⁰ Hauser Report, Appendix D-1-7–8, ¶18.

²⁵¹ Hauser Report, Appendix D-1-8–9, ¶19.

²⁵² Hauser Report, Appendix D-1-9, ¶¶20–24.

B. Professor Hauser’s conclusions are unsupported by the Purchase Driver Survey, and irrelevant to the claims at issue in this matter

157. Professor Hauser draws three main conclusions from the results of the Purchase Driver Survey:

- “Results from my Purchase Driver Survey suggest that most consumers do not rely solely on advertisements and instead conduct substantial research when selecting a tax preparation method/provider.”²⁵³
- “Contrary to Complaint Counsel’s allegations, I find that consumers consider a variety of factors important when selecting a tax preparation method / provider and that consumers are willing to make trade-offs between price and other features.”²⁵⁴
- “The Purchase Driver Survey provides evidence that consumers are unlikely to feel ‘locked in’ to a tax preparation provider and instead often feel comfortable abandoning returns and switching providers, both within and across tax years.”²⁵⁵

158. As an initial matter, contrary to Professor Hauser’s claim that the Purchase Driver Survey was designed to study the “process of consumers’ tax preparation information acquisition,” the survey does not actually accomplish this goal. Instead, it is narrowly focused on the “research” individuals conduct as they are considering switching tax preparation services or providers. The survey fails to collect any information about any passive information acquisition (e.g., gained through viewing advertisements) or any information about the information acquisition process of the majority of individuals who did not actively consider switching tax preparation services in the past year.

159. In addition, the conclusions Professor Hauser draws are unsupported by the Purchase Driver Survey, and his conclusions regarding the information consumers rely on, and the factors they consider important when selecting a tax preparation method / provider are largely irrelevant to the claims at issue in this matter.

²⁵³ Hauser Report, ¶104.

²⁵⁴ Hauser Report, ¶104.

²⁵⁵ Hauser Report, ¶104.

1. Whether individuals consider sources of information other than advertising is irrelevant to the question of whether they were misled by TurboTax's marketing campaigns

160. Professor Hauser concludes from the results of the Purchase Driver Survey that “most consumers do not rely solely on advertisements and instead conduct substantial research when selecting a tax preparation method/provider.”²⁵⁶ Professor Hauser also asserts that “[i]t is reasonable to hypothesize that consumers would actively seek additional information. My Purchase Driver Survey examines this hypothesis.”²⁵⁷

161. However, this assertion and Professor Hauser's conclusions are misleading because they rest on several unsupported assumptions. Even taking the results of Professor Hauser's Purchase Driver Survey at face value, his conclusion that “most consumers do not rely solely on advertisements” is irrelevant to the question of whether consumers were misled by TurboTax's marketing campaigns. In order to draw this conclusion, Professor Hauser makes three important assumptions: 1) that only individuals who *only* view advertising are at risk of being misled by advertising; 2) that *any other* sources of information will provide corrective information; and 3) that all consumers consider filing taxes a high-involvement decision, and will thus conduct extensive research. These assumptions are at best unsupported, and at worst, demonstrably false.

162. Professor Hauser attempts to establish that consumers were unlikely to be misled by TurboTax advertising because they were unlikely to rely *solely* on advertising when considering which tax product to use.²⁵⁸ Part of Professor Hauser's support for this conclusion appears to be an inference that consumers are skeptical of Intuit's free offer are more likely to consider other sources.²⁵⁹ In a logical flaw repeated by several of Intuit's experts, Professor Hauser determines evidence of *some* consumers skepticism is conclusive on that point.²⁶⁰ Beyond this faulty conclusion, Professor Hauser's assumption that only individuals who *only* view advertising are at risk of being misled by advertising is clearly false. In particular, Professor Hauser suggests that only respondents who reported “View[ing] advertisements” or “Review[ing] marketing emails” as the sole activity they undertook in “researching tax preparation methods / providers” may have been deceived by advertising. Following the apparent logic of Professor Hauser's argument that “free” advertising claims would only have any risk of misleading consumers if they were the *only*

²⁵⁶ Hauser Report, ¶104.

²⁵⁷ Hauser Report, ¶107.

²⁵⁸ Hauser Report, ¶107-108.

²⁵⁹ Hauser Report, ¶106-107.

²⁶⁰ Hauser Report, ¶106-107.

information considered (and perhaps not even then)²⁶¹ belies the millions of dollars Intuit spends on its marketing, including its advertising for “free” offers. If ads for tax preparation software had *no influence* on individuals in the market for tax preparation services unless viewed in complete isolation (which is unlikely), why would Intuit spend upwards of \$90 million on only TV advertising each year between 2018 to 2022?²⁶² Professor Hauser would have one believe that none of the millions of dollars Intuit and others spend on marketing, nor the content of those marketing materials, matters at all in what tax preparation service individuals choose. In fact, in light of the millions of dollars Intuit and others spend on marketing during the tax season, it may be puzzling that so few respondents (26.4%) indicated they “Viewed advertisements.”²⁶³ However, as I discuss in greater detail below, this contradiction arises from the specific question Professor Hauser chose to ask in his survey, illustrating the flawed nature of the Purchase Driver Survey.

163. Professor Hauser’s conclusions also rest on the assumption that all other sources of information included in his closed-ended questions would have provided corrective information that would have resolved any potential for deception from Intuit’s marketing. However, a plain reading of the response options provided in the Purchase Driver Survey illustrate that this is clearly not the case. For example, there is no guarantee that “[Speaking] with friends and family” would provide accurate information, let alone information that corrected any potential deception from Intuit’s marketing messages. In fact, such conversations could easily reinforce marketing messages rather than correcting them. Similarly, respondents who indicated “Explor[ing] tax preparation software / service websites” may have navigated through TurboTax’s website only, which would expose them to the claims outlined in the Complaint as being potentially misleading.²⁶⁴

164. Professor Hauser’s conclusion that respondents “conduct substantial research” is unsupported by the Purchase Driver Survey.²⁶⁵ In particular, Professor Hauser relies only on the number of information sources respondents indicated consulting as evidence of the “substantial research” respondents conducted.²⁶⁶ However, the questions in his survey do not solicit any indication of the amount of time respondents spent consulting those information

²⁶¹ Hauser Dep. Tr. 78:8-15, Jan. 25, 2023 (Rough Transcript) (“Q. And why didn’t you test the other aspects of the ads? A. Because I chose to test the statement of ‘free’ or the emphasis on ‘free,’ which upon reading the complaints was one of the major issues. And there’s no evidence that the statement of ‘free’ has any effect on consumer consideration, consumer actual purchase and the percent of people going to the free edition.”).

²⁶² See, Workpaper 3.

²⁶³ Hauser Report, ¶107.

²⁶⁴ It is noteworthy that while over 38% of consumers responding to open-ended questions indicated they used a search engine as a method to research tax preparation options, consumers were not provided with a “search engine” option, see Hauser Report Figure 13, “search engine” was not an option provided in closed-ended responses. Hauser Report, Figure 14. It is possible that—as Professor Hauser acknowledged in his deposition—that consumers who described “search engine” in their open-ended responses may have selected the option or options most like “search engine,” which could have been “Explor[ing] tax preparation software / service websites” or “Explor[ing] the IRS or state government websites.” Hauser Dep. Tr. 123:6–22, Jan. 25, 2023 (Rough Transcript).

²⁶⁵ Hauser Report, ¶104.

²⁶⁶ Hauser Report, ¶109.

sources, nor do they solicit any indication of the importance or weight respondents assigned to each of the information sources. Importantly, many of the options available in the list Professor Hauser provided to respondents may overlap with one another, artificially inflating the number of activities respondents would report. For example, respondents may consider “Explored tax preparation software / services websites” and “Tried out one or more online tax website(s) without filing” as similar activities, and check both after having spent a few minutes answering initial questions about their tax situation on a single website. Similarly, a respondent may have read a single article that included a video and comments, and indicate that their research included “Watch[ing] online tutorials / videos,” “Read[ing] customer reviews or testimonials,” and “Read[ing] articles, rankings, or third-party reviews.”²⁶⁷

165. As part of coming to the conclusion that respondents “conduct substantial research,” Professor Hauser assumes that individuals view the purchase of tax preparation services as a high-involvement decision.²⁶⁸ None of his sources directly state that tax preparation services constitute a high-involvement consumer decision.²⁶⁹ Professor Hauser then cites literature describing the research process consumers undertake for high-involvement goods, again without establishing that such literature applies to individuals in search of tax preparation services. This assumption is flawed in at least two respects. First, it assumes that all individuals have the time to research different tax preparation services. However, as discussed in my opening report, many individuals file close to the filing deadline,²⁷⁰ and may not have the time before the deadline to perform the extensive research assumed in the Hauser Report. Second, it assumes that all individuals have the inclination to research different tax preparation services. As discussed in Section VI.B, individuals may not be willing to research decisions, even those that have relatively significant financial implications.

2. The purchase factors questions do not give any indication of which factors were decisive, rendering Professor Hauser’s conclusions unsupported and irrelevant

166. The Hauser Report relies on the results of the purchase factors questions (Q7c / Q11c / Q14c) to conclude “[e]ven if Intuit were shown to have deceived consumers about ‘free’ ... ‘free’ is not the only driver of consumer choice.”²⁷¹ The ability to file for free does not have to be the only driver of consumer choice for the deception to affect consumer choices, it

²⁶⁷ Hauser Report, Appendix D-2, Q6c.

²⁶⁸ Hauser Report, ¶¶102, 105, 107.

²⁶⁹ RX546, Assael, H., 2004. “Consumer Behavior: A Strategic Approach.” Houghton Mifflin Company, Boston, MA, INTUIT-FTC-PART3-000595153; Farrell, D., Greig, F. and Hamoudi, A., “Filing Taxes Early, Getting Healthcare Late,” JPMorgan Chase & Co., April 2018, available at <https://www.jpmorganchase.com/institute/research/healthcare/insight-filing-taxeseearly#finding-1>, INTUIT-FTC-PART3-000606964.

²⁷⁰ Novemsky Opening Report, fn. 20.

²⁷¹ Hauser Report, ¶116.

simply has to be a driver of consumers' choice. Professor Hauser does not provide any evidence that whether a product is free does not affect consumer choice about that product. In fact, Professor Hauser himself finds that 70.4% of respondents consider price an important factor in their choice of a tax preparation provider,²⁷² and agrees in his deposition that "it's a basic tenet of economics ... that price is traded off against other aspects. ... [so] that does not surprise me at all that people consider price."²⁷³ Nothing in Professor Hauser's survey suggests that these respondents would not be deceived by Intuit's marketing regarding their ability to file for free with TurboTax. To the extent they are deceived, that deception is likely to enter into their choice of a tax preparation provider exactly because they consider price an important factor in their purchase decisions.

167. Professor Hauser reports that respondents selected more than one important factor,²⁷⁴ and concludes that "consumers consider multiple factors in addition to price (and [] price is often not the most important factor) when considering or choosing tax preparation software."²⁷⁵ In drawing this conclusion, Professor Hauser is attempting to suggest that any deception regarding price would not drive consumer choice for many or most consumers. However, even his less relevant conclusion is not supported by the results of the Purchase Driver Survey.²⁷⁶ The purchase factors questions asked in the Purchase Driver Survey include no indication of which factors were more or less important to respondents, or how relatively important they were to respondents. In a survey setting such as the one utilized by Professor Hauser, it is costless for respondents to pick many factors, but that does not imply that all selected factors were equally important to respondents, nor does it imply that all selected factors entered respondents' decisions in the same way. As a result, Professor Hauser has no basis to conclude that any deception regarding price would not materially influence consumers' choices regarding tax preparation software, rendering his conclusion that "'free' is not the only driver of consumer choice" entirely irrelevant to the issues in this matter.²⁷⁷

168. Consumers use many different strategies to evaluate different product attributes and make a decision between products. For example, one individual may weigh several attributes at the same time, and trade off better and worse attributes between two products.²⁷⁸ This appears to be the model Professor Hauser assumes all consumers follow. However, other consumers may apply a lexicographic model of decision-making, in which the individual

²⁷² Hauser Report, ¶113.

²⁷³ Hauser Dep. Tr. 105:4-9, Jan. 25, 2023 (Rough Transcript).

²⁷⁴ Hauser Report, ¶113.

²⁷⁵ Hauser Report, ¶115.

²⁷⁶

Hauser Report, ¶114.

²⁷⁷ Hauser Report, ¶116.

²⁷⁸ Wayne D. Hoyer, Deborah J. MacInnis, and Rik Pieters, *Consumer Behavior*, 7th ed. (CENGAGE Learning, 2018), p. 217.

considers attributes starting with the most important attribute, and includes in the choice set any product that dominates on that attribute, or meets a certain threshold value for that attribute. For example, an individual may first only consider online tax preparation options, and then eliminate any option with which they cannot file for free.²⁷⁹ Individuals may also employ additional heuristics and simplifying strategies when they are not motivated to expend substantial effort making a decision.²⁸⁰

169. Questions that ask about importance alone—such as the questions in the Purchase Driver Survey—do not collect the information necessary to establish how the factors selected entered into the purchase decision, or how individuals would weigh the factors against one another. Professor Hauser acknowledges this limitation of his survey in his report, noting “I did not ask respondents to rank or otherwise indicate ‘how important each factor was to their decision-making process.’”²⁸¹ In other words, the Hauser Purchase Driver Survey has no way of determining how respondents would consider or weigh the importance of each of the factors named (including price), and thus cannot reliably conclude that respondents made trade-offs between factors when making a decision of which tax preparation method or service to use, or that “free” was not a driver of consumer choice. In fact, Professor Hauser’s own survey results illustrate (and Professor Hauser concedes)²⁸² that price is the most frequently-selected factor important to respondents, mentioned by over 70% of respondents to the relevant question.²⁸³

170. Professor Hauser attempts to diminish this result in two ways: first, he points out that only six respondents (4.8% of respondents who answered the relevant question) selected price as the only important factor;²⁸⁴ and second, he attempts to argue that “free service” and “affordability” are entirely distinct concepts in the responses to his open-ended questions.²⁸⁵ He argues that these points support his conclusion that “consumers can and do make trade-offs among various product features (including price, ease of use, reliability, security, and availability of additional support), and that in the market for tax preparation, ‘free’ is not a universal priority.”²⁸⁶

171. On the first point, as I discuss above, Professor Hauser has no way of knowing how important price was relative to other attributes for the 65.6% of respondents who indicated

²⁷⁹ Wayne D. Hoyer, Deborah J. MacInnis, and Rik Pieters, *Consumer Behavior*, 7th ed. (CENGAGE Learning, 2018), p. 217–218.

²⁸⁰ Wayne D. Hoyer, Deborah J. MacInnis, and Rik Pieters, *Consumer Behavior*, 7th ed. (CENGAGE Learning, 2018), pp. 236–238.

²⁸¹ Hauser Report, fn.260. Professor Hauser also confirmed that he did not ask respondents to weigh or rank the different factors in his deposition. Hauser Dep. Tr. 117:20–23, Jan. 25, 2023 (Rough Transcript).

²⁸² Hauser Report, ¶112.

²⁸³ Hauser Report, Exhibit 13a.

²⁸⁴ Hauser Report, ¶113, Figure 16.

²⁸⁵ Hauser Report, ¶122.

²⁸⁶ Hauser Report, ¶117.

price was one of the important factors. On the second point, even though the independent coders Professor Hauser used identified “free service” and “affordability” as two separate themes in the open-ended responses, Professor Hauser provides no evidence that respondents would not consider “free” to be an “affordable” price. Indeed, he agreed in his deposition that the results for the “free” and “affordability” categories should be added to yield the respondents who considered price.²⁸⁷ In addition, the examples he provides in his report do not rule out that respondents considered “free” to be an “affordable” price. For example, one respondent noted “the cost of filing,” while another indicated “Easy; convenient and reasonably priced.”²⁸⁸ Neither of these responses rules out the possibility that the individuals would prefer to file for free if they felt the option were available to them.

172. Professor Hauser’s conclusion that “‘free’ is not a universal priority” is additionally irrelevant to the FTC’s allegations.²⁸⁹ “Free” does not need to be a *priority* for it to be misleading. Indeed, even if price is not consumers’ only consideration in evaluating different tax preparation services, it may still be one consideration for many or all consumers and TurboTax’s ads “free” may still influence individuals to navigate to the TurboTax website and / or start their tax returns with TurboTax. Moreover, while Professor Hauser’s report argues that “[i]t is common that consumers pay more for products they perceive as higher quality or value, even if there is free alternative,”²⁹⁰ Professor Hauser seems to concede that (consistent with economic theory) this is generally not the case, because “as price goes up, fewer people buy things.”²⁹¹ Further, while Professor Hauser argues that “[m]any consumers are generally willing to pay a price higher than ‘free’ to choose the product that meets their needs,”²⁹² consumers who consider using TurboTax because of the “free” advertising may not appreciate that Free Edition does not meet their needs until they have incurred sunk costs, such as time wasted entering personal financial information.

173. Given how frequently price (including “affordability” and “free service”) is mentioned as an important factor by respondents in the Purchase Driver Survey, and given that price is a differentiating factor between tax preparation methods and providers, it is likely that price would be a decisive factor for many respondents. In addition, the frequency with which price is mentioned by respondents as an “important factor” in their decision to select a particular tax preparation provider may suggest that individuals are likely to be more susceptible to marketing messages regarding price, such as the TurboTax ads and marketing materials at issue in this matter.

²⁸⁷ Hauser Dep. Tr. 106:10–12; 106:25–107:12, Jan. 25, 2023 (Rough Transcript).

²⁸⁸ Hauser Report, fn. 289.

²⁸⁹ Hauser Report, ¶117.

²⁹⁰ Hauser Report, ¶118.

²⁹¹ Hauser Dep. Tr. 104:13–105:9, Jan. 25, 2023 (Rough Transcript); *see also id.* 145:22–147:9.

²⁹² Hauser Report, ¶122.

3. The results of the Hauser Purchase Driver Survey fail to show that consumers are satisfied with TurboTax and do not feel “locked in” to the product

174. As the Hauser Report acknowledges, the Hauser Purchase Driver Survey is not designed to evaluate whether consumers feel “locked in” after having filled in their personal and financial information.²⁹³ The Hauser Purchase Driver Survey does not ask respondents who considered changing tax preparation methods/providers why they considered changing, nor does it ask respondents who did change why they changed their tax preparation method or provider. As a result, Professor Hauser has little basis for using the Hauser Purchase Driver Survey to support a conclusion that “consumers are generally unlikely to be ‘locked in’ to a tax preparation provider.”²⁹⁴

175. Moreover, evidence relied on by Professor Hauser to support his conclusion is based on anecdotal evidence and faulty logical assumptions. Professor Hauser assumes that the fact that a minority of consumers are willing to try out different tax preparation products before filing is an indication that consumers are not locked in.²⁹⁵ Specifically, Professor Hauser refers to the 21.6% of respondents who considered switching tax providers who reported trial use as a part of their research process, less than 10% of his analytical sample.²⁹⁶ As an initial matter, drawing a conclusion about consumers overall from a minority of consumers is a faulty logical leap. Additionally, Professor Hauser relies in part on anecdotal evidence from open-ended question responses from two survey respondents to conclude that consumers may try different tax preparation websites to compare prices without filing.²⁹⁷ These conclusions do not follow the evidence presented.

176. Additional analysis from the Hauser Purchase Driver Survey reported in support of the argument that there is no evidence of lock-in due to consumer satisfaction is misleading. The Hauser Report notes that 45.6% of TurboTax users in 2021 did not consider switching tax preparation methods/providers (that is, were sorted into Track 1 in the survey).²⁹⁸ The Hauser Report argues that these figures indicate high customer satisfaction with TurboTax.²⁹⁹ However, Professor Hauser fails to mention that TurboTax users are substantially less likely than users of other preparation methods to not consider switching: 61.5% of users of other tax

²⁹³ Hauser Report, ¶¶124–125.

²⁹⁴ Hauser Report, § VI.D.

²⁹⁵ Hauser Report, ¶¶125–126.

²⁹⁶ 27 respondents report trial use as a part of their research process, out of 282 respondents in Professor Hauser’s analytical sample. Hauser Report, Figure 19; Hauser Report, Exhibit 7.

²⁹⁷ Hauser Report, ¶125.

²⁹⁸ Hauser Report, Figure 21.

²⁹⁹ Hauser Report, Figure 21.

preparation methods were sorted into Track 1.³⁰⁰ That is, TurboTax users were more likely to consider switching than users of other products.

177. By contrast, users of TurboTax were more likely than users of other products to consider switching, but decide not to switch (i.e., were sorted into Track 2 in the Purchase Driver Survey). The Hauser Report also notes that 42.7% of TurboTax users in 2021 considered switching but ultimately chose to use TurboTax again.³⁰¹ The Hauser Report misleadingly compares this to 43.3% of respondents to the survey who “either used or considered using a different method/provider than they used in the previous year,”³⁰² however, the relevant comparison is the percentage of respondents who did not use TurboTax in 2021, and who considered using a different method/provider than they used in the previous year. Only 26.3% of users of other tax preparation services / methods considered switching, but then decided not to switch.³⁰³

178. This combination of facts is consistent with TurboTax users being less satisfied with the product than users of other tax preparation methods, but still unlikely to switch methods. Indeed, a similar percentage of TurboTax and other tax preparation service / method users filed with a new provider in 2021,³⁰⁴ suggesting that TurboTax users are not necessarily more likely to actually switch providers, despite being much more likely than users of other tax preparation services / methods to *consider* switching providers. Professor Hauser’s analysis fails to evaluate these figures, and does not evaluate this alternative explanation for his results. As a result, his conclusion that “consumers are generally unlikely to be ‘locked in’ to a tax preparation provider” is unsupported by the Purchase Driver Survey.

4. The results of Professor Hauser’s Purchase Driver Survey support the fact that TurboTax advertisements and website are the likely source of consumer misimpressions

179. The results Professor Hauser presents in his Purchase Driver Survey provide evidence that TurboTax advertisements and the TurboTax website are likely causes of consumer beliefs about whether or not they can file for free using TurboTax online software. The most common responses to Professor Hauser’s Purchase Driver Survey questions regarding

³⁰⁰ Hauser Report, Figures 20 and 21. Figure 20 shows that 157 / 282 total respondents were sorted into Track 1, while Figure 21 shows that 47 / 103 TurboTax users sorted into Track 1. This implies that 110 / 179 (61.5%) of users of other tax preparation methods sorted into Track 1.

³⁰¹ Hauser Report, Figure 20.

³⁰² Hauser Report, ¶128.

³⁰³ Hauser Report, Figures 20 and 21. Figure 20 shows that 91 / 282 total respondents were sorted into Track 2, while Figure 21 shows that 44 / 103 TurboTax users sorted into Track 2. This implies that 47 / 179 (26.3%) of users of other tax preparation methods sorted into Track 2.

³⁰⁴ Hauser Report, Figures 20 and 21. Figure 20 shows that 31 / 282 total respondents were sorted into Track 3, while Figure 21 shows that 11 / 103 TurboTax users sorted into Track 3. This implies that 20 / 179 (9.2%) of users of other tax preparation methods sorted into Track 3.

activities consumers undertook as research in selecting their tax preparation method and provider relate to using a search engine and exploring a tax preparation software or service website.³⁰⁵ Both of these activities are likely to direct consumers to TurboTax marketing materials. A substantial portion of the respondents of Professor Hauser's Purchase Driver Survey also indicated that they consulted with advertisements or marketing materials.

180. The most common activity respondents selected that Professor Hauser provided as a response option to his close-ended question about which activity, if any, respondents undertook in researching tax preparation methods and providers was "Explored tax preparation software / service websites." In fact, 46.4% of respondents in Professor Hauser's Purchase Driver Survey indicated that they explored tax preparation software and service websites.³⁰⁶ Definitionally, this activity must include reviewing TurboTax product websites. In addition, 26.4% of respondents viewed advertisements, 21.6% tried out one or more online tax website(s) without filing, and 15.2% reviewed marketing emails.³⁰⁷ I also note that these activities are likely to either indirectly or directly lead to Intuit marketing.

C. The Purchase Driver Survey results are based on less than half of respondents, leading to inflated results and unreliable conclusions

181. The Hauser Report states that the purpose of the Hauser Purchase Driver Survey is "to evaluate consumer preferences for various tax preparation solutions, the behaviors consumers exhibit in the buying process, and the factors that contribute to their tax filing solution selection."³⁰⁸ However, the presentation of results for the Hauser Purchase Driver Survey is flawed and misleading, because it fails to evaluate these points for *all tax filers*, instead focusing on tax filers that *did switch* tax preparation methods/providers, or *considered switching* tax preparation methods/providers. This subset represents less than half (43.3%) of tax filers that qualified for and completed the Hauser Purchase Driver Survey.³⁰⁹ The Hauser Report provides no justification for why individuals who did not consider switching tax preparation methods or providers (55.7% of the sample)³¹⁰ were not asked how they selected the tax preparation service they use, and as a consequence, why they are excluded from the main analyses in the report.

182. Of the respondents to the Hauser Purchase Driver Survey, over half stated that they used the same tax preparation method/provider in 2021 as they did in 2020. Contrary to the Hauser Report's conclusion that consumers "conduct substantial research when selecting a

³⁰⁵Hauser Report, Exhibit 11a.

³⁰⁶ Hauser Report, Exhibit 11a.

³⁰⁷ Hauser Report, Exhibit 11a.

³⁰⁸ Hauser Report, ¶7.

³⁰⁹ Hauser Report, Figure 20.

³¹⁰ Hauser Report, Figure 20.

tax preparation method/provider,³¹¹ over half of respondents presumably conducted no research at all for tax year 2021. The Hauser Purchase Driver Survey does not ask these respondents what research they conducted or what factors they considered important when they first chose the tax preparation method/provider they are currently using. However, as discussed above, Professor Hauser failed to address that TurboTax users in his survey are more likely to consider switching, and then file their taxes with TurboTax. This suggests that TurboTax users may be *less* satisfied with their tax preparation service than users of other services / providers, and suggests that Professor Hauser’s conclusion that “consumers like the product enough to continue using [it] from one year to the next” is unsupported.³¹²

D. The Hauser Purchase Driver Survey suffers from additional flaws

1. The research questions from the Hauser Purchase Driver Survey are biased and irrelevant

183. Many texts on survey research emphasize the importance of only asking respondents questions to which they have answers, and using various filters to ensure that is the case.³¹³ To the extent this directive is not followed, it is likely to introduce bias into the survey results because respondents may guess at the answer to the question in ways that they infer the survey designer would prefer.³¹⁴ The Hauser Purchase Driver Survey fails in this basic premise and likely introduces bias as a result. In Tracks 2–4, the Hauser Purchase Driver Survey asked respondents “What, if any, research did you conduct into potential tax preparation methods / providers?”³¹⁵ This question is flawed and biased for at least three reasons.

184. First, Professor Hauser uses the term “research” to refer to the sources of information respondents used in making a decision about tax preparation methods. However, by calling the sources of information “research,” he discourages respondents from indicating they viewed advertisements, because even respondents who gleaned information from advertisements they viewed would likely not consider that activity “research.” Indeed, Professor Hauser has no evidence that respondents would consider such activities “research,” and report them in his survey.³¹⁶ Given the volume of advertising put out by TurboTax and its competitors during the tax season (discussed above in Section III.A.3), it seems unlikely that

³¹¹ Hauser Report, ¶104.

³¹² Hauser Report, ¶130.

³¹³ See, e.g., Diamond, Shari S., “Reference Manual on Scientific Evidence Third Edition,” *Federal Judicial Center*, 2011, pp. 389–391.

³¹⁴ Diamond, Shari S., “Reference Manual on Scientific Evidence Third Edition,” *Federal Judicial Center*, 2011, p. 390.

³¹⁵ Emphasis in original. Hauser Report, Purchase Driver Survey, Q6a, Q10a, Q13a.

³¹⁶ Professor Hauser appears to claim in his deposition that the qualitative interviews informed this language, but the qualitative interview guide included in his report similarly instructed the moderator to ask respondents about “[r]esearch the respondent conducted.” Hauser Report, Appendix D-4, p. D-4-1; Hauser Dep. Tr. 112:13–25, Jan. 25, 2023 (Rough Transcript).

only a quarter of the target audience (26.4% in Professor Hauser's Purchase Driver Survey)³¹⁷ would have seen at least one ad for a tax preparation service.

185. Second, Professor Hauser is implicitly assuming that only the sources of information respondents report to this biased question are relevant information to individuals' purchase decisions. In addition to encouraging respondents to report only sources of information that could be gathered by conducting "research," it would also encourage respondents to discard any information they already had or thought they already knew. As discussed above in Section IV.C Professor Hauser criticizes the Novemsky Survey for including one-sided, leading questions. However, the lack of a filter question establishing that respondents conducted any research³¹⁸ renders this question in the Purchase Driver Survey biased and leading, making it likely to generate unreliable responses.

186. Even if respondents consider such activities "research," as a discussed above, Professor Hauser's presentation of results from this question assumes that none of the "multiple sources beyond TurboTax advertisements"³¹⁹ would be influenced by TurboTax advertising. In particular, Hauser relies heavily on evidence that individuals talk to family and friends for information on tax providers, but fails to account for two important facts, namely that: 1) family and friends may also have been influenced by Intuit's advertising; and 2) even if an individual's family and friends have accurate information, they may not have the same tax situation as the individual, and thus may not provide accurate information to the individual on whether or not they can file for free using TurboTax.

187. Third, asking a question about what research respondents did is likely to generate a demand artifact.³²⁰ Respondents are likely to understand from the framing of this question, and the extreme emphasis on asking "what ***research did you conduct***" that the researcher believes they *should* have done research, encouraging them to provide examples of research they might have conducted, whether or not they in fact undertook those activities. This emphasis is also likely to lead respondents to report activities that they actively pursued, and activities they think would be considered "research," which is unlikely to include the context in which most individuals would view advertisements. Because of this demand artifact, respondents are also likely to select more options in the closed-ended question regarding

³¹⁷ Hauser Report, Figure 14.

³¹⁸ For example, following Professor Hauser's directive that such questions be two-sided in order to not lead respondents, a question such as "Did you or did you not conduct any research into potential tax preparation methods / providers?"

³¹⁹ Hauser Report, ¶116.

³²⁰ See, e.g., Sawyer, Alan G., "Demand Artifacts in Laboratory Experiments in Consumer Research" *Journal of Consumer Research*, Vol. 1(4), March 1975, <http://www.jstor.org/stable/2488704>, pp. 20—30; Shimp, Terence A., et al. "A Critical Appraisal of Demand Artifacts in Consumer Research." *Journal of Consumer Research*, vol. 18, no. 3, 1991, pp. 273–83.

research activities, as they attempt to show the researcher that they did in fact conduct research

188. Professor Hauser may attempt to argue that the inclusion of the phrase “if any” in this question rescues this question from being leading. However, the inclusion of “if any” is insufficient to avoid suggesting to respondents that they should have conducted at least some research, and that they should focus on information they actively collected. This is particularly true given the phrase “research did you conduct” is emphasized in italics and bold typeface and underlined. Given this heavy emphasis on asking respondents what “research did [they] conduct,” respondents are not likely to give much weight to the phrase “if any.”

2. The Hauser Purchase Driver Survey sample is overly broad

189. The Hauser Purchase Driver Survey sample includes all taxpayers “irrespective of their tax preparation method or provider.”³²¹ This target population is overly broad and thus inappropriate for evaluating the claim that consumers were misled by TurboTax advertising, because the relevant population is composed consumers who would consider filing online, and who are not eligible to file for free with TurboTax (any individuals who *could* file for free with TurboTax by definition would not be misled by Intuit’s marketing campaigns). To the extent Professor Hauser’s target population varies systematically from this relevant population, his conclusions based on the broader population cannot be applied to the specific relevant population.

190. Professor Hauser failed to collect any information that could be used to determine whether his respondents were eligible to file their taxes for free with TurboTax. However, Professor Hauser’s target population differs from the relevant population on at least one observable dimension: his target population includes taxpayers who rely on an accountant or other in-person tax preparation service to complete their taxes, in addition to those who complete their taxes online (either themselves or with professional assistance). Professor Hauser reports that 16.3% of his sample consists of respondents who worked with a tax professional to file their household taxes. However, these two groups of individuals are likely to have systematically different tax situations that drive their choices to file online versus with an in-person provider. Individuals who utilize in-person tax preparation with a skilled provider are likely to be very different (e.g., more complicated returns, more likely to do research) from individuals who utilize online tax preparation software, which may bias the results in favor of Professor Hauser’s conclusions.

³²¹ Hauser Report Appendix C, ¶ 3

VI. Dr. Golder's Uncompelling Opinions and Criticisms of My Opening Report Are Based on Indirect Evidence and Speculation

191. A central conclusion of the Golder Report is that “reasonable consumers are unlikely to believe that TurboTax is necessarily ‘free for them.’”³²² A substantial portion of the Golder Report consists of attempts to support various claims that purportedly underpin this central opinion.³²³ However, the evidence Dr. Golder cites does not support his conclusions and is often entirely irrelevant.

192. While Dr. Golder attempts to marshal various indirect evidence, which he then characterizes based on his own speculations about what “reasonable consumers” would or wouldn’t do or believe, he fails to identify any evidence that directly addresses the main questions at hand.³²⁴ “Whether or not, and to what extent, consumers believe they can use TurboTax For free” is an uncomplicated question about consumer beliefs and perceptions related to Intuit’s ubiquitous “free” advertising campaigns. One way to gain insight into the effects of that campaign is by obtaining the relevant information from the consumers themselves, for example, by way of a properly designed, scientific consumer survey that provides direct empirical evidence regarding the inquiry. However, neither Dr. Golder nor Intuit experts Professor Hauser, Ms. Kirk-Fair, or Mr. Deal undertake such a survey, despite undertaking three other surveys which are then used as very indirect evidence in the service of speaking to this central issue. None of Intuit’s experts attempt to assess whether misconceptions exist by directly asking consumers about their perceptions. In contrast, my TurboTax Perception Survey was designed to specifically address this central question (among other questions). My TurboTax Perception Survey results provide direct empirical evidence that refutes Dr. Golder’s thinly supported claim that “reasonable consumers are unlikely to believe that TurboTax is necessarily ‘free for them.’”³²⁵ In fact, many consumers who do not qualify for TurboTax Free Edition indeed have this misimpression.

193. Despite this failure to assess actual consumer perceptions, Dr. Golder purports to support his speculations about consumer perceptions with the following claims:

- “[Reasonable consumers] would be likely to approach [Intuit’s free ads] with inherent skepticism and expectations that there would be terms and conditions on the free offer.”³²⁶

³²² Golder Report, ¶25.

³²³ See Golder Report, Sections III.A, IV, V, VI, VII, VIII.

³²⁴ Golder Report, ¶25.

³²⁵ Golder Report, ¶25.

³²⁶ Golder Report, ¶226.

- “Reasonable consumers would be likely to expect disclosures in the ads, as well as more information on the TurboTax website, and interested consumers would even be likely to seek out additional information from third-party sources.”³²⁷
- “Intuit’s Free Ads consistently include industry standard disclosures that describe that the free offer is for simple tax returns only.... The TurboTax website, too, includes consistent disclosures proximate to every reference to a free offer, including both a concise disclosure indicating that the offer applies only to simple returns and more detailed information available in pop-ups and on product pages.”³²⁸
- “Post-purchase data, including high NPS scores, high customer ratings, high year-over-year customer retention, and low rates of complaints are all inconsistent with deception.”³²⁹

194. The purported supporting evidence for Dr. Golder’s claims above is plagued by numerous issues, such as illogical leaps, incorrect assertions that are refuted by a variety of evidence (including evidence cited by Intuit’s experts and Intuit’s own surveys), unsupported assumptions, and irrelevant statements. For example:

- Dr. Golder’s claim that reasonable consumers would likely approach Intuit’s free claims with inherent skepticism and would not expect TurboTax to be free is incorrect and contradicted by the facts, including many of the sources cited by Dr. Golder and Professor Hauser.
- Dr. Golder’s claim that “reasonable consumers” would either know what “simple returns only” means or would look for additional information to determine what it means is an unsupported assertion. Neither Dr. Golder, nor any other Intuit experts, tested whether and to what extent consumers understand what a “simple return” is. My TurboTax Perception Survey addressed this specific question by direct empirical evidence, refuting Dr. Golder’s unsupported claims and showing that many consumers do not correctly understand what “simple returns” means. What is more, “simple” has a common meaning, while TurboTax’s use of “simple” corresponds to a specific meaning, one that has changed multiple times over years.

³²⁷ Golder Report, ¶226.

³²⁸ Golder Report, ¶227.

³²⁹ Golder Report, ¶228.

- Next, Dr. Golder attempts to set out statistics about retention, customer satisfaction, and complaints to establish that consumers were not misled by Intuit's advertising. However, none of the statistics he marshals show an absence of deception.
 - » Dr. Golder presents a mismatch of statistics that present numbers from a variety of categories: consumers who paid to use TurboTax, all consumers who use TurboTax (those who paid and those who used it for free), and consumers who use any Intuit product (including non-TurboTax products like Mint or QuickBooks). None of these relate directly to the relevant group of consumers, much less to consumer deception.
 - » These statistics include a much broader set of consumers than those at issue here (those who are not eligible for Free Edition but were under the impression that they were). The statistics also do not include the substantial number of consumers who began using TurboTax and abandoned the process. Finally, the statistics also do not take into account the reasons that consumers who had the misimpression that they could file for free using TurboTax might continue to use TurboTax even after discovering that they are ineligible for Free Edition.

195. I discuss these flaws in detail below and illustrate why Dr. Golder's claims are unsupported and speculative.

A. Dr. Golder Fails to Show that Positive Customer Reviews and High Customer Retention Are Inconsistent with A Substantial Number of Consumers Being Deceived

196. Dr. Golder argues that Intuit has high scores across Net Promoter Score ("NPS"), customer reviews and ratings, and customer retention metrics, and that, "[i]f customers expected to file for free but couldn't, this would not be the case."³³⁰ These conclusions are flawed because they are based on overinclusive data sets, underinclusive data sets, and fail to take consumer psychology into account, such as the concepts of cognitive dissonance and the status quo bias.

197. Dr. Golder's discussion of these highly aggregated metrics is fatally flawed because it includes, for example, consumers who were not deceived because they were eligible to file their taxes for free with TurboTax. The metrics are also underinclusive, because they fail to

³³⁰ Golder Report, ¶36.

measure data about consumers who may have come to the TurboTax website and even begun filing their taxes but abandoned the process. In contrast, in my Opening Report I surveyed the correct population of consumers, those who were not eligible to file for free with TurboTax, and found that a misimpression about the ability to file for free is prevalent.

198. Dr. Golder's analysis of customer satisfaction and related metrics also fails to account for (i) TurboTax customers who have a misimpression about whether they can file for free and may not realize that they were misled; and (ii) that even customer retention as high as 84 percent, which may be driven to a degree by the perception of high switching costs and status quo bias, does not preclude a substantial number of customers having the misimpression that they can file for free when they arrive at the TurboTax website.

199. An important principle to consider in conjunction with the metrics analyzed by Dr. Golder, though dismissed entirely in his report,³³¹ is cognitive dissonance. In a circumstance where the fact of deception has been established, as it was with my survey, there can still be a question as to whether the deception was perceived as such by affected consumers. For example, if TurboTax customers have the misimpression that they can file for free and discover that they cannot, it is not clear whether they would attribute their inability to file for free to their own tax situation (as the language in the TurboTax upgrade screen would suggest),³³² or would think the marketing message had been intended for people with a different tax situation, and hence infer that they had not been intentionally deceived by TurboTax's marketing. This process of attribution is well understood in the literature of consumer psychology, where consumers who detect a deception determine whether to attribute it externally or internally (i.e., "their fault or mine?"), and in the case of external attribution, whether there was intention, the magnitude of the deception, and the costs associated with switching away.³³³

³³¹ Golder Report, ¶48 (stating that he has "seen no evidence (and Dr. Novemsky points to no evidence) that, in this case, cognitive dissonance exists, let alone is so strong as to overpower the negative feelings of deception that are hypothesized to exist here.").

³³² For example, by telling consumers in the TurboTax product that they had to upgrade "due to your tax situation." See Kirk Fair Report, Appendix D.1.

³³³ Gillespie et al., "A tangled web: views of deception from the customer's perspective," *Business Ethics, A European Review*, Volume 25, No. 2, April 2016, p. 204 ("Expectations regard the future, whereas perception describes the current environment. These antecedents facilitate the deception by creating discrepancies between prior views and reality, thus leading to cognitive dissonance. Cognitive dissonance theory asserts that a consumer has 'certain cognitive elements which are "knowledges" about himself, his environment, his attitudes, his opinions, and his past behavior' (Oshikawa 1969: p. 44). If one of these elements follows logically from another, then these elements are 'consonant' to one another. The elements are 'dissonant' if one does not follow logically from the other. Such dissonance can be aroused in three ways: after making an important and difficult decision, after being forced to say or do something contrary to private opinions or beliefs, and after being exposed to discrepant information (Oshikawa 1969). In such a case, the person will be motivated to reduce

1. Net Promoter Score

200. Dr. Golder presents NPS data from 2012 to 2020, [REDACTED], to show that Intuit (and TurboTax online specifically) score highly in absolute terms and compare favorably in relative terms.³³⁴ NPS is a popular but limited metric intended to distill customer sentiment into a single value.³³⁵ Importantly, the NPS score masks the number of detractors that comprise it. For example, Figure 12 below [REDACTED]



[REDACTED]. Finally, the evidence presented by Dr. Golder (and also cited by Dr. Hauser) does not read as favorably as he implies. For example, [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

tension created by this dissonance in some manner.”); pp. 206–207 (“After the consumer has perceived the deception, he or she undergoes the process of determining attribution. Attribution encompasses how consumers explain causality of the deception [...]”); p. 207 (“Internal attribution occurs when the consumer feels responsible for the occurrence of the perceived deception. When this path is taken, the consumer relinquishes the retailer of responsibility and takes the blame on himself. Decay in the perceived deception occurs, resulting in the consumer changing his cognition regarding the deception. Ultimately, no change to the relationship occurs and the dissonance is resolved.”); p. 207 (“External attribution occurs when the consumer places responsibility on the other party, in this case, the salesperson or company. This assessment is carried out by determining the intentionality of deception, magnitude and stability of the deception, and the switching costs.”).

³³⁴ Golder Report, ¶¶39–42.

³³⁵ As Dr. Golder notes, NPS is calculated by first asking customers a single question about how likely they are to recommend the product, with answers recorded on a scale of 0–10 (with 10 being the most likely to recommend) and subtracting the percentage who answered between 0 and 6 (“detractors”) from the percentage who answered 9 or 10 (“promoters”). Those who answered 7 or 8 (“passives”) are excluded from the calculation. The usefulness of the NPS metric has come under some scrutiny in recent years, in particular due to its inability to offer insights as to why customers respond the way they do, the fact that it measures intention rather than action (*i.e.*, its inability to be *predictive* of behavior), and because of its failure to account for the at times contradictory nature of human behavior, where some people can be both detractors and promoters simultaneously. For example, one survey indicated that “52% of all people who actively discouraged others from using a brand had also actively recommended it.” Stahlkopf, Christina, “Where Net Promoter Score Goes Wrong,” *Harvard Business Review*, October 18, 2019, available at <https://hbr.org/2019/10/where-net-promoter-score-goes-wrong>.

³³⁶ Intuit,

[REDACTED] Mr. Deal criticizes my characterization of Cash App Taxes (formerly Credit Karma Tax) as a “free” service because it requires consumers to allow the company to utilize their tax preparation data. Deal Report, ¶46. I have focused on the concept of “free” as a purely pecuniary concept for purposes of this matter. Moreover, [REDACTED]. See, e.g., GX 410 [REDACTED]

FIGURE 12*TurboTax NPS, Paid Products, 2012–2020*

Note:

[1] NPS (Net Promoter Score) is based upon a survey question which asks respondents to rank how likely they are to recommend a certain brand/product/company to friends, family, or colleagues on a scale of 0–10. Respondents who answer between 0–6 are called “detractors,” respondents who answer between 7–8 are called “passives,” and respondents who answer between 9–10 are called “promoters.” NPS = $(\% \text{ of Promoters} - \% \text{ of Detractors}) * 100$. See, e.g., “U.S. Consumer 2017 Net Promoter Benchmarks,” Satmetrix, 2017, available at <https://info.nice.com/rs/338-EJP-431/images/satmetrix-infographic-2017-b2c-nps-benchmarks-glance-061217.pdf>; Chen, E., “What is the Net Promoter Score (NPS)?,” MIT Orbit, available at [\[2\] The potential maximum shares of detractors are based on two equations: \(i\) \$NPS = \(\% \text{ of Promoters} - \% \text{ of Detractors}\) * 100\$; and \(ii\) \$\% \text{ of Promoters} + \% \text{ of Detractors} + \% \text{ of Passives} = 100\%\$.](https://orbitkb.mit.edu/hc/en-us/articles/206440723-What-is-the-Net-Promoter-Score-NPS-; Intuit, [REDACTED]”.</p>
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201. Dr. Golder also [REDACTED]

[REDACTED]. However, as Dr. Golder’s own source on the definition of NPS scores indicates, NPS scores are “not very transferable across industries”³³⁷ since they will pick up differences between industry-level sentiments (e.g., the differences in NPS levels between the relatively highly rated brokerage and investments industry and the poorly rated cable and satellite TV industry).³³⁸ Dr. Golder’s

³³⁷ Chen, Elaine, “What Is the Net Promoter Score (NPS)?,” *MIT Orbit*, available at [https://orbit-kb.mit.edu/hc/en-us/articles/206440723-What-is-the-Net-Promoter-Score-NPS-\(%E2%80%9CWhat, INTUIT-FTC-PART3-000600984](https://orbit-kb.mit.edu/hc/en-us/articles/206440723-What-is-the-Net-Promoter-Score-NPS-(%E2%80%9CWhat, INTUIT-FTC-PART3-000600984).

³³⁸ See, e.g., “U.S. Consumer 2020 Net Promoter Benchmarks,” *Satmetrix*, 2020, https://cincysc.com/wpcontent/uploads/2020/10/2020_benchmarks.pdf (“U.S. Consumer 2020 Net Promoter Benchmarks”), INTUITFTC-PART3-000598532.

benchmarking analysis of Better Business Bureau complaints, which I discuss below in Section V.C, likely suffers from the same flaw.

2. Customer reviews and ratings

202. Dr. Golder points to customer reviews and ratings on the TurboTax website as evidence that “the products are meeting or exceeding customer expectations, with every product receiving high customer ratings.”³³⁹ He also compares the ratings to those on competitor websites, and ratings across TurboTax and its competitors from the review platform Influenster, to show that TurboTax is relatively highly rated.³⁴⁰ Dr. Golder’s analysis of reviews and ratings ignores that the relevant subset of TurboTax customers in this case is not all customers. The relevant group of consumers are those who think they can use TurboTax to file for free and whose tax situation is such that they are ineligible to file for free using TurboTax. Thus, his reporting of these aggregated numbers waters down any feedback that may have been shared by those who were harmed by the misimpression that they can file for free using TurboTax with the feedback of the much larger group who either did not have the misimpression or qualified to file for free but did not understand the reasons why that turned out to be the case. Additionally, the reviews on the TurboTax website are limited to those who have completed their filing with TurboTax.³⁴¹ In other words, these customer reviews entirely omit any tax filers who may have begun a tax return with TurboTax and then exited the process prior to filing for any reason, including the fact that they learned that, despite their misimpression, they cannot file for free. Finally, there is no data on the absolute number of relevant tax filers, and no reason to believe *a priori* that the relevant set of tax filers would submit ratings or reviews more or less often than the average TurboTax customer. Thus, one can have no prior expectation as to the degree to which the relevant set of tax filers would be reflected in the highly aggregated, self-selected average ratings presented by Dr. Golder.

203. As I have noted, TurboTax used language on its website that encouraged customers to attribute their inability to file for free to their own circumstances, rather than Intuit’s marketing.³⁴² Consumers may not feel dissatisfied if they attribute their misperception to their own tax situation—an example of “internal attribution” of a perceived deception—or if they believe Intuit inadvertently communicated free messaging to them—an example of “external

³³⁹ Golder Report, ¶44.

³⁴⁰ See Golder Report, ¶¶45–46 and Figure 3.

³⁴¹ Intuit’s customer reviews are hosted by Bazaarvoice. For Bazaarvoice to capture the review information, the customer must complete their tax filing using a TurboTax product. GX 149, Nov. 30, 2022 Deposition of J. Crosby, at 42:22–43:12, 47:19–47:25.

³⁴² For example, by telling consumers in the TurboTax product that they had to upgrade “due to your tax situation.” See Kirk Fair Report, Appendix D.1.

attribution,” without intent on the part of the company.³⁴³ In either of these plausible circumstances, consumer psychology suggests that such a consumer would resolve the dissonance caused by the realization that they were unable to file for free and would be unlikely to provide Intuit with negative feedback.

3. Customer retention

204. Dr. Golder cites customer retention rates of 80 percent and 84 percent for various tax years to show “that the vast majority of customers continue to use TurboTax products year-over-year.”³⁴⁴ He also notes [REDACTED]

[REDACTED]³⁴⁵
This, Dr. Golder claims, is yet more evidence of customer satisfaction. However, as above, Dr. Golder’s analysis of retention rates is diffused by including irrelevant consumers, for example consumer who are able to use TurboTax for free. Retention rates, by their nature, are also underinclusive as they do not measure consumers who may have attempted, but not been able to, file their taxes for free with TurboTax. Finally, Dr. Golder’s analysis of retention rates ignores the corresponding rate of defection, between 16 percent and 20 percent *of tens of millions of filers*, whose reasons for defecting are not observed.

205. Furthermore, Dr. Golder’s analysis ignores the documented tendency of tax filers to choose their filing method because it is what they have used before, an “inertia-like effect”³⁴⁶ that functions as a form of the status quo bias, a psychological tendency to maintain one’s current or previous decision when faced with alternatives.³⁴⁷ Dr. Golder makes no attempt to disentangle the effect of this tendency from that of customer satisfaction in driving these retention rates. Consistent with this “inertia,” TurboTax (and the tax preparation industry in general) should be expected to have high retention rates. In addition to the convenience of familiarity, high retention rates can also stem from the costs consumers face, like the cost of switching and loss aversion, and transaction costs. Indeed, responses in Professor Hauser’s

³⁴³ Gillespie et al., “A tangled web: views of deception from the customer’s perspective,” *Business Ethics, A European Review*, Volume 25, No. 2, April 2016, pp. 206–207 (“After the consumer has perceived the deception, he or she undergoes the process of determining attribution. Attribution encompasses how consumers explain causality of the deception [...]”); p. 207 (“Internal attribution occurs when the consumer feels responsible for the occurrence of the perceived deception. When this path is taken, the consumer relinquishes the retailer of responsibility and takes the blame on himself. Decay in the perceived deception occurs, resulting in the consumer changing his cognition regarding the deception. Ultimately, no change to the relationship occurs and the dissonance is resolved.”); p. 207 (“External attribution occurs when the consumer places responsibility on the other party, in this case, the salesperson or company. This assessment is carried out by determining the intentionality of deception, magnitude and stability of the deception, and the switching costs.”).

³⁴⁴ Golder Report, ¶47.

³⁴⁵ Golder Report, ¶47.

³⁴⁶ INTUIT-FTC-PART3-000607494–558 at 498 (“[R]espondents were also asked to choose up to 13 factors for why they chose their filing method. The findings regarding why taxpayers chose their filing method suggest that inertia is a strong factor for taxpayers continuing to use the same method year after year.”), 520.

³⁴⁷ See, e.g., W. Samuelson and R. Zeckhauser, “Status Quo Bias in Decision Making,” *Journal of Risk and Uncertainty*, 1988, Vol. 1, pp. 7–59 at 9 (“The finding that individuals exhibit significant status quo bias in relatively simple hypothetical decision tasks challenges the presumption (held implicitly by many economists) that the rational choice model provides a valid *descriptive* model for all economic behavior.”).

Purchase Driver Survey indicate that respondents do rationalize their choice to continue with their prior tax provider because of perceived switching costs. For example:

I like the fact that my previous year tax information is able to be uploaded into the previous year. It makes it easier and faster to complete our taxes.³⁴⁸

TaxAct is easy to use and automatically transfers the previous years information to the current tax year.; Too much trouble to use another tax service and I'm completely satisfied with TaxAct³⁴⁹

I have used Taxhawk for years and it has all my info saved and its easy to use and cheap.³⁵⁰

Saw no need for this.; Need to keep my history in one place.³⁵¹

Because all of my information was already in Turbotax so the filing was pre-filled. Convenience.; It was nothing against other tax service providers, Turbotax is just what I know how to use.³⁵²

I like turbo tax and dont want to learn another one; Continuity of data³⁵³

Because all my prior year information is already stored there. It is much easier just to do it that way again.³⁵⁴

206. As these examples show, retention rates for tax providers should not be taken at face value as evidence of customer satisfaction or lack of deception.

207. Furthermore, the relevant set of tax filers may form a misimpression without knowing they have been misled. There is a difference between objective deception and perceived deception. Objective deception “takes place outside of the consumer’s mind ... [and] does not necessarily need to be perceived by the consumer, nor does she have to feel disconfirmed in her expectations.”³⁵⁵ Perceived deception is “the consumer’s feeling that a marketer is

³⁴⁸ INTUIT-FTC-PART3-000607560, response to Q4b, record 142.

³⁴⁹ INTUIT-FTC-PART3-000607560, responses to Q4a and Q4b, record 252.

³⁵⁰ INTUIT-FTC-PART3-000607560, response to Q4a, record 45.

³⁵¹ INTUIT-FTC-PART3-000607560, responses to Q4a and Q4b, record 390.

³⁵² INTUIT-FTC-PART3-000607560, responses to Q4a and Q4b, record 182.

³⁵³ INTUIT-FTC-PART3-000607560, responses to Q4a and Q4b, record 37.

³⁵⁴ INTUIT-FTC-PART3-000607560, response to Q4a, record 1476.

³⁵⁵ Held, Johana and Germelmann, Claas Christian, “Deception in consumer behavior research: A literature review on objective and perceived deception,” *Projectics*, 2018 (“[O]bjective deception takes place outside of the consumer’s mind. Deception is a consequence of a marketer’s action. This action does not necessarily need to be perceived by the consumer, nor does she have to feel disconfirmed in her expectations.”).

responsible for trying to set a false belief with any type of marketing communication.”³⁵⁶ At issue in this case is the question of whether an objective deception has occurred, not a perceived deception. I have surveyed a sample of tax filers who do not qualify to file for free using TurboTax and asked whether they have the impression that they can file their taxes for free using TurboTax—that is, whether there is an objective deception is measurable in their impressions. The results of that survey show that a large portion do have the misimpression that they can file for free.

B. Dr. Golder’s Evidence That Some Customers Try Multiple Online Tax Preparation Providers or Switch Providers Does Not Rule Out Substantial Lock-In or High Switching Costs

208. A plausible explanation of Intuit’s customer retention rates is lock-in and high perceived switching costs. Dr. Golder argues that there is no lock-in and that consumers do not consider switching costs when using TurboTax but has no direct evidence supporting his argument. Dr. Golder, in turn, (i) attempts to address the psychology of lock-in in a conclusory manner; (ii) uses data about defectors to show lack of lock-in when the data does not support his conclusion; and (iii) relies on anecdotal evidence and flawed logic to show a purported absence of switching costs. In fact, some of the evidence cited by Dr. Golder and evidence ignored by Dr. Golder supports a finding that there is likely significant lock-in and high perceived switching costs.

209. First, Dr. Golder attempts to address the psychology behind lock-in. According to Dr. Golder, the notion that high retention rates can be caused by cognitive dissonance and the status quo bias, as I explain above, “belies common sense and basic principles of marketing.”³⁵⁷ However, according to his own evidence an “inertia-like effect” is measurable among tax filers.³⁵⁸ Furthermore, the same study that identified this effect found that 40 percent of tax filers who use paid preparers were eligible for the Volunteer Income Tax Assistance (“VITA”) program, a free government program, and “yet only 11% of those who use paid preparers said they would be ‘very likely’ or ‘extremely likely’ to use VITA if they switched methods.”³⁵⁹ This kind of behavior might also be seen to belie common sense, as it

³⁵⁶ Held, Johana and Germelmann, Claas Christian, “Deception in consumer behavior research: A literature review on objective and perceived deception,” *Projectics*, 2018 (“[P]erceived deception is defined as the consumer’s feeling that a marketer is responsible for trying to set a false belief with any type of marketing communication.”).

³⁵⁷ Golder Report, ¶53.

³⁵⁸ INTUIT-FTC-PART3-000607494–558.

³⁵⁹ INTUIT-FTC-PART3-000607494–558 at 500 (“[A]t least 40% of those who use paid preparers are eligible for VITA, yet less than 4 million people use that service. And that’s despite having more than 10,000 locations sponsored by more than 2,000 partners nationwide. According to our survey results, VITA users have the highest satisfaction rate of any other method and VITA could provide a free alternative to those who pay preparers, and yet only 11% of those who use paid preparers said they would be ‘very likely’ or ‘extremely likely’ to use VITA if they switched methods.”).

indicates that tax filers are willing in some cases to continue using a paid product over a free service, let alone one with the highest satisfaction rate, and yet it is present in the data.

210. Dr. Golder further acknowledges status quo bias, but points out that status quo bias “may cause a customer without strong feelings” to return out of inertia, but “if consumers were deceived, they *would* have strong feelings.”³⁶⁰ I would amend his latter statement as follows: If consumers knew they had been deceived, remember being deceived, think the deception is the company’s fault, think the company deceived them intentionally, and think the product was not worth the price after using it, then they might have strong feelings. As I discuss at length in the previous section, many consumers may not be aware of the deception at issue here. What is more, the status quo bias may be compounded by high perceived switching costs,³⁶¹ as the responses I note above from Dr. Hauser’s survey indicate, even if consumers had strong feelings about TurboTax.

211. Next, in an attempt to marshal data to support his conclusions, Dr. Golder engages in flawed logic to further rebut any possible lock-in, arguing that because something is true for a minority, it must be true in general. Dr. Golder [REDACTED]

[REDACTED] ³⁶²

[REDACTED] ³⁶³ Similarly, as Dr. Golder reports, Dr. Hauser’s Purchase Driver Survey found that 21.6 percent of respondents tried out one or more tax websites without using that website to file in tax year 2020. Dr. Golder’s conclusion that these statistics about a minority of consumers demonstrates a willingness to try multiple providers in a given year (or supports the idea that consumers conduct substantial research) is simply a logical error. The fact that a minority of tax filers try out multiple tax providers or consider switching tax providers supports the opposite conclusion: that most tax filers do not.

212. In further analysis of consumers who abandon their TurboTax filing, or “defect,” Dr. Golder presents [REDACTED]

[REDACTED] ³⁶⁴ This analysis, Dr. Golder claims, [REDACTED]

³⁶⁰ Golder Report, ¶52 (emphasis in original). See also, INTUIT-FTC-PART3-000602289, p. 25.

³⁶¹ See, e.g., Fernando Luco, “Switching Costs and Competition in Retirement Investment,” *American Economic Journal Microeconomics*, 2019, Vol. 11, No. 2, pp. 26–54 at 26, 52.

³⁶² Golder Report, ¶57. See also, INTUIT-FTC-PART3-000602289, p. 25.

³⁶³ Dr. Golder cites [REDACTED] Golder Report, ¶47. [REDACTED]

³⁶⁴ Golder Report, Figure 4.

[REDACTED]

[REDACTED].³⁶⁵ However, [REDACTED]

[REDACTED]

[REDACTED]³⁶⁶ While Dr. Golder focuses on [REDACTED] he ignores that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]³⁶⁷ Additionally, [REDACTED]

[REDACTED]³⁶⁸ Considering this data in the context of quotes like those from the Hauser Purchase Driver survey listed above, this completion rate may be influenced to some degree by consumers' tendency to honor sunk costs.

213. To address switching costs, Dr. Golder relies on anecdotal evidence that actually tends to show the *presence* of switching costs. Dr. Golder argues that customers regularly switch tax preparation providers year to year, or consider doing so, and points to a number of unconvincing examples to support this claim. For example, he points to an advertisement that focuses on the ease of switching from TurboTax to another provider³⁶⁹ and a product review describing how tax preparation services allow consumers to import prior year tax returns from a competitor³⁷⁰ as evidence that switching costs are low. Dr. Golder ignores that this is evidence of *competition to lower switching costs*, which is most likely to catch customers' attention when switching costs are perceived to be high. Dr. Golder also points out that [REDACTED]

[REDACTED]

[REDACTED]³⁷¹ [REDACTED]

[REDACTED] TurboTax's retention rates and churn seem unremarkable.

214. In a further flawed attempt to establish an absence of switching costs, Dr. Golder points to the Hauser Purchase Driver Survey and Kirk Fair Disclosure Survey as additional evidence of low switching costs, noting Professor Hauser's finding that 43.3 percent of respondents either changed providers or considered changing providers from the prior year,³⁷² and Dr.

³⁶⁵ Golder Report, ¶58.

³⁶⁶ Intuit, "Consumer Group GOAT SLT Review," June 2022, INTUIT-FTC-PART3-000602247, slide 4.

³⁶⁷ Intuit, "Consumer Group GOAT SLT Review," June 2022, INTUIT-FTC-PART3-000602247, slide 4. Consistent with Dr. Golder's analysis of the same file, this is based on data through May 27, 2022, and the share of traffic who exited prior to starting is (123 million - 47.8 million) / 123 million * 100 = 61.1 percent.

³⁶⁸ Golder Report, ¶59, footnote 81, 100% - 21.3% = 78.7%.

³⁶⁹ Golder Report, ¶61 and Figure 5.

³⁷⁰ Golder Report, ¶62.

³⁷¹ Golder Report, ¶64.

³⁷² Golder Report, ¶66. *See also*, Hauser Report, ¶128.

Kirk Fair's finding that consumers were willing to conduct additional research and potentially switch providers when faced with an upgrade screen.³⁷³ In the case of the Hauser Purchase Driver Survey, 11% of respondents actually switched, while 32.3% "considered switching." This reflects a lower rate of actual switching than the TurboTax Defection Survey Dr. Golder cites elsewhere, and more importantly indicates that *the vast majority did not switch*. Similarly, the evidence from the Kirk Fair Disclosure Survey merely identifies a willingness to *research and consider switching* in the event that a respondent faces an upgrade screen, and points to anecdotal evidence from *one respondent* to support this premise.³⁷⁴ Even if a substantial number of consumers followed through on these consideration, it would not be evidence that there is not a substantial number who do not consider switching.

215. Dr. Golder continues to engage in flawed logic in an attempt to support his conclusions about lock-in and switching costs. For example, Dr. Golder identifies that Professor Hauser finds 88% of survey respondents used the same tax service as before. Professor Hauser then asks "Did you or did you not consider using a different tax preparation method / provider this year?" to which 55.7% of survey respondents say "No." Even setting aside the high rate of "no" responses, the vague phrasing of the survey question that asks whether respondents "considered" switching preparation methods means that even respondents who answered in the affirmative (32.7%) could include those who thought about switching, but ultimately did not (possibly for reasons including lock-in and switching costs). Although Dr. Golder relies on Ms. Kirk Fair's claims that her "Enhanced Screen" shows that consumers continue to upgrade despite being told about the option to file for free, which Dr. Golder uses as evidence that they do not feel locked in,³⁷⁵ Ms. Kirk Fair's survey is not a legitimate test for whether or not consumers felt locked in to their service because, for example, the alternative "Enhanced Screen" in her survey did not support porting over the data a user has already entered.³⁷⁶ Thus, Dr. Golder's conclusion may conflate individuals who did not switch due to switching costs with individuals who were willing to upgrade.

216. Overall, Dr. Golder's arguments related to lock-in and switching costs merely point to indirect evidence (with analysis that is rife with flaws and illogical leaps, as I have described above).

³⁷³ Golder Report, ¶66. *See also*, Golder Report, ¶¶35, footnote 30.

³⁷⁴ Golder Report, ¶66. *See also*, Kirk Fair Report, ¶¶34–35.

³⁷⁵ Golder Report,

³⁷⁶ Kirk Fair Report, Appendix D.1.

C. Dr. Golder's Analysis of Intuit's Rate of Complaints Is Not Evidence of A Lack of Deception As He Claims

217. Dr. Golder relies on complaints made to third parties like the FTC or the Better Business Bureau to point out that consumer were not deceived. However, that reliance is flawed because (i) the kinds of complaints he considers are incomplete, (ii) the data he relies on are not limited to the relevant group of consumers, and (iii) he ignores pertinent psychological reasons consumers may not complain about TurboTax, including if they do not appreciate that they have been deceived. Even consumers who appreciate that they have been deceived may not overcome the barriers to actually file a complaint. Indeed, research has shown that consumers self-select to complain in ways that are not well understood, lower propensities to complain can be present along demographic lines, and that consumers' willingness to complain to government entities can vary as well, suggesting that any set of complaints, and particularly a set of complaints collected by a government entity, may be unreflective of consumer sentiments to an unknown degree.³⁷⁷

218. First, Dr. Golder considers complaints made to certain third parties and collected in the Consumer Sentinel database during a specific timeframe.³⁷⁸ Dr. Golder claims that the rate at which consumers complain is low (between 0.0001 percent and 0.0005 percent of the total number of TurboTax customers who filed at least one tax return from tax year 2015 to tax year 2021), and that "such a miniscule number of complaints is inconsistent with Complaint Counsel's alleged deception."³⁷⁹ However, the complaints discussed here are likely an undercount and include only those made to third parties, since, notably, Dr. Golder makes no attempt to review, consider, or analyze complaints made directly to Intuit. Additionally, as in numerous other instances, Dr. Golder fails to limit the data he relies on to data relevant to this matter, rendering his analysis uninformative. First, Dr. Golder makes no attempt to restrict his universe of tax filers—the denominator in his rate of complaints—to the relevant set of consumers who thought they could file for free with TurboTax but were ineligible to do so (and nor could he, as an unknown number of deceived customers may have opted out of ever filing with TurboTax once they learned that they could not file for free). Second, as I have discussed above, it is possible that many of the relevant tax filers are not aware they have been deceived or blame themselves rather than TurboTax and would be unlikely to file a complaint. In any such case, Dr. Golder's numerator—the number of complaints themselves—may not accurately reflect consumer deception. Third, there are barriers to

³⁷⁷ Devesh Raval, "Whose Voice Do We Hear in the Marketplace? Evidence from Consumer Complaining Behavior," *Marketing Science* 39, no. 1, 2020, pp. 168–187 at 168.

³⁷⁸ Consumers may not know to complain to the Better Business Bureau or other law enforcement agencies, including the FTC. Dr. Golder's analysis noticeably has no conclusions about consumer complaints to Intuit, likely the most reliable source of such information, that could have been readily available to him. Moreover, while Dr. Golder at length parses complaints put forward by Complaint Counsel in this matter, *see* Golder Report ¶¶68–82, it is my understanding that those complaints are available to the finders of fact to review and do not require detailed parsing by experts in this matter.

³⁷⁹ Golder Report, ¶¶68–83.

complaining. For the complaints considered by Dr. Golder, consumers must consider where to complain (for example, the Better Business Bureau or a state attorney general's office) and must put in the effort to write and submit the review. Any of these factors may serve as a barrier to complaining. In short, his calculation is underinclusive, too aggregated to be informative, and likely fails to capture a complete picture of consumer impressions resulting from the alleged deception in this case.

219. Next, Dr. Golder analyzes complaints about TurboTax made to a third party, the Better Business Bureau, again failing to consider any data about complaints made directly to Intuit. For his analysis of Better Business Bureau complaints, Dr. Golder assembles a set of benchmark companies for Intuit, to which he compares Intuit on an absolute and relative basis.³⁸⁰ In absolute terms, Dr. Golder finds that Intuit has 3,131 complaints, compared to between 58 and 52,055 for his selected benchmark companies.³⁸¹ On a relative basis, Dr. Golder finds that Intuit has received 31.3 complaints per million customers. This is lower than the average for each of his other benchmark groups, including that of direct Intuit competitors, which he measures at 58.9 complaints per million. Setting aside the fatal conceptual errors I have outlined for similar analyses above, and from which this analysis also suffers, for example barriers to filing complaints, Dr. Golder chose to assign to Intuit 100 million customers as the denominator for this relative calculation. Dr. Golder acknowledges in his report that this 100 million comes from Intuit's measure of its customer base *across its product offerings and platforms*,³⁸² which, in addition to TurboTax, include QuickBooks, Mint, Credit Karma, and Mail Chimp.³⁸³ In short, Dr. Golder's analysis is aggregated even further away from the relevant set of tax filers, and incorporates to an unclear degree complaint details and a customer base unrelated to TurboTax.

220. Next, Dr. Golder presents a flawed "keywords" analysis of Better Business Bureau complaints,³⁸⁴ an unnecessarily complicated analysis that purports to show that rate of complaints for each of his defined categories (e.g., "Advertising" or "Deception") is in line with those of Direct Intuit Competitors, TV Providers, Automobile Insurance Providers, and Wireless Carriers.³⁸⁵ This analysis is conceptually flawed, unconvincing in its comparisons, and rife with conceptual and technical errors. First, there is no reason to expect that any

³⁸⁰ Golder Report, ¶¶86–87.

³⁸¹ Golder Report, ¶88, Appendix G.

³⁸² Golder Report, Figure G-2. See also, "SEC Form 10-K for the fiscal year ended July 31, 2021," *Intuit Inc.*, available at <https://www.sec.gov/ix?doc=/Archives/edgar/data/896878/000089687821000233/intu-20210731.htm> ("Intuit 10-K"), INTUIT-FTC-PART3-000599641, at p. 5 ("We serve approximately 100 million customers across our product offerings and platforms.").

³⁸³ "Intuit Ecosystem of Financial Products," *Intuit Inc.*, available at <https://www.intuit.com/products/>.

³⁸⁴ Golder Report, ¶¶91–93, Figure 11.

³⁸⁵ Dr. Golder also presents an analysis of Better Business Bureau complaints for a set of companies that "were investigated for consumer deception by the FTC or ProPublica," including Chime Financial, MoneyGram, and Perdoceo Education Corporation. Golder Report, FN 150 & Appendix G. His analyses of these investigations are either inconclusive, uninformative, or tend to undermine his position. For example, Dr. Golder's calculated complaint rate per million customers for MoneyGram is lower than Intuit's by nearly half.

complaint category (as Dr. Golder defines it) should tend to accrue complaints at a rate that is comparable across industries. The things that upset customers about Wireless Carriers or TV Providers may be entirely different than those that upset users of tax filing services. Second, the same can be said of Intuit's direct competitors. The things that upset customers about H&R Block may be different from the things that upset customers about TurboTax because H&R Block and TurboTax offer a different experience. Third, it is by no means clear that his arbitrarily specified and unnecessarily complicated word search method is successful at correctly flagging reviews into the desired categories. Indeed, a cursory review of his analysis shows that his string searching for the word "free," which flows into his "Price / Change" category, fails to identify capitalized instances of the word.³⁸⁶ Finally, even if one were to accept his analysis at face value, it shows that, across every category but one, Intuit recorded a higher rate of complaints than its direct competitors.³⁸⁷

D. Dr. Golder's Assessment That Intuit's Disclosures Align with "Industry Standard Disclosures" is Irrelevant

221. Dr. Golder attempts to rebut my empirical evidence of consumer misperceptions by discussing, at length, the existence and practical limitations regarding Intuit's disclosures. These discussions are unsupported by anything other than his observations, assertions, and an analysis of "industry standard disclosures" which is entirely irrelevant to determining whether or not Intuit's ads were misleading. Dr. Golder offers an analysis of Intuit's Free ads wherein he reviews the "presence, content, and proximity and placement of disclosures in the at-issue TurboTax ads," and finds that "Intuit's Free Ads include industry standard disclosures and are in line with ads from benchmark companies."³⁸⁸ He also assumes, without evidence, that the "simple returns" language informs customers that "they would need to go to the TurboTax website for additional detail before they concluded that TurboTax was free for them."³⁸⁹ However, Dr. Golder fails to conduct any systematic study of consumers' perceptions, and ignores consumers' perceptions, including perceptions of switching costs and beliefs about whether they can file for free.

1. The "simple" disclosure is not informative for tax filers

222. Dr. Golder provides exhaustive descriptions of the presence of the "simple returns" language in Intuit ads, a fact that is not at issue. Dr. Golder provides a summary of disclosures in 187 ads identified by Complaint Counsel for TV, social media/display, paid

³⁸⁶ Golder Backup Materials.

³⁸⁷ Golder Report, Figure 11.

³⁸⁸ Golder Report, ¶97.

³⁸⁹ Golder Report, ¶97.

search, and email,³⁹⁰ and presents two exemplar ads with disclosures³⁹¹ to demonstrate that a variant of the “simple returns” language was present. He also notes that “see if you qualify language” was present for all TV ads from tax years 2020 and 2021.³⁹² However, even if the disclosure were present most or all of the time, or if was accessible to all TurboTax consumers as Dr. Golder argues, my Perception Survey shows that a substantial portion of consumers do not associate “simple return” language with the specific criteria Intuit uses to determine eligibility restrictions for its free product. Therefore, even if some consumers notice the disclaimer that TurboTax Free Edition is “for simple U.S. returns,” or otherwise develop the notion that TurboTax Free Edition is for simple or uncomplicated returns, the consumers may still be misled by Intuit’s ads because they do not necessarily associate the phrase “simple returns” with the specific criteria used by Intuit, particularly as those criteria have changed over time.

223. Dr. Golder purports to show that the “simple returns” language is informative because various other industry participants use the term “simple,”³⁹³ and because very few complaints mentioned confusion about the term.³⁹⁴ However, the issue in this case is not a matter of whether Intuit’s marketing aligns with so-called industry norms—it is a matter of whether Intuit’s marketing misleads consumers about whether or not they can file for free with TurboTax. Further, as it relates to customer complaints, the issue is not necessarily whether the term “simple” is hard to understand, it is that customers are likely to have a preconceived notion as to what “simple” means, particularly in the context of their taxes. Indeed, as I showed in the TurboTax Perception Survey in my Opening Report, 55% of respondents who had not filed with TurboTax in the past three years believed that their income tax return met TurboTax’s definition of a “simple U.S. return,” even though by construction no respondents in my survey qualified to file for free using TurboTax.³⁹⁵ Additionally, people are cognitive misers, as I discuss in more detail below, meaning they constantly try to conserve mental energy, expending it only when motivated to. In this context, the tendency to minimize cognition may reveal itself in a tendency to assume that TurboTax’s use of “simple” matches the one’s own understanding.

³⁹⁰ Golder Report, Figure 12.

³⁹¹ Golder Report, Figures 13 and 14.

³⁹² Golder Report, ¶102.

³⁹³ Golder Report, ¶¶107–113. In fact, the use of the term across the industry may add to consumer confusion about its meaning. Intuit uses the term “simple” in a manner that is tied to specific qualification criteria it controls, while other industry participants control their own criteria for what constitutes “simple,” and those criteria do not always align. For example, a return that is “simple” at H&R Block may not be “simple” at TurboTax. See Hauser Report, footnote 87.

³⁹⁴ Golder Report, ¶106. Again, Dr. Golder relies only on complaints made to third parties identified by Complaint Counsel without doing any review of complaints made directly to Intuit.

³⁹⁵ Novemsky Opening Report, Figure 3.

2. Dr. Golder’s claim that Intuit’s free ads inform reasonable consumers about the qualifications for free offers is speculative and unsupported

224. Dr. Golder continues to make speculative and unsupported claims about Intuit’s disclosures, without relying on any empirical evidence. In a section header, Dr. Golder claims that “Intuit’s Free ads inform reasonable consumers about the qualifications for free offers.”³⁹⁶ This is a curious claim because, as Dr. Golder explains at great length, Intuit’s “free” ads do not include any qualification criteria.³⁹⁷ Dr. Golder does not repeat this claim anywhere else in his report and does not explain what this claim is based on and how it is supported. In fact, the claim is entirely counterfactual as Intuit’s ads do not, in fact, list or provide the multitude of qualification criteria for TurboTax Free Edition.

225. Dr. Golder then claims Intuit’s “simple returns” disclosure effectively conveys the existence and category of eligibility limitations for free offers. This claim is also unsupported. Neither Dr. Golder nor any of Intuit’s other experts undertake any exercise to determine the effectiveness of Intuit’s disclosures. Instead, Dr. Golder merely speculates as to how consumers interpret the disclosures.

226. Dr. Golder then opines that full disclosures of eligibility criteria would be impractical, and that the “simple returns” language “puts consumers on notice that there are eligibility restrictions related to complexity,” but that more work is required to see if they qualify.³⁹⁸ He cites my adjustments to screening criteria language in my Perception Survey as evidence of the challenge of being clear with language about individuals’ tax situations.³⁹⁹ First, it does not follow that deceptive advertisements are acceptable just because curing a misimpression would be “impractical.” Second, the nature of the qualification criteria for various TurboTax products is entirely within Intuit’s control, and challenges related to the complexity of those eligibility criteria have always been fully appreciable for Intuit. Third, Dr. Golder appears to be rebutting some perceived arguments about the kinds of disclosures that would be sufficient to dispel any misperceptions caused by Intuit’s ads. However, what the exact nature of such disclosures should or would look like is beyond the scope of any work I have conducted in this matter and irrelevant to the central question about whether consumers are misled by Intuit’s advertising.

227. Finally, Dr. Golder notes that to the extent consumers are unsure about their eligibility after watching an ad, information is available on the TurboTax website.⁴⁰⁰ But Intuit only

³⁹⁶ Golder Report, Section V.

³⁹⁷ See e.g., Golder Report, ¶115.

³⁹⁸ Golder Report, ¶114.

³⁹⁹ Golder Report, ¶115.

⁴⁰⁰ Golder Report, ¶117.

offers details of what “simple” means behind a hyperlink that is outside the flow of what consumers would need to do to pursue this “free” service from TurboTax, or, more recently, at the very bottom of a webpage. It is well established that consumers act as cognitive misers, processing as little information as possible to navigate their decisions,⁴⁰¹ even in very high dollar-value decisions.⁴⁰² In fact, there are many situations where consumers are processing information so lightly that small changes in the context of the decision can change consumers’ decisions, even when those decisions involve large amounts of money or even one’s own health.⁴⁰³ So, while Intuit’s experts attempt to characterize tax preparation as sufficiently high stakes to incentivize tax filers to invest time and energy to optimize their approach,⁴⁰⁴ consumer psychology says that this should not be the expectation. Thus, hyperlinks are unlikely to be sufficient for presenting important information like eligibility criteria because they require more action than simply reading a description of “simple returns” on the current webpage, and consumers are even less likely to process such information when it is relegated to a hyperlink.⁴⁰⁵

3. Intuit’s disclosures do not dispel consumer misperceptions that they can file for free when that is not the case

228. Dr. Golder implies that Intuit’s advertising is legally sufficient, pointing to FTC guidance on disclosures and regulations governing a different industry (financial lending).⁴⁰⁶ Pointing at a high level to these legal frameworks, Dr. Golder surmises that there is a “tension” between the length of a disclosure and its understandability,⁴⁰⁷ and then glosses over the specifics of the advertising at issue *in this case* to suggest that the primary issue is the length—and not the contents—of the disclosure.⁴⁰⁸ None of his ruminations, however, are relevant regarding whether or not consumers were misled by Intuit’s advertising, and at best suggest some hypothetical, new disclosure could be so long as to be ineffective in a space constrained advertisement.

229. While I’m not an attorney, I understand that the FTC provides the guidance regarding advertising disclosures that states in part:

⁴⁰¹ See, e.g., Daniel Kahnemann, *Thinking Fast and Slow* (New York, NY: Farrar, Straus and Giroux, 2011), pp. 31–49.

⁴⁰² Melissa A. Z. Knoll, The Role of Behavioral Economics and Behavioral Decision Making in Americans’ Retirement Savings Decisions, 70 Soc. Sec. BULL. 1 (2010).

⁴⁰³ Richard H. Thaler and Cass R. Sunstein, *Nudge Improving Decisions About Health, Wealth, and Happiness* (New York, NY: Penguin, 2009), pp. 179–197, 218–249.

⁴⁰⁴ See, e.g., Golder Report, ¶144.

⁴⁰⁵ Intuit had ample opportunity to measure whether consumers would click on hyperlinks to obtain more information about “simple returns” in Dr. Hauser’s Disclosure Efficacy Study but elected not to because, according to their expert, it was not relevant to studying the efficacy of the language used in disclosures, including the language that was hyperlinked. See Hauser Dep. Tr. 166:19-167:20, Jan. 25, 2023 (Rough Transcript).

⁴⁰⁶ Golder Report, ¶118–119.

⁴⁰⁷ Golder Report, ¶118.

⁴⁰⁸ Golder Report, ¶120.

Disclosures that are required to prevent an advertisement from being deceptive, unfair, or otherwise violative of a Commission rule, must be presented “clearly and conspicuously.” Whether a disclosure meets this standard is measured by its performance—that is, how consumers actually perceive and understand the disclosure within the context of the entire ad. The key is the overall net impression of the ad—that is, whether the claims consumers take from the ad are truthful and substantiated. If a disclosure is not seen or comprehended, it will not change the net impression consumers take from the ad and therefore cannot qualify the claim to avoid a misleading impression.

In reviewing their ads, advertisers should adopt the perspective of a reasonable consumer. They also should assume that consumers don’t read an entire website or online screen, just as they don’t read every word on a printed page. Disclosures should be placed as close as possible to the claim they qualify. Advertisers should keep in mind that having to scroll increases the risk that consumers will miss a disclosure.

In addition, it is important for advertisers to draw attention to the disclosure. Consumers may not be looking for—or expecting to find—disclosures. Advertisers are responsible for ensuring that their messages are truthful and not deceptive. Accordingly, disclosures must be communicated effectively so that consumers are likely to notice and understand them in connection with the representations that they modify. Simply making the disclosure available somewhere in the ad, where some consumers might find it, does not meet the clear and conspicuous standard.

If a disclosure is necessary to prevent an advertisement from being deceptive, unfair, or otherwise violative of a Commission rule, and if it is not possible to make the disclosure clear and conspicuous, then either the claim should be modified so the disclosure is not necessary or the ad should not be disseminated. Moreover, if a particular platform does not provide an opportunity to make clear and conspicuous disclosures, it should not be used to disseminate advertisements that require such disclosures...

There is no set formula for a clear and conspicuous disclosure; it depends on the information that must be provided and the nature of the advertisement. Some disclosures are quite short, while others are more detailed. Some ads use only text, while others use graphics, video, or audio, or combinations thereof. Advertisers have the flexibility to be

creative in designing their ads, as long as necessary information is communicated effectively and the overall message conveyed to the consumers is not misleading.

To evaluate whether a particular disclosure is clear and conspicuous, consider: the placement of the disclosure in the advertisement and its proximity to the claim it is qualifying; the prominence of the disclosure; whether the disclosure is unavoidable; the extent to which items in the other parts of the advertisement might distract attention from the disclosure; whether the disclosure needs to be repeated several times in order to be effectively communicated, or because consumers may enter the site at different locations or travel through the site on paths that cause them to miss the disclosure; whether the disclosures in audio messages are presented in an adequate volume and cadence and visual disclosures appear for a sufficient duration; and whether the language of the disclosure is understandable to the intended audience.

If there are indications that a significant proportion of reasonable consumers are not noticing or comprehending a necessary disclosure, the disclosure should be improved.⁴⁰⁹

230. Dr. Golder attempts to establish the sufficiency of Intuit's disclosure language by (i) noting that TV disclosures are not effective ways to communicate some information;⁴¹⁰ (ii) claiming that disclosures are sufficient if they merely communicate the "existence of an eligibility limitation;"⁴¹¹ and (iii) [REDACTED].⁴¹² These arguments are without merit and miss the central issue of this matter entirely.

231. Dr. Golder claims that providing additional details in TV advertising would not be effective because an "ad is short, comes without notice, and consumers cannot control the pace of the information."⁴¹³ This strawman argument attempts to draw conclusions about hypothetical disclosures that are not at issue in this case, and ignores the fact that empirical evidence shows Intuit's advertising led to consumer misperceptions. The relative ease or difficulty of providing information to consumers that would cure the misperception does not

⁴⁰⁹ .Com Disclosures: How to Make Effective Disclosures in Digital Advertising," FTC, March 2013 <https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-staff-revises-online-advertising-disclosureguidelines/130312dotcomdisclosures.pdf> ("FTC Guidelines, 2013"), pp 6-7.

⁴¹⁰ Golder Report, ¶¶120, 123.

⁴¹¹ Golder Report, ¶122.

⁴¹² Golder Report, ¶121.

⁴¹³ Golder Report, ¶120.

negate the fact that such consumers were misled. And while Dr. Golder [REDACTED]
[REDACTED]
[REDACTED],⁴¹⁴

My survey establishes that consumer may have their own understanding of what “simple tax returns” are, but often this understanding does not align with Intuit’s definition of the term. Finally, though Dr. Golder takes the position that consumers made aware of the existence of an eligibility limitation would seek out additional information on Intuit’s website, this argument ignores that consumers may still have reached Intuit’s website under the mistaken impression that they could file for free. What is more, as I have discussed above, hyperlinks are unlikely to be sufficient for presenting eligibility criteria because they require more action, and consumers are even less likely to process such information when it is relegated to a hyperlink.

232. Next, Dr. Golder seems to imply that Intuit’s disclosures comply with FTC guidance, primarily by pointing out that, in relation to criteria laid out in FTC guidance, Intuit’s ads are similar to other advertising in the marketplace.⁴¹⁵ However, evidence of what other companies do or do not do in their advertising is entirely irrelevant to the central question about whether consumers were misled by Intuit’s advertising. My survey directly addresses that central question.

E. Dr. Golder’s Conclusion That Consumers in this Industry Make Involved Purchase Decisions and Do Not Rely Solely on Ads are in Turn Unsupported and Speculative and Fail to Address the Issues in this Matter

233. To support his conclusions that consumers were not deceived, Dr. Golder makes unsupported claims about consumer decisions related to the tax filing process, and argues, in another logical fallacy, that because ads were not the only source of consumer information, the ads were not deceptive. Dr. Golder argues that “reasonable consumers are unlikely to be deceived by viewing Intuit’s Free Ads into believing that TurboTax was free for them when it was not, given the involved information search and buying process that culminates in filing one’s taxes, the inherent skepticism towards free offers, and consumers’ own familiarity with the tax preparation process.”⁴¹⁶ Here again, Dr. Golder relies on assumptions about the process to predict an outcome—that “reasonable” consumers would not form the misimpression that they can file for free using TurboTax—whereas I directly measured that misperception, a finding that contradicts his indirect and speculative analysis.

⁴¹⁴ INTUIT-FTC-PART3-000608560.

⁴¹⁵ Golder Report, ¶¶127–135.

⁴¹⁶ Golder Report, ¶142.

234. Dr. Golder argues, without empirical support, that “reasonable consumers” of tax preparation services are careful and make informed purchase decisions. In another example of a logical fallacy, Dr. Golder claims that a prolonged information search is common for high-involvement products like tax preparation. As evidence, he cites the Hauser Purchase Driver Survey, which finds that respondents who chose a new tax preparation provider or considered changing providers reported using three different sources of information in their research process, with 73.6 percent reporting using two or more sources of information.⁴¹⁷ Dr. Golder’s claim is directly refuted by evidence discussed above that suggests that tax filers experience considerable inertia and are unlikely to switch, even to get the service for which they currently pay for free.⁴¹⁸ Moreover, decades of research in consumer behavior show that consumers are cognitive misers and process as little information as possible in many decision contexts, including high stakes choices, like retirement.

235. Dr. Golder goes on to argue that “it is likely that a substantial number of consumers did not proceed directly from viewing a TurboTax ad to filing their taxes.”⁴¹⁹ His Figure 22

[REDACTED]

I note that this does not preclude the central role of Intuit’s advertising in creating misimpressions—from where do word of mouth sources collect their information? It is entirely possible, even likely, that word-of-mouth sources would base their understanding of whether one can file for free using TurboTax on the contents of Intuit’s marketing.⁴²⁰

236. Dr. Golder also notes that advertising is only one part of the consumer buying process, and that consumers encounter a variety of different advertising strategies along the marketing funnel.⁴²² First of all, Dr. Golder appears to have too narrow a view of “advertising.” Intuit’s advertising is not limited to, for example, ads on TV, but is present along the marketing funnel, including on the TurboTax website. Moreover, regardless of where ads appear in the marketing funnel, there are no legitimate reasons to de-emphasize disclosures in the manner that TurboTax has de-emphasized the disclosures about eligibility restrictions for TurboTax Free Edition. The fact that an ad may be oriented towards top-of-the-funnel brand building is not a reason to deemphasize relevant disclosures. Additionally, although Dr. Golder points

⁴¹⁷ Golder Report, ¶147.

⁴¹⁸ INTUIT-FTC-PART3-000607494–558.

⁴¹⁹ Golder Report, ¶150.

⁴²⁰ Golder Report, Figure 22.

⁴²¹ Ed Keller and Brad Fay, “Word-of-Mouth Advocacy A New Key to Advertising Effectiveness,” *Journal of Advertising Research* 52, no. 4, 2012, pp. 459–464 at 462 (“...20 percent of WOM discussions refer to paid advertising in media (Keller and Fay, 2009). When compared with other WOM discussions about products or services, such “advertising-influenced” conversations, are significantly more likely to involve recommendations to buy or try a brand when compared with other WOM discussions about brands. Moreover, these findings hold across a range or product categories...further analysis has revealed that the role of advertising in WOM is even stronger, with 25 percent of all consumer conversations about brands involving discussion about advertising (Kelley and Fay, 2012).”).

⁴²² Golder Report, ¶¶152–162.

out that [REDACTED]

[REDACTED],⁴²³ and ignoring [REDACTED]

[REDACTED].⁴²⁴ Finally, to the

extent that mobile ads mirror the content used for TV ads (mobile accounts for nearly half of advertising spending from 2020 to 2021), those small disclosures at the end of the ad will be even smaller on the screen, and mobile advertising is directly linked to sales conversions, meaning that such advertising is much further down the marketing funnel.

237. Dr. Golder cites testimony from Cathleen Ryan, VP of Marketing at Intuit, claiming that [REDACTED].⁴²⁵ However, this is directly in contrast with a widely disseminated national TV advertising campaign.

F. Dr. Golder’s And Professor Hauser’s Claim That “Reasonable Consumers” And / Or Consumers At Large Are Inherently Skeptical of Free Product Offers Is Incorrect And Refuted By Evidence, Including Evidence Cited By The Experts Themselves

238. Dr. Golder’s attempts to establish some large number of consumers skeptical of Intuit’s free claims fail. Dr. Golder claims that “reasonable consumers” would likely approach Intuit’s free ads with inherent skepticism and would not expect TurboTax to be free.⁴²⁶ Notably, Dr. Golder portrays the skepticism about free offers as applying to consumers in general, as he claims that “many consumers,”⁴²⁷ a “large portion of consumers,”⁴²⁸ and “reasonable consumers”⁴²⁹ are prone to this skepticism, and refers to “general skepticism”⁴³⁰ and “inherent skepticism”⁴³¹ among consumers. Professor Hauser makes similar statements claiming that “[m]ost consumers have a general expectation that for-profit companies earn revenue and do not provide everything for free, leading consumers to be skeptical of free claims made in advertisements,” also insinuating that these claims apply to consumers in general.⁴³² These claims are incorrect and contradicted by evidence cited by the two experts themselves.

⁴²³ Golder Report, ¶158, Figure 24.

⁴²⁴ Golder Report, footnote 247.

⁴²⁵ Ryan Deposition, 124:20–125:4.

⁴²⁶ Golder Report, ¶226.

⁴²⁷ Golder Report, ¶170.

⁴²⁸ Golder Report, ¶169.

⁴²⁹ Golder Report, ¶167.

⁴³⁰ Golder Report, ¶174.

⁴³¹ Golder Report, ¶¶141, 142, 226.

⁴³² Hauser Report, ¶106.

239. The main flaw in Dr. Golder and Professor Hauser’s arguments is the illogical leap from identifying that *any* skeptical consumers exist to claiming that therefore skepticism is a characteristic of consumers at large or of “reasonable consumers.” Indeed, both experts present a number of statistics, including statistics produced by Intuit, indicating that skepticism about free offers among consumers exists but is limited to a certain subgroup.

240. Specifically, Dr. Golder and Professor Hauser both [REDACTED]
[REDACTED]
[REDACTED] ⁴³³ Professor Hauser also [REDACTED]
[REDACTED]
[REDACTED], ⁴³⁴ and [REDACTED]
[REDACTED]
[REDACTED] ⁴³⁵ [REDACTED]
[REDACTED]
[REDACTED]

Similarly, Dr. Golder cites a survey published by Frontier in 2021, which states that 18% of respondents indicated that they do not trust free trial offers in general and 41% indicated that trust depended on the service provider.⁴³⁶ Setting aside that TurboTax is not advertising a product trial, making the comparison inapt, here again the share of skeptics is at best unclear, and likely represents a minority.

241. [REDACTED] Dr. Golder and Professor Hauser also [REDACTED]
[REDACTED] For example:

[REDACTED]
[REDACTED]
[REDACTED] ⁴³⁷

[REDACTED]
[REDACTED]
[REDACTED] ⁴³⁸

⁴³³ See Golder Report, ¶172. See also, INTUIT-FTC-PART3-000490565 (GX 460), p. 28 (emphasis added).
⁴³⁴ See Hauser Report, ¶106. See also, INTUIT-FTC-PART3-000601645, p. 21.
⁴³⁵ See Hauser Report, ¶106. See also, Intuit, “Re: RE: Phoenix TV Ad Results as of Jan 29,” February 2, 2022, INTUIT-FTC-PART3-000608479.
⁴³⁶ Golder Report, ¶168.
⁴³⁷ INTUIT-FTC-PART3-000490565 (GX 460), p. 28.
⁴³⁸ INTUIT-FTC-PART3-000490565 (GX 460), p. 28.

242. [REDACTED]

[REDACTED]. For example:

[REDACTED] >⁴³⁹

[REDACTED] ⁴⁴⁰

[REDACTED] ⁴⁴¹

[REDACTED] ⁴⁴²

243. [REDACTED] such as:

[REDACTED] ⁴⁴³

[REDACTED] ⁴⁴⁴

[REDACTED] ⁴⁴⁵

[REDACTED] ⁴⁴⁶

244. Indeed, [REDACTED] ⁴⁴⁷

⁴³⁹ INTUIT-FTC-PART3-000490565 (GX 460), p. 28.
⁴⁴⁰ INTUIT-FTC-PART3-000490565 (GX 460), p. 28.
⁴⁴¹ INTUIT-FTC-PART3-000490565 (GX 460), p. 28.
⁴⁴² INTUIT-FTC-PART3-000490565 (GX 460), p. 28.
⁴⁴³ INTUIT-FTC-PART3-000490565 (GX 460), p. 27.
⁴⁴⁴ INTUIT-FTC-PART3-000490565 (GX 460), p. 27.
⁴⁴⁵ INTUIT-FTC-PART3-000490565 (GX 460), p. 27.
⁴⁴⁶ INTUIT-FTC-PART3-000490565 (GX 460), p. 27.
⁴⁴⁷ INTUIT-FTC-PART3-000490565 (GX 460), p. 28.

245. Additionally, in their discussions of alleged general skepticism of free offers among consumers, Dr. Golder and Professor Hauser make statements that, regardless of whether they are true or not, are wholly irrelevant to the case in general and their own claims in particular. For example, Professor Hauser states that [REDACTED] [REDACTED] [REDACTED]”⁴⁴⁸ and that “[m]ost consumers have a general expectation that for-profit companies earn revenue and do not provide everything for free, leading consumers to be skeptical of free claims made in advertisements.”⁴⁴⁹ Dr. Golder echoes Professor Hauser, stating “[c]onsumers understand that for-profit companies need to make money,”⁴⁵⁰ and “reasonable consumers expect companies to monetize their products.”⁴⁵¹ But consumer beliefs about whether companies monetize their products or “do not provide everything for free” do not preclude that consumers believe that companies offer products advertised as free for free.

246. Dr. Golder also argues that consumers “routinely encounter free offers with restrictions” and that their “prior experiences with these free offers provide context for their interpretation and expectations when faced with other free offers.”⁴⁵² However, as described below, the examples Dr. Golder provides differ from the product at issue in this litigation in fundamental ways that render the comparison irrelevant.

247. For example, “BOGO” pricing and “Free with Purchase” examples refer to bundles of products and are thus not applicable to consumers’ perceptions of the advertisement of a standalone product as a free product. In the “Free for a Limited Time” example, a firm offers different prices over time for the *same* product. A consumer might use the product for free during the initial period, but he or she would need to pay to use the product to satisfy that same need once the trial period ends. Intuit’s TurboTax Free Edition product, on the other hand, is advertised as a product that allows the consumer to fulfill a discrete need (filing tax returns for a given year), for which the trial period pricing in Dr. Golder’s example is irrelevant.

248. Dr. Golder similarly mischaracterizes the similarity between his “Free Tier of Service” example and Intuit’s product offerings. In Dr. Golder’s example, a consumer who wants to stream music can use the basic service for free.⁴⁵³ While the consumer experience might be worse compared to that of a paid plan, the firm offers a product that allows the consumer to satisfy the need (streaming music) at zero cost. Intuit does not offer a similar “basic service” product that any consumer could use to fulfill their tax obligations: to satisfy this need, some

⁴⁴⁸ Hauser Report, ¶97.

⁴⁴⁹ Hauser Report, ¶106.

⁴⁵⁰ Golder Report, ¶166.

⁴⁵¹ Golder Report, ¶167.

⁴⁵² Golder Report, ¶166.

⁴⁵³ Golder Report, ¶165.

consumers would need to upgrade even if they were willing to accept the minimum functionality required to file the specific tax return that applies to their situation. The free product offering in this music streaming example is open to all consumers, independently of their personal circumstances, contrary to Intuit's TurboTax Free Edition.

G. Dr. Golder's Claim that "The TurboTax Website Provides Information in a Clear and Timely Manner" Ignores That Misperceptions May Drive Traffic to The Website In The First Place and That "Simple Returns" Language Is Not Well Understood

249. Dr. Golder's claim that the TurboTax website provides clear and timely disclosures is based on unsupported assumptions and is contradicted by the evidence.⁴⁵⁴ To support his assertion that the website is adequate to educate consumers, Dr. Golder presents an analysis of four webpages on the TurboTax website: the home page; a "simple returns" pop up describing qualification criteria; the "Products & Pricing" page; and the "Free Edition Landing Page."⁴⁵⁵ He then claims that each page "consistently includes disclosures reflecting the eligibility requirements of Free Edition."⁴⁵⁶

250. Setting aside that the phrase "provides information in a clear and timely manner" appears to endorse the view that visitors to the website have a misimpression that needs to be accurately and quickly dispelled, Dr. Golder's analysis fails to find support for the idea that the disclosures presented on the website are sufficient to correct any misimpressions. First, regardless of the effectiveness of disclosures on the website, the TurboTax "free" messaging still drives people to the website with the misperception that they can file for free. Second, the website landing page only makes information about what "simple returns" actually are available behind a hyperlink.⁴⁵⁷ Where the information appears on a webpage itself, it appears in small font at the bottom of the page, requiring consumers to scroll to find the information.⁴⁵⁸ Third, the disclosures themselves often repeat the "simple returns" language that, as I have discussed elsewhere, fails to convey to consumers that they may not qualify in a manner that is consistent with TurboTax's qualification criteria.⁴⁵⁹ Fourth, Dr. Golder's discussion of these four web pages acknowledges that TurboTax has made changes to the ways that it discloses the relevant qualification information to consumers.⁴⁶⁰ It is not clear from his analysis why such changes were necessary, or whether the prior iterations of web

⁴⁵⁴ TurboTax ads, including video ads and the website, include the disclaimer "simple U.S. returns only" or "simple tax returns only." As an initial matter, based on video ads alone, consumers would not have any additional information to determine whether they have a simple return or not, and obtaining additional information would require the consumer to visit the TurboTax website. As I have noted elsewhere, consumers are unlikely to seek out additional information about price if they believe they have that information already.

⁴⁵⁵ Golder Report, ¶177.

⁴⁵⁶ Golder Report, ¶179.

⁴⁵⁷ Golder Report, ¶179.

⁴⁵⁸ Golder Report, ¶187, Figure 27.

⁴⁵⁹ See Section V.D.1.

⁴⁶⁰ See, e.g., Golder Report, ¶192.

I. Whether or Not the Manner in Which Intuit Markets Its Free Edition Benefits Consumers As a Whole Is Irrelevant

254. Finally, Dr. Golder makes a number of arguments that the manner in which Intuit markets TurboTax for free benefits consumers.⁴⁷⁰ However, some potential salutary side effects of Intuit's advertising are irrelevant to the question about whether that advertising was deceptive for a significant portion of consumers. Dr. Golder claims that Intuit's marketing of free products increases consumer awareness of free options and leads to competitors offering similar products, thus likely increasing the number of consumers filing their taxes for free.⁴⁷¹ Relatedly, Dr. Golder claims that reducing or eliminating TurboTax Free Edition advertising is likely to have the perverse effect of decreasing free tax filing.⁴⁷² On this basis, Dr. Golder argues that Intuit's marketing "likely increased demand for, and acceptance of, online tax preparation products," and thus benefits consumers.⁴⁷³ Dr. Golder offers no analysis to support this speculative claim. Further, even if Dr. Golder's claim were true, his argument ignores the fact that millions of consumers who visited the TurboTax website or started filing with Free Edition, under the impression that they could use TurboTax for free, were unable to complete filing their taxes for free. The question at issue is not whether advertising free filing increases the number of free filings, but whether the ads have misled consumers who are not able to file for free.

255. Dr. Golder seems to argue that some level of deception may be acceptable if it increases the number of consumers who use TurboTax to file for free. For example, Dr. Golder reports

[REDACTED] in an attempt to show that millions of Americans are aware of the possibility of filing for free using TurboTax.⁴⁷⁴ But the number of individuals who file for free is irrelevant to the question of whether and to what extent Intuit misled consumers who were *not* eligible to file for free about their ability to file for free using TurboTax. Dr. Golder also notes that

[REDACTED]⁴⁷⁵ This, too, is irrelevant to the question of whether Intuit misled consumers, and could be interpreted as a measure of the relative scale and effectiveness of what are alleged to be Intuit's misleading marketing efforts. The fact that some consumers

⁴⁷⁰ Dr. Golder also argues that if Intuit were not allowed to advertise in the manner it currently is, it would be disadvantaged compared to its competitors. Golder Report, ¶233. However, Dr. Golder acknowledges that Intuit led the charge on free advertising claims (¶238), thus creating the current advertising environment itself.

⁴⁷¹ Golder Report, ¶235.

⁴⁷² Golder Report, ¶240.

⁴⁷³ Golder Report, ¶239.

⁴⁷⁴ Golder Report, ¶236.

⁴⁷⁵ Golder Report, ¶¶186, 187.

learn about the possibility of filing for free is not at issue; had those consumers not been misled by Intuit's advertisements, they may have behaved differently in preparing their taxes.

VII. The Opinions in Ms. Kirk Fair's Report Are Flawed and Change None of the Opinions in My Opening Report

256. In her report, Ms. Rebecca Kirk Fair presented the results from the Kirk Fair Disclosure Survey, conducted in 2020 in connection with this matter.⁴⁷⁶ The survey had a test / control design with three groups, where different groups were shown different stimuli, specifically different content on the "hard-stop" upgrade screens. In the survey, Ms. Kirk Fair presented respondents in all three groups with an online banner advertisement by Intuit (containing free claims), with screenshots from a few pages on the TurboTax website, and an instruction that respondents should assume they started their returns in the Free Edition of TurboTax.⁴⁷⁷ Respondents were then presented with the upgrade screen (which had three versions, one for each group), and questions regarding the respondents' considerations and selection of different options for preparing their taxes.⁴⁷⁸ Ms. Kirk Fair uses the results from the Kirk Fair Disclosure Survey to opine on the extent to which providing consumers with more or less information about alternative methods of filing their taxes affects consumers' tax preparation decisions.⁴⁷⁹

257. I note that Ms. Kirk Fair does not opine on my TurboTax Perception Survey as part of her report. Nor does she respond to any of the opinions presented in my Opening Report. In fact, her survey was not designed to assess deception resulting from TurboTax marketing, the main issue addressed by my survey and my report. Thus, none of my conclusions from my Opening Report are affected by the content presented in Ms. Kirk Fair's report.

258. In this section, I address three aspects of the Kirk Fair Report: (i) The Kirk Fair Disclosure Survey suffers from several methodological and design flaws; (ii) these flaws undermine numerous of Ms. Kirk Fair's conclusions, including her conclusion that the results of the Kirk Fair Disclosure Survey contradict my "implication that consumers who are not eligible for TurboTax Free Edition upgrade to TurboTax Paid products because they don't have a choice;"⁴⁸⁰ and (iii) Ms. Kirk Fair's responses to the criticisms I previously levied against her survey (in my Second Declaration) do not have merit and do not rebut my criticisms.

⁴⁷⁶ Kirk Fair Report, ¶7.

⁴⁷⁷ Kirk Fair Report, ¶18; Appendix D.1, at Q2–Q5.

⁴⁷⁸ Kirk Fair Report, ¶20.

⁴⁷⁹ Kirk Fair Report, ¶7.

⁴⁸⁰ Kirk Fair Report, ¶17.

A. The Kirk Fair Disclosure Survey Suffers from Several Methodological and Design Flaws.

259. The Kirk Fair Disclosure Survey suffers from several methodological and design flaws, which are relevant for evaluating her claims and conclusions. These flaws render the survey unable to provide any evidence regarding the behavior of potentially misled consumers (*i.e.* those with the misperception that they can file their taxes for free with TurboTax, even though they are not eligible to do so under TurboTax’s qualification criteria), about which Ms. Kirk Fair opines. Any inference Ms. Kirk Fair makes about these potentially misled consumers is baseless and cannot be supported by the results of the Kirk Fair Disclosure Survey.

260. First, Ms. Kirk Fair’s survey sample does not consist of those who are not eligible to file for free using TurboTax online software; instead it includes both respondents who are and are not eligible to file for free using TurboTax online software. The target population of the Kirk Fair Disclosure Survey is “U.S. taxpayers who had filed their taxes using an online tax preparation software product.”⁴⁸¹ Because Ms. Kirk Fair did not ask any questions to determine whether the respondents in her survey were or were not qualified to file for free using TurboTax online software, it is impossible to evaluate the results of her survey separately for the group of potentially misled consumers.

261. Second, the Kirk Fair Disclosure Survey provides no insight into whether respondents believe they could file their taxes for free using TurboTax online software. Her sample almost certainly includes both respondents who believe they can file their taxes for free using TurboTax online software and those who do not. To the extent respondents do not believe they can file for free using TurboTax online software, their actions in response to the stimuli in the survey are irrelevant for assessing how those respondents who have misimpressions about whether or not they can file for free using TurboTax online software as a result of Intuit marketing would behave in response to the same stimuli.

262. Third, Ms. Kirk Fair asks respondents to entertain a hypothetical scenario when she tells them: “[i]magine you choose to use TurboTax’s ‘Free Edition’ product to begin preparing your tax returns,”⁴⁸² This instruction has two major problems:

- There are various categories of respondents for which Ms. Kirk Fair’s scenario is unrealistic. For example, respondents who had prior experiences with using TurboTax and were previously directed to a paid product, and respondents who are able to use TurboTax for free were asked to answer questions based

⁴⁸¹ Kirk Fair Report, Appendix C, 8.

⁴⁸² Kirk-Fair Report, Appendix C, ¶28.

on a situation they would not be in. It is not clear how successfully these respondents would be able to answer from the perspective of the hypothetical scenario they were asked to adopt.

- Even for those respondents who were able to accept the hypothetical situation Ms. Kirk Fair imposes, the instructions say nothing about respondents' beliefs during the imaginary process. Therefore, a respondent in this survey may imagine *starting* with Free Edition because he or she was instructed to, but at the same time *does not believe* he or she can file for free using TurboTax. Survey responses from such a person are completely irrelevant for assessing the thoughts and actions of the potentially misled consumers who start using TurboTax believing they can file for free.

263. Fourth, the Ms. Kirk Fair's Disclosure Survey does not replicate the experience of TurboTax users, and particularly does not replicate the time and effort (or "sunk costs" as I discussed in Section VII.C), that taxpayers may experience when using TurboTax to file their taxes. Once the main questionnaire in the Kirk Fair Disclosure Survey begins, there are only five screens before the respondents reach the upgrade screen and are asked to answer questions.⁴⁸³ Four of them show an image for at least 10-seconds,⁴⁸⁴ so a respondent could proceed to answering survey questions as quickly as about 40 seconds after they begin the main questionnaire. Respondents are not asked to enter any personal or income information in order to make choices about how to proceed with their tax filing. In contrast, a real TurboTax user would have to invest substantially more time and enter more information before reaching an upgrade screen, making it more likely they would continue to upgrade to a TurboTax paid product as a result of those sunk costs.

264. Finally, the Kirk Fair Disclosure Survey does not replicate any of the switching costs actual TurboTax users would encounter if they decided not to continue to upgrade to a TurboTax paid product after encountering the upgrade screen. Respondents in the Kirk Fair Disclosure Survey do not need to start over with the tax filing process at another tax service provider if they choose not to upgrade, and hence, there is no extra cost for choosing an option other than TurboTax rather than upgrading. In contrast, a real TurboTax user encountering the upgrade screen would need to evaluate whether or not switching is worth the extra cost (time, effort, money). As discussed in Section VI.B, switching costs make it

⁴⁸³ Kirk Fair Report, Appendix D.2 (pages are unnumbered, but the relevant screens appear at PDF pages 156–59, 165–66 of 222 (representative/current screen group), 173–76, 182–83 of 222 (enhanced information group), and 190–93, 199–200 of 222 (reduced information group) (omitted pages in each set are larger versions of pages 159, 176, and 193, spread over multiple pages)).

⁴⁸⁴ Kirk Fair Report, ¶ 12; Appendix D.1, at Q2–Q5.

more likely that consumers would continue to use TurboTax paid products, even in the face of feeling that they had been misled by Intuit's marketing.

265. To summarize, the results and conclusions from the Kirk Fair Disclosure Survey are irrelevant and uninformative about how or why the relevant group of consumers in this case (*i.e.*, those who are misled by Intuit marketing to think they can file their taxes for free using TurboTax online software) would behave when they came across TurboTax upgrade screens.

B. The Results and Conclusions from Ms. Kirk Fair's Disclosure Survey Are Irrelevant and Uninformative

266. Ms. Kirk Fair claims that the results of her survey contradict my "implication that consumers who are not eligible for TurboTax Free Edition upgrade to TurboTax Paid products because they don't have a choice."⁴⁸⁵ Ms. Kirk Fair does not elaborate any further on her claim, or provide any justification as to how the findings of her survey contradict with the results of my TurboTax Perception Survey. Ms. Kirk Fair's claim is not correct.

267. To begin with, Ms. Kirk Fair chooses to rebut the position that consumers do not have a choice but to upgrade when faced with an upgrade screen. That is not my position and a refutation of that is not a refutation of my conclusions as she claims it is. I do not claim that consumers had no choice or were forced to upgrade, but rather that there were psychological forces at play that could induce them to upgrade to a paid product even if they would not have considered that same product at the outset of their interaction with the TurboTax website.

268. Ms. Kirk Fair argues that her survey results instead reflect a world where respondents "appear to understand that they have a choice to upgrade and pay for that upgrade, continue pursuing the free option, or to pursue other tax filing solutions, and they are willing to do research to understand their best options."⁴⁸⁶ However, the existence of a subset of respondents like those Ms. Kirk Fair describes is irrelevant to the question of whether or not a significant number of consumers continue to upgrade to TurboTax paid products because they feel they do not have a good alternative given the investment they made in the TurboTax website, much less whether they have the misimpression that they can file their taxes for free using TurboTax online software.

269. Further, whether or not consumers are willing to switch tax filing providers is related to status quo bias, as well as consumers' switching costs and how each individual's switching costs relate to their perceived benefit from switching. As discussed in Section VI.B, there is

⁴⁸⁵ Kirk Fair Report, ¶17.

⁴⁸⁶ Kirk Fair Report, ¶17.

ample evidence, including from marketing and psychological literature, from Intuit experts' own surveys, and from Intuit's documents, indicating that these factors and the resulting lock-in may be substantial. For example, setting aside its methodological and design flaws, the Kirk Fair Disclosure Survey also presents results consistent with substantial lock-in. Even though respondents are able to spend as little as about a minute completing Ms. Kirk Fair's main questionnaire and even though they do not encounter any real costs from indicating that they would switch providers after encountering the upgrade screen, Ms. Kirk Fair finds that 70% of the respondents (who were shown the actual TurboTax upgrade screen) would stay with a TurboTax product, while only 21% choose a non-TurboTax method (the remaining 8% are unsure).⁴⁸⁷

270. Additionally, I note that several of Ms. Kirk Fair's conclusions about how consumers respond when encountering an upgrade screen are also flawed. First, the fact that a small minority of consumers switch away from TurboTax after viewing the upgrade screen does not logically imply that the upgrade screen did not induce many or all of the remaining consumers to upgrade to a paid TurboTax product. This observation that millions of consumers leave TurboTax upon reaching the upgrade screen is strong evidence that millions of people are only engaging with the TurboTax website because they falsely believe that they can file for free and once they are dissuaded of that false belief, they no longer wish to engage with TurboTax. The further observation that millions of consumers upgrade upon reaching the upgrade screen is evidence that the upgrade screen in fact causes consumers to upgrade. In other words, any behavior in the face of the upgrade screen in the Kirk Fair Disclosure Survey is consistent with the notion that either: 1) many consumers who believe they could file for free decided to leave TurboTax; or 2) many consumers who indeed expected to file for free upgraded despite the fact that they would not have planned to use a paid TurboTax product if they had known from the start that they would have to pay to use TurboTax. Second, a statistically insignificant difference between groups in consumer studies like those Ms. Kirk Fair presents are notoriously difficult to interpret precisely because they can arise for a variety of reasons, including because the changes between versions of the study were not sufficiently noticed by respondents or were not sufficiently persuasive to respondents to create a difference. In this case, it is likely that the description of the IRS Free File Program in the Kirk Fair Disclosure Survey was not appealing to respondents and therefore its inclusion in some versions of the study did not sway respondents.

271. Ms. Kirk Fair states that “[i]f consumers had been deceived by Intuit's ads, as the FTC alleges, [she] would expect to see substantial, statistically significant differences in respondent choices upon learning about an additional free option at the point of the hard stop

⁴⁸⁷ Kirk Fair Report, Exhibit 2.A.

screen,” and that she did not observe such a reduction.⁴⁸⁸ However, these conclusions do not in fact follow from the evidence she cites. The fact that consumers upgrade when faced with a hard stop at similar rates whether or not they are told about the IRS Free File Program does not mean that they did not arrive at the site expecting to file for free and still desiring to file for free when they encounter the upgrade screen. Rather, it is likely that there is no difference in upgrade rates because the free alternative offered requires them to stop what they are doing and start over at irs.gov. Although filing for free is attractive, this option may not be because: (1) it requires them to start over; and (2) they may believe that going to irs.gov would lead to an experience similar to filing with the paper forms widely associated with filing directly with the IRS. In other words, Ms. Kirk Fair’s conclusion is predicated on the idea that the IRS Free File Program is in other ways perceived to be identical to the TurboTax Free Edition respondents were expecting to use. It seems very likely that if the upgrade screen offered an opportunity to continue with Free Edition and not upgrade without giving up the accuracy of the tax return, that most, if not all, customers would choose to do that.

272. Ms. Kirk Fair claims that she would expect to but did not observe the same reduction “in selection of TurboTax Paid products if consumers choose to upgrade because they feel locked in to the TurboTax platform and not because they prefer TurboTax.”⁴⁸⁹ Again, the fact that respondents prefer continuing with TurboTax over beginning their tax preparation again and filing with the IRS Free File Program does not indicate that they would have a preference for using TurboTax if they knew, before arriving at the website and starting to fill out their tax information, that they would have to pay to file with TurboTax. Whether respondents would still prefer to upgrade to TurboTax paid products if they knew at the outset of starting with TurboTax Free Edition that they would have to pay to file their taxes could only be inferred from Ms. Kirk Fair’s survey if it had indeed included a group of respondents who were informed of the fact that they would have to pay to file their taxes at the outset of beginning the process with TurboTax. Ms. Kirk Fair would have to find that the rate at which that group of respondents are willing to use a paid TurboTax product is not different than the other groups in her survey. This was not part of her survey design, and so no conclusion can be drawn about how respondents beginning to file their taxes with the expectation of filing for free would affect customers’ behavior once on the website.

273. Ms. Kirk Fair claims that her survey “provides evidence that finding the cheapest tax solution is not the number one priority for many consumers.”⁴⁹⁰ However, Ms. Kirk Fair’s analysis conflates caring *only* about whether a tax provider is free with the idea that the fact that it is free matters to one’s choice. The fact that consumers do not prefer any free option

⁴⁸⁸ Kirk Fair Report, ¶16.

⁴⁸⁹ Kirk Fair Report, ¶28.

⁴⁹⁰ Kirk Fair Report, ¶28.

over other options that may not be free but have other attributes does not in any way imply that they would not prefer the option they selected to be free.

274. Ms. Kirk Fair also misstates the conclusion one can draw from the comparison of the different upgrade screens she tested in her survey. She claims to be evaluating whether “TurboTax upgrade screens induce customers to upgrade to a Paid TurboTax product” by comparing upgrade rates across different versions of the upgrade screen.⁴⁹¹ The logic of experimental design would contradict this statement because comparisons across versions of the upgrade screen can only be used to evaluate whether the language she chose to vary across upgrade screens changes the rate of customer upgrading. These comparisons cannot and do not allow her to evaluate whether the upgrade screens cause customers to upgrade, as she claims she can. To draw conclusions about the impact of the upgrade screen, she would have had to include a version of her survey in which respondents did not encounter an upgrade screen. She did not. It goes without saying that the upgrade screens induced upgrading because customers who chose to use TurboTax Free Edition undoubtedly would have continued using Free Edition had they not encountered an upgrade screen. Therefore, her conclusions that upgrade screens do not cause consumers to upgrade are not supported by her survey data. All her survey data allow Ms. Kirk Fair to conclude is that the changes she chose to make to the upgrade screen across respondent groups did not change its effectiveness in inducing customers to upgrade to a paid product.

C. Ms. Kirk Fair’s Responses to Criticisms of Her Disclosure Survey from My Second Declaration

275. Ms. Kirk Fair responds to criticisms of her survey that I had previously included in my Second Declaration. (I note that the Kirk Fair Disclosure Survey and its results appear to be unchanged from the time when I provided these criticisms in my Second Declaration.) Generally, Ms. Kirk Fair claims that the critiques I make of her survey misconstrue her survey data.⁴⁹² However, this is not correct.

276. In my Second Declaration, I opined: “The fact that consumers do not select free options when presented with them, after presumably having invested some time and effort in entering their tax information, shows that consumers would not switch even when presented with a cheaper option that requires them to ignore their sunk time and effort and start over.”⁴⁹³ Ms. Kirk Fair argues that I have not conducted my own analysis of her survey data and that an analysis of both the closed- and open-ended responses in the Kirk Fair Disclosure Survey

⁴⁹¹ Kirk Fair Report, ¶24.

⁴⁹² Kirk Fair Report, ¶38.

⁴⁹³ Second Novemsky Declaration.

contradict this claim.⁴⁹⁴ In particular, she notes that no open-ended responses indicated sunk costs as a reason for not switching tax providers at the upgrade screen, and that only 11% of respondents provided answers consistent with feeling like they did not have a choice.⁴⁹⁵

277. Ms. Kirk Fair misunderstands my criticism. I do not claim that consumers had no choice or were forced to upgrade, but rather that there were psychological forces at play that could induce them to upgrade even if they would not have purchased the product to which they upgraded if they had considered that same product at the outset of their interaction with the TurboTax website. The fact that Ms. Kirk Fair cites that respondents' open-ended answers were not coded consistently with respondents feeling like they "did not have a choice" is not evidence that they did not still feel a desire to honor their sunk costs and continue with TurboTax, even though they would not have if they had not already started using that website. Moreover, the fact that psychologically naive coders did not spontaneously generate a code for sunk costs is merely evidence that the coders were not familiar with the idea and/or that consumers do not reliably report that sunk costs drive their behavior, either because this can happen outside of consumers' awareness or because they do not consider it a good reason and are therefore reluctant to report it as underlying their behavior. Similarly, I note that the likelihood of a respondent volunteering sunk costs as a reason for not switching tax providers seems unlikely.⁴⁹⁶ Even further, there are relatively low sunk costs for respondents in Ms. Kirk Fair's Disclosure Survey compared with the sunk costs they would experience in the marketplace, so any measure of the extent to which consumers considered sunk costs in making their choices would be an underestimate at best. Thus, the results of the Kirk Fair Disclosure Survey continue to be biased by the fact that respondents in her survey do not encounter the hard stop after investing the time and effort to enter their information as would occur in the real world.

278. In my Second Declaration, I made the observation that "61% of consumers [in the Kirk Fair Disclosure Survey] did not indicate that they had agency to identify the right tax product for their situation and preferences."⁴⁹⁷ Ms. Kirk Fair claims this observation "presents no discernable argument about respondents' tax solution choices" and is speculative.⁴⁹⁸ This is a puzzling response, as Ms. Kirk Fair is simultaneously stating that 39% is the share of respondents "that independent coders found explicitly described having the agency to identify appropriate tax preparation products for their particular tax situation and preferences."⁴⁹⁹ Given this finding, it is not speculative to arithmetically determine that 61% of respondents in

⁴⁹⁴ Kirk Fair Report, ¶39.

⁴⁹⁵ Kirk Fair Report, ¶39.

⁴⁹⁶ Hal R. Arkes and Catherin Blumer, "The Psychology of Sunk Cost," *Organizational Behavior and Human Decision Processes* 35, 1985, 124–140 ("Evidence that the psychological justification[of sunk cost effects,] for [deciding not to switch tax filing providers] is predicated on the desire not to appear wasteful is presented.").

⁴⁹⁷ Second Novemsky Declaration, ¶36.

⁴⁹⁸ Kirk Fair Report, ¶40.

⁴⁹⁹ Kirk Fair Report, fn. 38.

her survey did not indicate they had the same agency.⁵⁰⁰ This suggests that as many as 61% of respondents in Ms. Kirk Fair’s survey may experience feelings of being locked-in to, or in other words feel a lack of agency to switch from, their tax service provider.

279. In my Second Declaration, I noted a result from the Kirk Fair Report which revealed that “a majority of respondents (53%) say the reason they chose to upgrade to a paid TurboTax product is because of their ‘tax situation,’” and that this provides evidence that consumers’ attributions for why they upgraded were in line with the reason suggested by the upgrade screen language—it explicitly pointed to their “tax situation” as the reason requiring them to upgrade.”⁵⁰¹ Ms. Kirk Fair states that TurboTax also had this phrase in its actual upgrade screens and her stimuli are consistent with TurboTax’s communications.⁵⁰² However, this is irrelevant as to whether the “tax situation” language has an impact on consumers thinking their tax situation is the reason for the necessity of an upgrade. The fact that the same “tax situation” phrase exists in real-world contexts only means that one should expect a similar impact on customers’ beliefs in the real world also. To the extent this effect is present in those who began filing their taxes with TurboTax online software thinking that it would be free for them, it would make consumers think it is their fault, not TurboTax’s fault that they have to upgrade, and would make consumers less likely to complain about Intuit’s practices.

280. Finally, Ms. Kirk Fair points out that only 2 respondents use the exact phrase “tax situation” in their open-ended responses and most respondents point to a specific aspect of their tax situation as causing the upgrade.⁵⁰³ This is a meaningless distinction. The respondents do not have to use the exact phrase from the upgrade screen to provide evidence that their reasoning is consistent with the reasoning suggested by the upgrade screen prompt. If the upgrade screen explicitly implicates a consumer’s “tax situation” as driving the need for the upgrade, consumers mentioning a specific aspect of their tax situation when explaining why they chose to upgrade is consistent with my observation that the upgrade screen language influenced how consumers think about the cause of their need to upgrade and does not refute it in any way.

VIII. Mr. Deal’s Analyses and Conclusions are Deeply Flawed, and His Critiques of My Opening Report Are Unsupported and Defy Logic

281. Mr. Deal uses a set of incorrect assumptions in his effort to establish that consumers were unlikely to be misled by Intuit’s “free” marketing and to undermine the opinions

⁵⁰⁰ 61% = 100 – 39%.

⁵⁰¹ Second Novemsky Declaration, ¶37.

⁵⁰² Kirk Fair Report, ¶41.

⁵⁰³ Kirk Fair Report, ¶41.

expressed in my Opening Report. Mr. Deal conducts analyses where he misunderstands what deception means, makes extraordinary leaps that defy logic, imposes unshared assumptions (such as deception only arises if someone pays money), and makes numerous other conceptual mistakes in attempts to bound the number of consumers who could have been deceived by TurboTax marketing. He does so by relying on faulty assumptions about consumer behavior to preclude millions of consumers from the set of consumers who, he asserts, could have been potentially deceived, and by lodging unsupported and irrelevant criticisms of various aspects of my Perception Survey and my related opinions. I address each in turn.

A. Mr. Deal Relies on Faulty Assumptions When He Attempts to Preclude Millions of Consumers From Being Likely To Be Misled by Intuit’s “Free” Advertising

282. Mr. Deal, through a set of faulty and unsupported assumptions, attempts to reduce the universe of consumers who may have been deceived by Intuit’s marketing, concluding that only [REDACTED] consumers could conceivably have been deceived by Intuit.⁵⁰⁴ However, none of Mr. Deal’s assumptions relied upon to reach this conclusion are supported by the evidence.

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 an account, arriving at a pool of only [REDACTED] TurboTax customers.⁵⁰⁵ 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.

284. Mr. Deal asserts that the [REDACTED] customers who “Explored TurboTax and Pursued other Options” (logged in but did not file with TurboTax) could not have been deceived.⁵⁰⁶ Mr. Deal assumes that these [REDACTED] consumers who logged into TurboTax but ultimately did not file with TurboTax could not have been deceived by TurboTax marketing. This is simply flawed logic. While some of them may have simply logged in to get their information from last year or for other reasons, most if not all of them may have logged in with the intention to file with TurboTax this year. It may be that the only reason they did not ultimately file is because they arrived with the false notion that they could file for free, based on TurboTax advertisements, and switched away from TurboTax either before or after starting their return because they realized that they could not actually file for free with TurboTax. So not only could all [REDACTED] of these consumers have been deceived, the fact that they came to the website, and the fact that most of them likely spent some time

⁵⁰⁴ Deal Report, ¶153.

⁵⁰⁵ Deal Report, ¶98.

⁵⁰⁶ Deal Report, ¶101.

entering their current tax information, suggests that they may well have been deceived precisely because they entered information and then abandoned their return. This is exactly the pattern I would expect from a consumer who is not eligible for Free Edition but arrived under a false impression created by TurboTax advertising that they were eligible for Free Edition. When they discover they are not, they may overcome any sunk costs accrued and leave the website. The fact that Mr. Deal not only fails to recognize that all of them could have been deceived but also assumes that *none* of them were deceived is beyond comprehension and clearly leads to unreliable conclusions.

285. Next, Mr. Deal claims that [REDACTED] of the remaining customers who paid to file and “expressed a rational economic choice by seeking to maximize tax refund” could not have been deceived by TurboTax.⁵⁰⁷ Mr. Deal identifies [REDACTED] consumers who could have filed with Free Edition were it not for deductions or credits they claimed that were not covered in Free Edition. He claims that their choice to upgrade to a paid product is not the result of deception, but rather of a rational choice to save money.⁵⁰⁸ This is an extraordinary and flawed analysis because it precludes the idea that they were both deceived and making a rational choice to save money and because of how it construes what it means to a consumer when a TurboTax advertisement communicates to them that they can file for free. A consumer who hears “Free, Free, Free” does not hear that they can file for free but must increase their tax liability by, for example, [REDACTED] the required tax liability, but rather they hear and believe that they can file for free and only pay the taxes they are obligated to pay by law. The fact that they cannot file in a way that allows them to pay only the taxes required by law with Free Edition means that they were deceived by the original message. No consumer would think that paying [REDACTED] dollars in taxes with TurboTax Free Edition is getting a “free” service. As a result, these consumers should not be excluded from a population of those who were potentially deceived by TurboTax marketing.

286. Additionally, Mr. Deal argues that [REDACTED] customers who paid to file and “revealed [a] preference for paid add-on features” were not deceived.⁵⁰⁹ Mr. Deal claims that these [REDACTED] consumers who paid for add-on products could not have been deceived, and to suppose they might have been deceived in “incorrect”.⁵¹⁰ In fact, Mr Deal’s analysis is incorrect and does not reflect the nature of preferences that consumers possess. A consumer who learns that their initial impression that they could file for free is indeed false and that they must pay to file with TurboTax was clearly deceived. The fact that the customer decides to pay an additional fee for an additional service (such as live support) could reflect (i) a strong preference for having help, or (ii) a reduced sensitivity to exactly how much they are

⁵⁰⁷ Deal Report, ¶112–115.

⁵⁰⁸ Deal Report, ¶112–115.

⁵⁰⁹ Deal Report, ¶118, Figure 14.

⁵¹⁰ Deal Report, ¶116–124.

paying TurboTax once they realize that have to pay something to file.⁵¹¹ In any case, it is very easy to imagine that the consumer who pays for the add-on is still a consumer who would strongly prefer not to have to pay for the base filing service and was in fact deceived into thinking they would not have to pay to file with TurboTax. Mr. Deal's assumption in this case, that anyone who was deceived could not possibly opt to pay for add-on services, defies logic and ignores the structure and psychology of consumer preferences.

287. Mr. Deal next asserts that [REDACTED] customers who paid to file in the past "demonstrated awareness" of TurboTax paid products, and therefore could not have been deceived.⁵¹² Once again, his logic is deeply flawed and his analysis unreliable. None of the four subgroups he identifies as part of this total can correctly be presumed to not have been deceived, as Mr. Deal does indeed presume. The first group is those who paid to file with TurboTax in the past.⁵¹³ My TurboTax Perception Survey shows very directly that a substantial number of consumers who paid to file with TurboTax do have the misimpression that they could file for free with TurboTax in the current tax year based on TurboTax advertising and the TurboTax website. Consumers may be under this misimpression because their tax situation changed from prior years, they correctly believe that the criteria for filing for free with TurboTax can vary from year to year, or simply that TurboTax would not be repeating "Free, Free, Free" if their product was not currently free for them. The second and third groups Mr. Deal identifies as part of this total to be excluded are consumers who saw an upgrade screen in a prior year or started in a paid product in a prior year. Similar to the first group discussed in this paragraph, these consumers could have arrived at the TurboTax website this year with the false impression that they could file for free based on TurboTax advertising for all the same reasons already discussed. The fourth and final group contributing to Mr. Deal's total of [REDACTED] consumers to exclude is consumers who started with a paid product or were recommended a paid product in the current tax year. This group could also have arrived at the TurboTax website with the misimpression that they can file for free with TurboTax based on TurboTax advertising. Upon arriving, they could have encountered information indicating that their impression about their ability to file for free was indeed false. Mr. Deal's assumptions that not only one, but all four of these groups could not

⁵¹¹ See, e.g., Ravi Dhar et al., "The Shopping Momentum Effect," *Journal of Marketing Research* 44, no. 3, 2007, pp. 370–378 at 370 ("Shopping momentum arises from the idea that shopping has an inertial quality, that there is a mental hurdle in the shift from browsing to shopping, which makes further purchases more likely when it is crossed. Commercial practice appears to support the existence of a shopping momentum effect. Consider the efforts of retailers that use loss leaders to get people into their stores (Mulhern and Padgett 1995) or the heroic efforts by both electronic and paper catalogers to encourage a first purchase. Shopping momentum contrasts with a strictly rational perspective in which the decision to purchase any product is based on its associated costs and benefits."). See also, Richard H. Thaler, "Mental Accounting Matters," *Journal of Behavioral Decision Making* 12, 1999, pp. 183–206 at 185 ("Both the gain and loss functions display diminishing sensitivity. That is, the gain function is concave and the loss function is convex. This feature reflects the basic psychophysical principle (the Weber-Fechner law) that the difference between \$10 and \$20 seems bigger than the difference between \$1000 and \$1010, irrespective of the sign").

⁵¹² Deal Report, ¶128.

⁵¹³ Deal Report, ¶131.

possibly have been deceived by TurboTax into believing that they can file their taxes for free is evidence of a flawed and unreliable analysis.⁵¹⁴

288. In sum, Mr. Deal argues that from the pool of [REDACTED] TurboTax consumers, defined as those who logged into their existing accounts or created a new one during tax year 2021, the majority should be ruled out from potentially forming a misimpression. Out of the [REDACTED] TurboTax consumers in tax year 2021, Mr. Deal claims that only [REDACTED] customers ([REDACTED] percent of [REDACTED]) “may have the conditions consistent with the possibility of being deceived.”⁵¹⁵ Mr. Deal’s analysis requires extraordinary leaps and assumptions, and repeats numerous conceptual mistakes I have refuted elsewhere in this report; namely, the inappropriate use of highly aggregated, indirect evidence to make inferences and assumptions about the preferences and impressions of a specific entire group of tax filers.

289. Mr. Deal next proceeds with his analysis of the remaining [REDACTED] ([REDACTED] percent of [REDACTED]) customers, who he claims have met his erroneous conditions for possibly forming the wrong impression about their eligibility to file for free using TurboTax. He applies the same flawed logic as in the examples above to further reduce this group.⁵¹⁶ Here again, Mr. Deal reaches erroneous conclusions based on similar flawed logic to what I have described above.

B. Mr. Deal’s Criticism of My Opening Report And TurboTax Perception Survey Are Unsupported and Illogical

290. Mr. Deal engages in flawed logic in an attempt to undermine my Opening Report, for example by attempting to establish that (i) my survey sample was not representative, (ii) my survey failed to account for consumer beliefs formed based on their past experiences with TurboTax, (iii) my survey screening questions were faulty, (v) consumer are willing to engage in research and product comparison when shopping for tax preparation services, and (iv) consumers do not experience switching costs when they begin using TurboTax under the misperception that they can file for free.

291. First, Mr. Deal incorrectly argues that the fact that [REDACTED] ([REDACTED] percent of the TY21 customer base identified by Mr. Deal) filed their federal and state taxes for free (and

⁵¹⁴ Mr. Deal’s analysis of his remaining [REDACTED] customers who he claims have met his erroneous conditions for possibly forming the wrong impression about their eligibility to file for free using TurboTax suffers from similar flaws. This includes Deal Report,

⁵¹⁵ Deal Report, ¶153. He also cross-references this finding against product recommendation scores and customer reviews (among those who have completed their tax return), and complaints to show that “the majority of customers ... did not have unfavorable experiences using TurboTax.” Deal Report, ¶154. I have already addressed the shortcomings of these methods at length elsewhere in this report, and this analysis suffers from the same fatal flaws.

⁵¹⁶ Deal Report, Section VII.

██████████ from tax year 2014 to tax year 2021) undermines my claim that my survey results are representative.⁵¹⁷ As support for this argument, he quotes my Opening Report, where I say “[t]he TurboTax Perception Survey was chosen to be representative of *the population of interest*”⁵¹⁸ and “[t]he consumers of interest (and the appropriate target population) for the Perception Survey are potential taxpayers who at the time the survey was conducted were considering using an online tax software to file their 2021 taxes *and would not have qualified for TurboTax Free Edition.*”⁵¹⁹ Mr. Deal’s analysis of all tax payers is simply inapt, and his confusion is present in language he quotes from my Opening Report. The universe of all TurboTax customers is not the population of interest. The fact that some TurboTax customers do file for free is irrelevant to the issue in this case and does nothing to undermine my claim that the results of the TurboTax Perception Survey are generalizable to the relevant population at large.

292. Mr. Deal asserts that the result from my TurboTax Perception Survey for Group B, those who have paid to use TurboTax in the past three years, “is consistent with [Mr. Deal’s] view that customers’ expectations are informed by their past usage of TurboTax.”⁵²⁰ While we agree that consumers’ expectations are likely impacted by their past usage of TurboTax, as I noted in my Opening Report,⁵²¹ remarkably, Mr. Deal’s assessment completely ignores that 24.1% of Group B respondents in the TurboTax Perception Survey still had the misimpression that they can file for free using TurboTax,⁵²² *despite having paid to file with TurboTax in the past three years.* Evidently, while consumers’ recent past may indeed decrease the likelihood that they form this misimpression, it is not sufficient to overcome the impact of Intuit’s marketing messages.

293. In his description of the TurboTax website, Mr. Deal observes that consumers have the option to interact with tiles that inquire about their personal and financial situation.⁵²³ He then observes that the three questions I asked in the TurboTax Perception Survey to determine eligibility of respondents for free filing prompted my respondents for less information than Intuit’s SKU selector and interview process, which asks about “several other aspects of customers’ personal and financial situation to recommend the most appropriate product.”⁵²⁴ In making this observation, he insinuates that my more limited approach is in some way inadequate to determine eligibility.⁵²⁵ This insinuation is wrong, as well as meaningless. As I explained in my Opening Report, my screening questions were asked in a manner than can be

⁵¹⁷ Deal Report, ¶108.

⁵¹⁸ Novemsky Opening Report, ¶5 (emphasis added).

⁵¹⁹ Novemsky Opening Report, ¶21 (emphasis added).

⁵²⁰ Deal Report, ¶125.

⁵²¹ Novemsky Report, ¶70.

⁵²² Deal Report, ¶12.

⁵²³ Deal Report ¶ 68

⁵²⁴ Deal Report, ¶68.

⁵²⁵ Deal Report, ¶68.

easily understood and did not require respondents to understand the full complexity of Intuit's criteria.⁵²⁶ Any respondent who did not qualify per my questions would not qualify to file for free using TurboTax, and individuals who contribute to preparing taxes in their household can be reasonably expected to know their sources of income, have an expectation about whether they will itemize deductions, and know whether they received alimony or received, exercised, or disposed of stock options issued by an employer as part of their compensation.⁵²⁷

294. Mr. Deal next tries to establish that because competing products exist in the tax preparation market, consumers are unlikely to be deceived by Intuit's advertising. This conclusion does not follow. First, Mr. Deal presents his review of commercial DIY tax preparation products to show that other free options in the industry, such as Cash App Taxes, come with limitations and trade-offs that may influence consumer decisions. Based on his review of the industry, Mr. Deal asserts that there is no commercial DIY tax preparation service that "covers every tax situation, protects customer information ... and still charge \$0 for the entire service."⁵²⁸ This analysis is beside the point, and irrelevant to the question of whether the relevant group of tax filers has formed the misimpression that they can file for free using TurboTax or understands TurboTax's disclosures. The fact that some individual tax circumstances require a paid upgrade or limited free services with all tax service providers has no bearing on the questions at issue in this case. Mr. Deal's analysis seems to confuse the fact that no provider offers what he calls "truly free" services to all tax payers as evidence that no taxpayer could have been deceived by TurboTax marketing into believing incorrectly that they can file their taxes for free with TurboTax again defies logic. The former has little bearing on the latter, especially in light of the TurboTax advertising campaign that through its notable repetitive nature is clearly looking to impress upon consumers that TurboTax's offering may be different from what they would expect or have experienced before.

295. Mr. Deal then mischaracterizes the results and conclusions from the TurboTax Perception Survey in my Opening Report, claiming that my Opening Report "completely ignores consumers' potential desire to compare products available across tax preparation providers in an effort to maximize their refund or identify a trustworthy and convenient solution" and that I discount "their ability to conduct research and obtain information on product eligibility or other limitations."⁵²⁹ In fact, by measuring consumer perceptions at a time when, as I explained in my Opening Report, tax filing is more top-of-mind and as many consumers are thinking in earnest about how they will file their taxes,⁵³⁰ the TurboTax

⁵²⁶ Novemsky Opening Report, ¶26.

⁵²⁷ Novemsky Opening Report, ¶26.

⁵²⁸ Deal Report, ¶46.

⁵²⁹ Deal Report, ¶102.

⁵³⁰ Novemsky Opening Report, ¶22.

Perceptions Survey may provide evidence of the impact of comparing products, conducting research, and obtaining product eligibility information, as far as those efforts actually occur in the marketplace. As I have discussed at length, the relevant tax filers still had the misimpression that they could file for free.⁵³¹ Finally, to establish an absence of switching costs, Mr. Deal claims that, due to what he characterizes as a highly competitive tax preparation industry with low switching costs, customers can easily obtain further information on eligibility requirements or compare products available across providers.⁵³² As evidence for his claim that switching costs are low, Mr. Deal points to the fact that, within a tax year, customers maintain control of the required documents, which supposedly makes it easy to switch,⁵³³ and that, across tax years, competitors are ready to import their tax information from documents generated by the customer's previous service provider.⁵³⁴ This, Mr. Deal suggests, explains why the industry has an annual churn rate of [REDACTED].⁵³⁵ Of course, this churn rate, which includes services beyond DIY services like Intuit's TurboTax, implies that [REDACTED] consumers do not switch. Mr. Deal ignores that the churn rate he cites directly undermines his argument. His argument contains another incorrect inference. The fact that a consumer switches providers is not necessarily indicating low switching costs, it could instead be indicating high benefits that overcome high switching costs. His argument ignores this possibility rendering his conclusions unreliable.

296. Relatedly, in his analysis of users' time elapsed before being prompted to upgrade at a Hard Stop screen,⁵³⁶ Mr. Deal attempts to show that, "among the customers who started their tax return using Free Edition and sought to report sources of income other than W-2 income and limited interest and dividends," customers do not make too significant a time investment on the TurboTax website to switch.⁵³⁷ He reports in his analysis that [REDACTED] customers spend [REDACTED] or less before reaching a Hard Stop.⁵³⁸ This analysis appears to have been narrowed to present the data most favorably, biasing Mr. Deal's result. In particular, Mr. Deal notes that he limits the analysis to Free Edition customers who *sought to report sources of income other than W-2 income and limited interest and dividends*, meaning that his analysis appears to be based on customers who encounter a Hard Stop at the income stage.

As I discussed in Section VI.G of this report, [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED].⁵³⁹

Additionally, Mr. Deal's analysis of time elapsed excludes customers whose time elapsed on

⁵³¹ Novemsky Opening Report, Section IV.

⁵³² Deal Report, ¶¶12, 51–54.

⁵³³ Deal Report, ¶¶51–52.

⁵³⁴ Deal Report, ¶53.

⁵³⁵ Deal Report, ¶54.

⁵³⁶ Deal Report, ¶¶105–107.

⁵³⁷ Deal Report, ¶105.

⁵³⁸ Deal Report, ¶105.

⁵³⁹ See Section V.G. See also, Intuit's Responses to the FTC's First Set of Interrogatories, p. 21.

the website was [REDACTED].⁵⁴⁰ This exclusion results in the underestimation of the time invested by consumers. Adding these excluded consumers would increase the average time elapsed and therefore the cost of switching. Finally, even accepting his flawed analysis at face value, Mr. Deal fails to offer any evidence to support the assumption that a [REDACTED] is sufficiently low that a customer would not be inclined to honor that sunk cost by continuing.

IX. Compensation

297. I am being compensated at my billing rate of \$500 per hour. Staff at Cornerstone Research, a consulting firm, worked under my direction and assisted me in this matter, and GBK assisted me with managing and supervising the data collection and validation process for the survey. My compensation in this matter is in no way contingent upon the outcome of this or any other matter.

Signed this 27th day of January 2023.



Nathan Novemsky, Ph.D.

⁵⁴⁰ Deal Report, Fn. 240.

Documents Relied Upon

Academic Articles

- Björn A. Hüttel et al., “How Consumers Assess Free E-Services: The Role of Benefit-Inflation and Cost-Deflation Effects,” *Journal of Service Research* 21, no. 3, 2018, pp. 1–17.
- Curtis P. Haugtvedt et al., “Advertising Repetition and Variation Strategies: Implications for Understanding Attitude Strength,” *Journal of Consumer Research* 21, no. 1, 1994, pp. 176–189.
- Devesh Raval, “Whose Voice Do We Hear in the Marketplace? Evidence from Consumer Complaining Behavior,” *Marketing Science* 39, no. 1, 2020, pp. 168–187.
- Ed Keller and Brad Fay, “Word-of-Mouth Advocacy A New Key to Advertising Effectiveness,” *Journal of Advertising Research* 52, no. 4, 2012, pp. 459–464.
- Elisa Konya-Baumbach, “The Zero-Price Effect in a Multicomponent Product Context,” *International Journal of Research in Marketing* 33, no. 3, 2016, pp. 689–694.
- Erin Adamson Gillespie et al., “A Tangled Web: Views of Deception from the Customer’s Perspective,” *Business Ethics, A European Review* 25, no. 2, 2016, pp. 206–207.
- Fernando Luco, “Switching Costs and Competition in Retirement Investment,” *American Economic Journal: Microeconomics* 11, no. 2, 2019, pp. 26–54.
- Hal Richard Arkes and Catherin Blumer, “The Psychology of Sunk Cost,” *Organizational Behavior and Human Decision Processes* 35, no. 1, 1985, 124–140.
- Hunt Allcott and Christopher Knittel, “Are Consumers Poorly Informed about Fuel Economy? Evidence from Two Experiments,” *American Economic Journal: Economic Policy* 11, no. 1, 2019, pp. 1–37.
- Juan L. Nicolau and Ricardo Sellers, “The Free Breakfast Effect: An Experimental Approach to the Zero Price Model in Tourism,” *Journal of Travel Research* 51, no. 3, 2012, pp. 243–249.
- Melissa A. Z. Knoll, “The Role of Behavioral Economics and Behavioral Decision Making in Americans’ Retirement Savings Decisions,” *Social Security Bulletin* 70, no. 4, 2010, pp. 1–23.
- Mark Israel, “Services as Experience Goods: An Empirical Examination of Consumer Learning in Automobile Insurance,” *The American Economic Review* 95, no. 5, 2005, pp. 1444–1463.

- Ravi Dhar et al., “The Shopping Momentum Effect,” *Journal of Marketing Research* 44, no. 3, 2007, pp. 370–378.
- Richard H. Thaler, “Mental Accounting Matters,” *Journal of Behavioral Decision Making* 12, 1999, pp. 183–206.
- Rudy Douven et al., “Premium Levels and Demand Response in Health Insurance: Relative Thinking and Zero-Price Effects,” *Journal of Economic Behavior & Organization* 180, 2020, pp. 903–923.
- RX565, Johanna Held and Claas Christian Germelmann, “Deception In Consumer Behavior Research: A Literature Review on Objective and Perceived Deception,” *Projectics* 21, no. 3, 2018, pp. 119–145.
- RX744, Alan G. Sawyer, “Demand Artifacts in Laboratory Experiments in Consumer Research,” *Journal of Consumer Research* 1, no. 4, 1975, pp. 20–30.
- Sridhar Moorthy and Scott A. Hawkins, “Advertising repetition and quality perception,” *Journal of Business Research* 58, no. 3, 2005, pp. 354–360.
- Susanne K. Schmidt and Martin Eisend, “Advertising Repetition: A Meta-Analysis on Effective Frequency in Advertising,” *Journal of Advertising* 44, no. 4, 2015, pp. 415–428.
- Terence A. Shimp et al. “A Critical Appraisal of Demand Artifacts in Consumer Research,” *Journal of Consumer Research* 18, no. 3, 1991, pp. 273–283.
- William Samuelson and Richard Zeckhauser, “Status Quo Bias in Decision Making,” *Journal of Risk and Uncertainty* 1, no. 1, 1988, pp. 7–59.

Books & Book Chapters

- Daniel Kahnemann, *Thinking Fast and Slow* (New York, NY: Farrar, Straus and Giroux, 2011).
- Richard H. Thaler and Cass R. Sunstein, *Nudge: Improving Decisions About Health, Wealth, and Happiness* (New York, NY: Penguin, 2009).
- RX560, Philip Kotler and Kevin Lane Keller, *Marketing Management*, 15th Edition (Boston, MA: Pearson, 2016).
- RX709, Shari Seidman Diamond, “Reference Guide on Survey Research,” in *Reference Manual on Scientific Evidence*, 3rd Edition (Washington, D.C.: The National Academies Press, 2011), pp. 359–423.
- Wayne D. Hoyer et al., *Consumer Behavior*, 7th Edition (CENGAGE Learning, 2018).

Depositions & Hearings

- GX146, Deposition of Cathleen Ryan, November 18, 2022.
- GX160, Deposition of Jack Rubin, November 29, 2022.
- GX149, Deposition of Jennifer Crosby, November 30, 2022.
- Deposition of John R. Hauser, January 25, 2023 (Rough Transcript).

Expert Reports & Declarations

- GX313, Second Declaration of Nathan Novemsky, April 8, 2022.
- RX402, Declaration of John R. Hauser, SC.D., In the Matter of: Intuit Inc., August 30, 2022.
- GX303, Expert Report of Nathan Novemsky, Ph.D., December 9, 2022 with backup materials and surveys.
- RX1027, Expert Report of Bruce F. Deal, January 13, 2023.
- RX1017, Expert Report of Professor John R. Hauser, SC.D., January 13, 2023 with backup materials.
- RX1018, Expert Report of Professor Peter N. Golder, Ph.D., January 13, 2023 with backup materials.
- RX1016, Expert Report of Rebecca Kirk Fair, January 13, 2023.

Legal Documents

- RX260, Complaint for a Temporary Restraining Order and Preliminary Injunctive Relief Pursuant to Section 13(b) of the Federal Trade Commission Act, 15 U.S.C. § 53(b), *Federal Trade Commission v. Intuit Inc.*, March 28, 2022.
- RX263, Responses to Intuit's First Set of Interrogatories, *In the Matter of: Intuit Inc.*, September 19, 2022.

Produced Documents

- GX340, INTUIT-FFA-FTC-000169946
- GX410, INTUIT-FTC-PART3-000489527
- GX436, INTUIT-FTC-PART3-000490439
- GX437, INTUIT-FTC-PART3-000490440
- GX460, [Bates no.]

- GX655, INTUIT-FTC-PART3-000608479
- INTUIT-FTC-PART3-000603049
- INTUIT-FTC-PART3-000607560
- RX052, INTUIT-FTC-PART3-000602247
- RX057, INTUIT-FTC-PART3-000602289
- RX304, INTUIT-FTC-PART3-000608560
- RX379, INTUIT-FTC-PART3-000490565
- RX469, INTUIT-FTC-PART3-000598532
- RX504, INTUIT-FTC-PART3-000600984
- RX531, INTUIT-FTC-PART3-000599641
- RX560, INTUIT-FTC-PART3-000597494
- RX597, INTUIT-FTC-PART3-000601645
- RX704, INTUIT-FTC-PART3-000607308
- RX707, INTUIT-FTC-PART3-000607494
- RX772, INTUIT-FTC-PART3-000606964
- RX824, INTUIT-FTC-PART3-000608575

Websites & Public Materials

- “About iSpot,” iSpot.tv available at <https://www.ispot.tv/about>.
- “File online,” *H&R Block*, <https://www.hrblock.com/online-tax-filing/free-online-tax-filing>.
- “Intuit Ecosystem of Financial Products,” *Intuit Inc.*, available at <https://www.intuit.com/products>.
- Christina Stahlkopf, “Where Net Promoter Score Goes Wrong,” *Harvard Business Review*, October 18, 2019, available at <https://hbr.org/2019/10/where-net-promoter-score-goes-wrong>.
- Randall S. Brown and Margaret Harrigan, “The Comparability of the Treatment Control Groups at Randomization,” *U.S. Department of Health and Human Services*, October 27, 1983, available at <https://aspe.hhs.gov/sites/default/files/private/pdf/73976/compares.pdf>.

- RX 096; GX 316, “.com Disclosures: How to Make Effective Disclosures in Digital Advertising,” *Federal Trade Commission*, March 2013, available at <https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-staff-revises-online-advertising-disclosureguidelines/130312dotcomdisclosures.pdf>.
- RX771, Kush Patel, “Tax Preparation Services in the US,” *IBISWorld*, August 2019, available at <https://www.gsa.gov/cdnstatic/54121D%20Tax%20Preparation%20Services%20in%20the%20US%20Industry%20Report.pdf>.

Note: In addition to the documents on this list, I considered all documents cited in my report, my appendices, and my exhibits to form my opinions.

RX1349

Exhibit No. 1349
Date: 2-10-23
T. Alfaro

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

STATE OF OREGON, ex rel. ELLEN F. ROSENBLUM, in her official capacity as Attorney General for the State of Oregon,
Plaintiff,

-vs-

Case No. 14CV09149

LIVING ESSENTIALS, LLC, a Michigan limited liability company, and INNOVATION VENTURES, LLC, a Michigan limited liability company,
Defendants.

BENCH TRIAL - VOLUME 10

BEFORE THE HONORABLE KELLY SKYE
(EXCERPT OF NOVEMSKY TESTIMONY)

DATE: Monday, July 18, 2016

TIME: 9:17 a.m.

LOCATION: MULTNOMAH COUNTY COURTHOUSE
1021 SW FOURTH AVENUE
Portland, Oregon

REPORTER: Karen Fortna, CRR/RMR/RPR/CSR-5067

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IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

STATE OF OREGON, ex rel. ELLEN F.
ROSENBLUM, in her official capacity
as Attorney General for the State
of Oregon,
Plaintiff,

-vs-

Case No. 14CV09149

LIVING ESSENTIALS, LLC, a Michigan
limited liability company, and
INNOVATION VENTURES, LLC, a Michigan
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1	EXHIBITS, DEFENDANTS:		
2	NUMBER	DESCRIPTION	OFFERED ADMITTED
3	26	Document "Review #2"	
4		(WITHDRAWN).....1880	--
5	35	Barrett curriculum vitae.....1971	1971
6	36	Confidential draft budget summary	
7		(WITHDRAWN).....1880	--
8	37	Cognitive Drug Research Services	
9		and Costs Proposal (Pages admitted	
10		as business record).....1880	1966
11	38	Cognitive Drug Research - Services	
12		and Costs Proposal Change Order,	
13		(Admitted as business record)....1880	1966
14	39	Attachment A: Clinical Trial	
15		Request Form.....1880	1969
16	43	5-Hour ENERGY documents,	
17		(Admit only tables referenced)...1934	1954
18	51	LIV1100 Questions - Response Doc.	
19		(WITHDRAWN).....1880	--
20	60	Udani curriculum vitae.....1880	1880
21	747	Barrett deposition designations..1972	1972
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25	862	Wesnes deposition designations...1827	1829

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1	EXHIBITS, DEFENDANTS:		
2	NUMBER	DESCRIPTION	OFFERED ADMITTED
3	863	Novemsky curriculum vitae.....	1832 1832
4	864	Novemsky PowerPoint.....	1877 1878
5	865	Hanssens curriculum vitae.....	1885 1886
6	866	Hanssens PowerPoint.....	1933 1933
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1 Dr. Udani is Exhibit 861. And Your Honor, we have
2 on the tape today, are playing most -- the State's
3 designations as well as our designations, but not
4 the whole deposition.

5 THE COURT: Okay.

6 MR. MULLIN: And so you can be in
7 context, Ms. Stineman took this deposition and
8 Mr. Snider was there on behalf of Living
9 Essentials.

10 THE COURT: Okay.

11 (Defendants' Exhibit 861 and 862
12 admitted.)

13 (Jay Udani video deposition playback.)

14 MR. MULLIN: Sorry, Your Honor,
15 apparently there's a glitch. So, Your Honor, I
16 think we're going to have to change course here,
17 and while we're working on the technical issues,
18 we'll call a live witness, Dr. Novemsky.

19 THE COURT: Okay.

20 MR. FOSTER: We call Dr. Nathan Novemsky.

21 * * * *

22 NATHAN NOVEMSKY, PhD,
23 having first been duly sworn, was examined and
24 testified as follows:

25 COURT CLERK: Please be seated and please

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1 state your name and spell it for the record.

2 THE WITNESS: Nathan Novemsky,

3 N-A-T-H-A-N, N-O-V-E-M-S-K-Y.

4 DIRECT EXAMINATION

5 BY MR. FOSTER:

6 Q. Professor Novemsky, could you tell the Court a
7 little bit about yourself, please?

8 A. Sure. I am a PhD in social psychology. I studied
9 the psychology of judgment decision-making. I hold
10 an appointment as a full professor of marketing at
11 the Yale School of Management at Yale University in
12 New Haven, Connecticut, as well as an appointment
13 as a professor of psychology in the psychology
14 department at the same university.

15 Q. And what area of psychology have you focused on?

16 A. So I focus on the consumer decision-making or
17 consumer judgment decision-making, which overlaps
18 largely with social psychology and with marketing.

19 Q. And the field of social psychology, how does it
20 interact with marketing?

21 A. Well, the field of social psychology deals with how
22 people interpret and take in information and use
23 that to make judgments and decisions.

24 Q. Tell us a little bit about your academic research,
25 your studies, your areas of focus.

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1 A. So I focus on consumer information processing.
2 I focus, as I said, on consumer judgment and
3 decision-making. I focus on what information
4 people use and don't use when they make various
5 judgments and decisions.

6 Q. Do you use consumer research in your academic
7 endeavors?

8 A. I certainly do. I published articles in the
9 leading journals in consumer research, the Journal
10 of Consumer Research and the Journal of Marketing
11 Research. And in those situations, I absolutely
12 use -- I -- unfortunately, I think marketing is
13 misnamed. I would like to name a lot of things
14 psychology. I think that, you know, a lot of the
15 study of consumer behavior is really psychology
16 underneath and so a lot of psychologists like me
17 are actually professors of marketing.

18 Q. Have you designed and conducted surveys -- you said
19 in your academic research, but have you also
20 designed and conducted surveys for businesses?

21 A. I have. So I run a lot of studies for businesses
22 who are making often big decisions for marketing
23 and other functions where we'll study the problem
24 that they're focused on and then jointly run a
25 survey with that company to try to get the answer

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1 to lots of questions about how consumers react in
2 certain marketplace settings.

3 (Defendants' Exhibit 863 offered.)

4 MR. FOSTER: Your Honor, if I may, I
5 would like to offer Professor Novemsky's c.v.

6 MS. STINEMAN: No objection.

7 MR. FOSTER: It's Exhibit 863.

8 THE COURT: Okay. It's received.

9 (Defendants' Exhibit 863 admitted.)

10 BY MR. FOSTER:

11 Q. Could you estimate for the Court how many -- again,
12 this doesn't need to be with great precision, but
13 give a sense of your experience in designing and
14 conducting consumer surveys. How many have you
15 designed and conducted over the last five, ten
16 years?

17 A. Oh, hundreds. Every paper I write involves
18 consumer surveys and other types of consumer
19 experiments, and much of the work I do with many
20 companies at Yale also involves consumer surveys,
21 so I would say hundreds.

22 Q. And what is the purpose of conducting consumer
23 surveys in the context of consumer research?

24 A. So consumer surveys are to get at what's in
25 consumers' heads. The last 30 years' research has

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1 taught us that our ideas about what's in consumers'
2 heads are often insufficient and inaccurate, and so
3 the gold standard has become let's ask consumers
4 and then try to figure out through experimentation
5 and through survey what is actually in their heads.

6 Q. Well, your training is in social psychology, right?

7 A. Correct.

8 Q. So you're not trained to understand and comprehend
9 what's in the brain of consumers, say, when they
10 see a TV commercial?

11 A. I am indeed trained to try to understand it, but
12 the way we understand it is not by looking at our
13 own heads and saying, "Well, what do I think is in
14 their head?" We've been trained to say that
15 doesn't work. We need to actually run a study to
16 find out what's in people's heads. We don't even
17 know what's in our own heads is what a lot of
18 recent psychology studies have revealed.

19 Q. Okay. What role does experimental design play in
20 doing these studies?

21 First of all, are you familiar with a
22 concept called experimental design?

23 A. I surely am.

24 Q. Could you explain what that means to the Court,
25 please?

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1 A. Sure. So anytime you're trying to identify any
2 effect in the marketplace or otherwise, you would
3 have to do an experiment. An experiment involves
4 usually a control group and one or more
5 experimental groups where you show the control
6 group one set of things, you show the experimental
7 group a different set of things, usually with one
8 thing varied, critical thing you're trying to
9 understand the cause, its role as a causal agent.

10 And you then measure things from those
11 consumers in the control group as well in the test
12 group and then you can draw an inference about
13 causality. Without a control group, there's no way
14 to draw that inference of what's causing what, so
15 experimental design and control groups are
16 fundamental to every single paper I've ever
17 submitted to any journal.

18 Q. So this sounds to me, a layperson, like a
19 scientific method, right? I mean, you posit a
20 hypothesis and then you test the hypothesis through
21 experiment or testing?

22 A. It is often called the scientific method, correct.

23 Q. Now I hired you to help us look at some things in
24 this case, right?

25 A. You did.

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1 Q. Okay. When did that happen?

2 A. About a week ago, as I was packing to go on
3 vacation, actually.

4 Q. So you were getting ready to go on vacation and you
5 get a call from me.

6 Where did you spend your last week?

7 A. Spent the last week in Cape Cod with my family.

8 Q. So during your vacation, you were doing some work
9 that I asked you to do, right?

10 A. Sadly, I was, in the odd hours I could put my
11 family off, yes.

12 Q. Your Honor -- well, first of all, did you have some
13 slides that you would like to use in connection
14 with your presentation today?

15 A. I do. I do.

16 MR. FOSTER: Your Honor, if I may, I've
17 marked for identification purposes Exhibit 864.

18 BY MR. FOSTER:

19 Q. So we have a slide deck here to help you in your
20 presentation. Let's take a look at slide 2. What
21 did I ask you to do? Let's do that.

22 A. You asked me to look at --

23 Q. There we go. Okay.

24 A. You asked me to assess Ms. Butler's survey relevant
25 to this case and conclusions she may have drawn.

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1 from that survey.

2 Q. Okay. And this was the survey that she conducted
3 or designed relating to TV commercials?

4 A. Yes, related to what's called a Doctors Recommend
5 TV commercial.

6 Q. And were you provided with Ms. Butler's testimony
7 in this case, her PowerPoint presentation to the
8 Court and the underlying survey data she provided
9 us regarding that survey?

10 A. Yes, I was.

11 Q. And you reviewed that?

12 A. I did.

13 Q. What did Ms. Butler indicate she was testing for
14 when she designed and conducted the survey?

15 A. So she had hypothesized two false messages that she
16 thought consumers might take away. They're listed
17 on the screen. 73 percent of doctors surveyed
18 would recommend 5-hour ENERGY was the first one.
19 And the second one was some doctors in the survey
20 would recommend 5-hour ENERGY to all of their
21 patients.

22 Q. Now there is a reference on the slide 2 to the
23 source of that. And is that the PowerPoint
24 presentation that you were provided that she
25 presented to the Court?

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- 1 A. Yes.
- 2 Q. And Exhibit 405?
- 3 A. Correct.
- 4 Q. And this is at page 7 of that presentation where
5 she presented the two allegedly implied messages
6 that she was seeking to test?
- 7 A. Correct.
- 8 Q. Now did you review the design of Ms. Butler's
9 survey?
- 10 A. I did.
- 11 Q. Would you take a few minutes now and remind the
12 Court of how her survey was designed?
- 13 A. Sure, if we go to slide 3 there.
- 14 Q. Okay.
- 15 A. So respondents to the survey were shown this
16 commercial. There were actually three different
17 commercials and each respondent was shown only one
18 of those three commercials. They were allowed to
19 watch it up to two times, I understand, and after
20 they watched the commercial, they were first asked
21 a series of open-ended questions and then they were
22 asked closed-ended questions.
- 23 Q. Okay. So will you remind the Court of what the
24 open-ended questions were that were included in the
25 survey?

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1 A. Sure. On the next slide, we can see the open-ended
2 questions, "What is the main message of the
3 commercial you just watched?" And after they
4 responded, they were given a prompt for any other
5 messages.

6 They were later asked, "Did the
7 commercial communicate anything about doctors'
8 recommendations?" If they said yes, and only if
9 they said yes, they were asked, "What specifically
10 did the commercial communicate about doctors'
11 recommendations?"

12 And then again they were prompted after
13 they responded, "Is there anything else?"

14 Q. So there was this group of open-ended questions and
15 were there also some close-ended questions involved
16 in her survey?

17 A. Yes, indeed, there were close-ended questions on
18 the next slide.

19 Q. Can you refresh the Court's recollection about
20 that, please?

21 A. Sure. There were a total of six messages that were
22 presented as potentially communicated by the
23 commercial. They were divided into three groups:
24 false messages, neutral or correct messages and
25 noise messages. You go to the next slide, you'll

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1 see examples of each.

2 Q. If I might stop you just a moment. Again, these
3 characterizations that you're describing, those
4 were contained in Ms. Butler's testimony, in her
5 PowerPoint?

6 A. They were. These were her labels, not mine.

7 Q. Okay. And you were, I think, ready to move on to
8 the specific messages.

9 A. Right. So here you can see -- this is a slide
10 taken, again, directly from her presentation that
11 she presented here in court where the top two in
12 red are the false messages, the two in the middle
13 are the correct or neutral messages, and the two on
14 the bottom are considered noise messages.

15 Q. So the top two messages that she labeled "False,"
16 those were the specific messages that she initially
17 said she was intending to test in the survey; is
18 that right?

19 A. Right. So these two correspond to earlier in one
20 of my slides where I said here are the two ideas
21 she hypothesized were in consumers' heads as a
22 result of the commercial.

23 Q. Okay. All right. Now these colors that are on the
24 slide 6, are these colors colors you made up or do
25 they have some other source?

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1 A. No, this all comes from Ms. Butler's PowerPoint,
2 both the color, the layout and the numbering of
3 those responses A through F.

4 Q. All right. So you mentioned something about
5 control earlier in your testimony. Did you
6 consider whether or not this survey contained a
7 control?

8 A. I did. I was surprised to find out that the survey
9 actually did not contain a control.

10 So typically if you're trying to test does
11 this TV commercial cause a particular understanding
12 in consumers, you would show a set of consumers in
13 a test condition that tested it and you would show
14 other consumers a control ad and then you would
15 measure the consumer understanding, both for the
16 control group and for the test group and make
17 comparisons that way to draw any causal inference.
18 Here there was no control group, and so it, to me,
19 doesn't seem like a test of what the ad caused
20 consumers to understand or not understand.

21 Q. So is the use of a control group -- I mean, we're
22 talking about a control advertisement, right, a
23 counterpoint or something that would be tested
24 against the advertisement that you're looking to
25 understand; am I getting that right?

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1 A. You are.

2 Q. Okay. And is this part of the experimental design
3 that you were -- or process of experimental design
4 that you were describing to the Court earlier?

5 A. Yes. It's -- a cornerstone of experimental design
6 is that if you're going to draw any causal
7 inference of something like an ad caused some
8 effect like a consumer understanding of some kind,
9 you have to have an experimental design that
10 includes a control and a test group. Any other
11 design makes causal inference, you know,
12 impossible.

13 Q. And I know this may not be the perfect analogy,
14 but when people are doing drug trials, they use
15 placebos and then they're testing some drug, right?
16 Is that a similar approach to testing an
17 assessment?

18 A. Yes, it's a very similar approach. In the absence
19 of a placebo or some kind of control condition, a
20 medicine may or may not have an effect on patients.
21 Registering patients getting healthier without a
22 placebo condition could be the result of time
23 passage, it could be the result of other things the
24 patients are doing, and so we need to control to
25 make a strong inference this is the cause of this

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1 effect.

2 Q. Now you indicated that Ms. Butler did not employ a
3 control group, a control advertisement, in her
4 survey design. In your opinion, was the failure to
5 include a control group, a control ad, a material
6 defect in the design of the survey?

7 A. It absolutely was. It keeps her from being able to
8 claim scientifically that that ad caused any
9 particular understanding.

10 Q. During the limited time you have to share with me,
11 did you note any other problems with the Butler
12 survey design or the methodology employed?

13 A. Yes, I did.

14 Q. Okay. Did you notice any problems associated with
15 her treatment of responses to the open questions,
16 open-ended questions?

17 A. I certainly did. I certainly did. If you want to
18 go to the next slide, I have...

19 Q. All right. So tell the Court what's on slide 8,
20 please.

21 A. So this, again, is taken from her PowerPoint. The
22 code you see there that's with the arrow is
23 highlighted as "Doctors Recommend/Approve 5-hour
24 ENERGY." This is the code that she is going to
25 treat as finding misleading messages in consumers'

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1 you know, only 40 percent of my respondents being
2 able to say no to two clearly incorrect messages
3 makes me very suspect of the closed-ended data as
4 well.

5 So in sum, you know, I don't see anything
6 in this survey and then the results that Ms. Butler
7 presented that would convince me of anything about
8 how many consumers took away any particular false
9 or misleading message from that ad, for those three
10 ads.

11 MR. FOSTER: Thank you very much, Doctor.
12 Pass the witness.

13 CROSS EXAMINATION

14 BY MS. STINEMAN:

15 Q. Mr. Novemsky, what standards -- first of all, you
16 conduct consumer surveys, correct?

17 A. Correct.

18 Q. What standards do you use or apply when you're
19 creating your surveys?

20 A. Can you be more specific?

21 Q. What rules of thumb do you -- is there a standard
22 that you apply when you are determining what is
23 appropriate and what is not appropriate to include
24 in your survey or how to design your survey?

25 A. Sure. So I would try to figure out what is the

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1 hypothesis I want to test and I would try to ask
2 questions and often I would also generate a null
3 hypothesis. So here, one might generate the null
4 hypothesis, people do not take away these
5 particular false and misleading messages, and then
6 when it has the test hypothesis, they do take away
7 these false and misleading messages, and then I
8 would design a survey that allowed me to
9 differentiate between consumers' understanding of,
10 yes, they do understand these messages, or, no,
11 they don't take away these particular messages.
12 Q. I'm asking a more general question. Like for
13 example, Ms. Shari Diamond's article on standards
14 has been referenced in earlier -- in direct
15 examination, and I'm wondering if you have sort of
16 a guidebook that you rely on in your work so I
17 understand where you're coming from.
18 A. A guidebook?
19 Q. Or do you just have your own rules that you made
20 and that's what you rely on?
21 A. So in doing my PhD in psychology, we spent many
22 hours and certainly took entire classes about
23 experimental design and how do you design a study
24 in a way that allows you to draw the conclusions
25 that you want to do. Much of the review process

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1 also where I've been both the reviewer and author
2 is about looking at a survey and saying, "Well, the
3 authors claim the survey shows this. Does the
4 survey indeed show that?"

5 And so that's a back-and-forth between
6 reviewers and authors trying to answer the
7 question, yes, it does, or, no, it doesn't. And so
8 this kind of scrutiny and thinking about how do you
9 design a survey to show a particular conclusion is
10 part and parcel of sort of our everyday activities
11 as an academic.

12 Q. So you don't have a reference guide that you rely
13 on?

14 A. I don't have a single book that I rely on this
15 locus of knowledge.

16 Q. Can you tell me any of the ones that you would use
17 on a regular basis?

18 A. As an academic, you also know this knowledge is
19 evolving. I don't refer to specific methodological
20 books. Now my understanding of the methodology of
21 surveys is beyond what's in the textbooks of the
22 courses that I took as a PhD student and so there
23 isn't a specific book that has more in it than I
24 feel like I have in my head at this point.

25 Q. Did you test whether or not the advertisement at

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- 1 issue was, in fact, misleading to consumers?
- 2 A. I did not. I was not asked to test that.
- 3 Q. So your opinion doesn't touch that issue, correct?
- 4 A. I'm not --
- 5 Q. Your opinion is not that the ad is or is not
6 misleading, correct?
- 7 A. Correct. My opinion isn't whether the ad is
8 misleading, my opinion is about the results of the
9 survey and that the survey is not evidence that the
10 ad is giving consumers those two statements that
11 Ms. Butler forwarded as false statements.
- 12 Q. Did you create a control ad that you've mentioned
13 that you discussed in this case, like an example?
- 14 A. I did not run any studies for this case, I simply
15 assessed what she did. That was my only
16 assignment.
- 17 Q. You said that you picked a few references where the
18 coding included a "vague reference" through
19 Ms. Butler's data, correct? Is that right?
- 20 A. Correct.
- 21 Q. But you did not look at them all?
- 22 A. I did not look at all of them, no.
- 23 Q. Do you know how many of the responses to Q2 and Q3
24 were coded as "vague reference" out of the total
25 500 responses?

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1 A. I think my memory is there were 33.

2 Q. And is there some reason why you stopped at only

3 half of those or less than half of those?

4 Thirty-three doesn't sound like that many to look
5 at, frankly.

6 A. So in going through -- you know, looking at the
7 data file with 500 responses, what I wanted to look
8 for each coding section was, does this code
9 correspond to what she says it corresponds to? As
10 I went in and found a few that, to me, did not
11 correspond to what she was calling them, I would
12 stop, I would note here are a few that showed this
13 coding is not working consistently.

14 I wasn't trying to quantify or decide how
15 many errors there were, I was saying there are
16 clearly errors here. These errors are obvious to
17 me. If anyone went through and looked and read
18 those verbatims, I would think that it would be
19 obvious to them also that these are not misled
20 consumers at least as measured by this particular
21 question.

22 So I didn't try to be exhaustive or
23 quantitative in my analysis, I just tried to say,
24 are these codes being applied appropriately or
25 inappropriately? And in my judgment, they were

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1 being applied inappropriately.

2 Q. So you pulled out five examples out of 33; is that
3 right?

4 A. I believe so.

5 Q. How many of the responses that were coded as vague
6 did you look at in order to come up with those five
7 examples?

8 A. Oh, I don't remember, but I -- I don't remember. I
9 looked at a few. I had the Excel sheet up. I
10 would have to skim through it, find where it said
11 "vague reference" and then look across and read it.
12 And as I read them, I found a couple that really
13 struck me and then I stopped. I don't remember how
14 many exactly.

15 Q. In the process, did you also find some that you
16 felt were coded properly as a 6?

17 A. To be honest, I don't remember.

18 Q. So when you were discussing or evaluating the
19 "vague reference" responses to Q5 and Q6, did you
20 follow the same practice where you didn't review
21 all of them?

22 A. I don't recall if I reviewed the "vague reference"
23 codings for Q5 and Q6 specifically. I looked down
24 the column for "vague reference" and looked across.
25 I don't remember if I just looked at Q2 and Q3 or

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1 if I also looked at Q5 and Q6, I just don't
2 remember.

3 Q. Did you do any recalculating of Ms. Butler's
4 statistical analysis taking into account your
5 specific concerns about responses that had been
6 coded in a way you didn't think was appropriate?

7 A. No because I would have had to go through all 500
8 and done a recoding, which is the process that I
9 described a few minutes ago, and that was not
10 something I had time to do in the last week.

11 Q. Were you asked about what a control ad would look
12 like in this case?

13 A. Was I asked by whom?

14 Q. Were you asked to consider what that -- what would
15 have been appropriate in terms of a control ad?

16 A. I thought about it myself when thinking through the
17 design. You know, you would have to take out
18 whatever you, you know -- in any false advertising
19 situation -- I've been involved in a number of
20 them -- you would have to take out whatever you
21 consider to be the offending statement, the part of
22 the advertisement that you think is false either by
23 omission or commission so it could be done to add
24 in some clarification -- maybe here the appropriate
25 thing would be to add in some clarification that

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1 doctors recommend 5-hour ENERGY -- sorry, that
2 doctors recommend low-calorie energy supplements
3 and 5-hour ENERGY is one such supplement. Maybe if
4 you said it in those words, I don't know -- you
5 know, someone would have had to come up with an
6 idea of an ad that they do not think is misleading
7 and use that as a control ad.

8 That's not something I could do sitting
9 here on the fly. It's something I would spend some
10 time doing and maybe pre-test a little bit to come
11 up with the right one.

12 Q. So it's not an easy task, right?

13 A. No.

14 Q. So I did see in your file turned over that you had
15 been provide with, among other materials, a
16 reference manual on scientific evidence from the
17 Federal Judicial Center. Is that a reference
18 manual that you were familiar with before the
19 lawyers provided it for you in this case?

20 A. Is that the one authored by Shari Diamond?

21 Q. Yes.

22 A. I've heard about that one before, yes.

23 Q. Excuse me?

24 A. I've heard about that prior to it being given to me
25 in this case, yes.

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1 Q. Do you rely on it as a reference in your work?

2 A. In my academic work, I do not.

3 Q. Do you consider it a reliable source?

4 A. I know that it's widely used in litigation. It's
5 not used at all in academia, so I don't -- it's not
6 what I use when I do my academic work. I know it's
7 referenced often in litigation.

8 Q. Have you done work in litigation related to a
9 survey before?

10 A. I have.

11 Q. How often?

12 A. I've been involved with a couple of dozen surveys
13 in litigation context either rebutting or running
14 the survey.

15 MS. STINEMAN: I don't have anything
16 further, Your Honor.

17 MR. FOSTER: No redirect.

18 THE COURT: You may step down.

19 (Witness excused.)

20

21 (End of Novemsky testimony.)

22

23

24

25

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1 STATE OF MICHIGAN)
2 COUNTY OF OAKLAND)

4 Certificate of Notary Public

5 I do hereby certify the witness, whose attached
6 testimony was taken in the above matter, was first duly
7 sworn to tell the truth; the testimony contained herein
8 was reduced to writing in the presence of the witness, by
9 means of stenography; afterwards transcribed; and is a
10 true and complete transcript of the testimony given. I
11 further certify that I am not connected by blood or
12 marriage with any of the parties, their attorneys or
13 agents, and that I am not interested directly, indirectly
14 or financially in the matter of controversy.

15 In witness whereof, I have hereunto set my hand
16 this day at Royal Oak, Michigan, State of Michigan.

17 I hereby set my hand this day, July 22, 2016.

20 *Karen Fortna*

22 Karen Fortna, CRR/RMR/RPR/CSR-5067

23 Notary Public, Oakland County, Michigan

24 Signing in Portland, Oregon

25 My Commission expires 4/30/2019

CERTIFICATE OF SERVICE

I hereby certify that on February 10, 2023, I caused the foregoing document to be filed electronically using the FTC's E-Filing system, which will send notification of such filing to:

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Respectfully submitted,

/s/ Derek Woodman
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