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

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

RESPONDENT INTUIT INC.'S POST-TRIAL REPLY BRIEF

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTRODUCTION 1

ARGUMENT 5

I. COMPLAINT COUNSEL FAILED TO PROVE THAT THE CHALLENGED ADS CONVEYED WITHOUT QUALIFICATION THAT CONSUMERS COULD FILE THEIR TAXES FOR FREE 5

A. The Challenged Ads Communicated That Free TurboTax Offers Were Available To Consumers Who Qualified 5

B. Complaint Counsel Failed To Prove That The Challenged Ads' Claims About Qualified Free Offers Were Likely To Mislead A Substantial Minority Of Reasonable Consumers 21

II. THE CHALLENGED ADVERTISEMENTS WERE NOT DECEPTIVE TO REASONABLE CONSUMERS 22

A. Complaint Counsel Distort Or Disregard The Evidence About Reasonable Consumers In The Online Tax-Preparation Market 24

B. Complaint Counsel's Reliance On Intuit's Documents And A Podcast Is Misplaced 28

C. Reliable Survey Evidence And Data Concerning Consumers' TurboTax Experiences Reflect That A Significant Minority Of Reasonable Consumers Was Not Likely To Be Deceived 34

III. COMPLAINT COUNSEL HAVE NOT ESTABLISHED THAT THE CHALLENGED ADS' CLAIMS WERE MATERIAL 43

IV. THE CHALLENGED ADS EFFECTIVELY CONVEYED THE FREE OFFERS' QUALIFICATIONS 46

A. Intuit's Television And Video Ads 47

B. Intuit's Website And Online Ads 56

C. Complaint Counsel's Door-Opener Theory Fails 62

D. Intuit's Expert Evidence Proved That The Challenged Qualifications Were Effective 65

V. COMPLAINT COUNSEL'S PROPOSED ORDER IS UNWARRANTED AND INAPPROPRIATE 68

A. A Cease-And-Desist Order Is Unwarranted 68

B. The Proposed Order Is Inappropriate 75

1. Findings 75

2. Conduct Provisions 77

3. Scope Of The Order 84

4. Compliance-Monitoring Provisions 85

VI. THE PROCEEDING IS LATE AND UNCONSTITUTIONAL 85

A. The Compliant Is Untimely 85

B. The Proceeding Is Unconstitutional 86

CONCLUSION 90

TABLE OF AUTHORITIES

CASES

Page(s)

Allen v. Williams, 2022 WL 17551564 (D. Colo. Dec. 8, 2022) 74, 85

American Beverage Ass'n v. City & County of San Francisco, 916 F.3d 749 (9th Cir. 2019)....................80

American Home Products Corp. v. FTC, 695 F.2d 681 (3d Cir. 1982)....................84

AMG Capital Management, LLC v. FTC, 141 S.Ct. 1341 (2021) 88

Arellano v. McDonough, 143 S.Ct. 543 (2023) 44

Bell v. Publix Super Markets, Inc., 982 F.3d 468 (7th Cir. 2020) 63

Benco Dental Supply Co., 2019 WL 5419393 (F.T.C. Oct. 15, 2019) 68

Book-of-the-Month Club, 48 F.T.C. 1297 (1952) 1, 55

Castagnola v. Hewlett-Packard Co., 2012 WL 2159385 (N.D. Cal. June 13, 2012)....................50

Cinderella Career & Finishing School, Inc. v. FTC, 425 F.2d 583 (D.C. Cir. 1970) 5

Citizens Financial Group, Inc. v. Citizens National Bank of Evans City, 383 F.3d 110 (3d Cir. 2004)....................14

Cliffdale Associates, Inc., 103 F.T.C. 110 (1984)....................6

Collins v. Yellen, 141 S.Ct. 1761 (2021)....................89

Coro, Inc. v. FTC, 338 F.2d 149 (1st Cir. 1964) 69

Daniel Chapter One, 2009 FTC LEXIS 157 (Aug. 5, 2009)....................50

Daubert v. City of Lindsay, 2011 WL 3917369 (E.D. Cal. Sept. 6, 2011) 49

Davis v. HSBC Bank Nevada, N.A., 691 F.3d 1152 (9th Cir. 2012)....................61

DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151 (1983)....................86

D.L. Blair Corp., 82 F.T.C. 234, 255-256 (1973)....................62

Dohrmann v. Intuit Inc., 823 F.App'x 482 (9th Cir. 2020) 59

Ebner v. Fresh, Inc., 838 F.3d 958 (9th Cir. 2016) 52

Encyclopaedia Britannica, Inc., 87 F.T.C. 421 (1976)....................64

Estrella-Rosales v. Taco Bell Corp., 2020 WL 1685617 (D.N.J. Apr. 7, 2020) 50

Fanning v. FTC, 821 F.3d 164 (1st Cir. 2016) 8

Fast Food Workers Committee v. NLRB, 31 F.4th 807 (D.C. Cir. 2022)....................86

Fish v. Kobach, 309 F.Supp.3d 1048 (D. Kan. 2018)....................13

Freeman v. Time, Inc., 68 F.3d 285 (9th Cir. 1995) 60, 61

FTC Policy Statement on Deception, 103 F.T.C. 174 (1984)....................6, 9, 24, 43, 48, 62, 73

FTC v. Cement Institute, 333 U.S. 683 (1948) 69, 74

FTC v. Cyberspace.Com LLC, 453 F.3d 1196 (9th Cir. 2006)....................50, 51

FTC v. DirecTV, Inc., 2018 WL 3911196 (N.D. Cal. Aug. 16, 2018) 26, 50, 63

FTC v. Fleetcor Technologies, Inc., 620 F.Supp.3d 1268 (N.D. Ga. 2022)....................50

FTC v. Grant Connect, LLC, 827 F.Supp.2d 1199 (D. Nev. 2011)....................51

FTC v. Ivy Capital, Inc., 2011 WL 2470584 (D. Nev. June 20, 2011)....................86

FTC v. Johnson, 96 F.Supp.3d 1110 (D. Nev. 2015) 61

FTC v. Mary Carter Paint Co., 382 U.S. 46 (1965) 51, 55, 59, 72, 73, 77

FTC v. Merchandise Services Direct, LLC, 2013 WL 4094394 (E.D. Wash. Aug. 13, 2013) 69

FTC v. Stefanchik, 559 F.3d 924 (9th Cir. 2009)....................9

FTC v. Willms, 2011 WL 4103542 (W.D. Wash. Sept. 13, 2011)....................61

Goodman v. FTC, 244 F.2d 584 (9th Cir. 1957)....................5

Grayned v. Walgreens, 2022 WL 2527821 (E.D. Mo. July 7, 2022) 5

Grolier, Inc., 99 F.T.C. 379 (1982) 64

Harris v. Las Vegas Sands L.L.C., 2013 WL 5291142 (C.D. Cal. Aug. 16, 2013)....................64

Heinz W. Kirchner, 63 F.T.C. 1282 (1963) 23

Humphrey's Executor v. United States, 295 U.S. 602 (1935) 88

iMortgage Services, LLC v. Louisiana Real Estate Appraisers Board, 2023 WL 2254528 (M.D. La. Feb. 27, 2023)....................71

In re Autozone, Inc., 2016 WL 4208200 (N.D. Cal. Aug. 10, 2016) ... 14

Instant Media, Inc. v. Microsoft Corp., 2007 WL 2318948 (N.D. Cal. Aug. 13, 2007) ... 13

Jarkesy v. SEC, 34 F.4th 446 (5th Cir. 2022) ... 88

Kraft, Inc., 114 F.T.C. 40 (1991) ... 66

LabMD, Inc. v. FTC, 894 F.3d 1221 (11th Cir. 2018) ... 82, 83

Mastercard, Inc., 2022 WL 17975182 (F.T.C. Dec. 23, 2022) ... 74

MHC Mutual Conversion Fund, L.P. v. Sandler O'Neill & Partners, L.P., 761 F.3d 1109 (10th Cir. 2014) ... 52

Moore v. Trader Joe's Co., 4 F.4th 874 (9th Cir. 2021) ... 63

National Institute of Family & Life Advocates v. Becerra, 138 S.Ct. 2361 (2018) ... 79, 80

Natural Organics, Inc., 2001 WL 1478367 (F.T.C. Jan. 30, 2001) ... 5

Pom Wonderful LLC, 155 F.T.C. 1 (2013) ... 9

Resort Car Rental Systems, Inc., 83 F.T.C. 234 (1973) ... 64

Resort Car Rental Systems, Inc. v. FTC, 518 F.2d 962 (9th Cir. 1975) ... 23

S.C. Johnson & Son, Inc. v. Clorox Co., 241 F.3d 232 (2d Cir. 2001) ... 6, 8, 47, 54

SEC v. Murphy, 626 F.2d 633 (9th Cir. 1980) ... 69

Seila Law v. CFPB, 140 S.Ct. 2183 (2020) ... 89

Starter Corp. v. Converse, Inc., 170 F.3d 286 (2d Cir. 1999) ... 13

Telebrands Corp., 140 F.T.C. 278 (2005) ... 10, 11, 12, 19, 23

Thompson Medical Co., 104 F.T.C. 648 (1984) ... 6, 66

TRW, Inc. v. FTC, 647 F.2d 942 (9th Cir. 1981) ... 71, 72

United States v. H&R Block, Inc., 833 F.Supp.2d 36 (D.D.C. 2011) ... 70

United States v. W. T. Grant Co., 345 U.S. 629 (1953) ... 68, 69, 74, 78, 85

Washington v. Hyatt, 2020 WL 3058118 (N.D. Ill. June 9, 2020) ... 64

Williams v. Pennsylvania, 579 U.S. 1 (2016) ... 87

Winzler v. Toyota Motor Sales U.S.A., Inc., 681 F.3d 1208 (10th Cir. 2012) ... 74

Withrow v. Larkin, 421 U.S. 35 (1975)....87

Wold v. Robart, 2018 WL 1135396 (E.D. Wis. Feb. 28, 2018)....71

STATUTES AND REGULATIONS

15 U.S.C. §57b(a)(2)....74

16 C.F.R.
§3.43(a)....21, 50, 65
§251.1....51, 78

OTHER AUTHORITIES

FTC, *.com Disclosures: How to Make Effective Disclosures in Digital Advertising* (Mar. 2013), https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-staff-revises-online-advertising-disclosure-guidelines/130312dotcomdisclosures.pdf....59

FTC, *Enforcement Policy Statement in Regard to Clear and Conspicuous Disclosure in Television Advertising* (Oct. 21, 1970), https://www.ftc.gov/news-events/news/press-releases/1970/10/commission-enforcement-policy-statement-regard-clear-conspicuous-disclosure-television-advertising....48

FTC v. Libbey Inc., No. 1:02-cv-00060-RBW (D.D.C. Apr. 3, 2002)....89

INTRODUCTION

Complaint Counsel's post-trial brief reads in large part as if the trial never happened. It's rife with assertions that have been refuted by uncontroverted testimony. And most of Complaint Counsel's arguments are supported only by documents they chose not to introduce at trial, presumably because a witness would have explained why Complaint Counsel's tortured reading of them does not pass muster. Complaint Counsel's failure (or inability) to grapple with the trial is unsurprising; the largely undisputed testimony and other evidence offered makes plain that none of Intuit's advertisements was deceptive, is deceptive, or will be deceptive in the future. But whatever the reason for it, Complaint Counsel's post-trial brief reinforces what was clear at the close of trial: Complaint Counsel did not carry their burden to prove either past deception or that any cease-and-desist order is warranted, let alone both.

Complaint Counsel's introductory epigraphs are emblematic of the shortcomings in their case. Complaint Counsel quote a presentation prepared by an outside advertising agency—not Intuit—about advertising a truly free TurboTax product (or SKU) as free. And they pair that with a quote from *Book-of-the-Month Club*, 48 F.T.C. 1297 (1952)—a 70-year-old case about "the *false* use of the word 'free,'" *id*. at 1312 (emphasis added). That phony equivalence cannot help Complaint Counsel. Unlike the book of the month that was free for no one, TurboTax Free Edition and the other free TurboTax offers at issue here were and are in fact free; it is literally impossible for a consumer to pay for any such offer or product.

Complaint Counsel nonetheless characterize ads stating the truth that free TurboTax SKUs are free as false or misleading, because some consumers' taxes are too complex for TurboTax Free Edition. But the fact that some consumers do not qualify for a free product does not mean the product is not free or that ads saying it is are deceptive. Complaint Counsel say the challenged ads *are* deceptive because they purportedly conveyed to consumers that *all* TurboTax

products are free, or that certain free TurboTax products are available to everyone. But Complaint Counsel have not proposed a single factual finding about the allegedly deceptive claim or claims that any of the challenged ads conveyed, either expressly or implicitly. That failure is fatal, and it too is emblematic of Complaint Counsel's approach to this case, which has been to try to establish deceptive advertising by rhetoric and by Complaint Counsel's subjective beliefs about what the ads said and how reasonable consumers would have interpreted them. That is not the law. Because Complaint Counsel have failed to satisfy their burden as to the claims purportedly made by the challenged ads, they cannot prevail.

Complaint Counsel also wrongly contend that since "two-thirds" of U.S. taxpayers do not file Form 1040 with no attached schedules, it is misleading to tell consumers whose returns *do* qualify about TurboTax Free Edition. However, Complaint Counsel's two-thirds figure is, as the Court observed at trial, "pretty much meaningless" because it takes as its denominator all U.S. taxpayers rather than those who are actually in the market for online tax-preparation products or would ever consider using a free tax-preparation product that on its face is for "simple tax returns only." Looking at the appropriate population, most consumers *do* have simple tax returns and thus qualify to use TurboTax's free SKUs. That is borne out by Intuit's data showing the vast majority of new TurboTax users each year qualify to file their taxes for free and do so.

This leaves Complaint Counsel in an unprecedented position: Intuit advertises its free tax SKUs because it wants consumers to use them, and thanks to the advertising at issue, they do use them in large numbers. Intuit is aware of no case or other authority finding deception in remotely comparable circumstances; certainly Complaint Counsel have not cited one in their pre or post-trial papers.

Instead, Complaint Counsel misquote and mischaracterize the evidence. For instance, they repeatedly focus on excerpts from the challenged ads, arguing that certain words in isolation were deceptive even though consumers never viewed bits of the ads in isolation—which is why black-letter law does not countenance such a cabined analysis. Assessing the complete record, rather than viewing only a portion of ads or otherwise taking exhibits out of context, leaves no doubt that the challenged ads were not deceptive. To the contrary, the ads made clear that a specific TurboTax SKU was being advertised, that only taxpayers with simple tax returns qualified for that SKU, and that consumers could visit the TurboTax website to find more information about the offer's qualifications.

Complaint Counsel also go astray by acknowledging only one of the ads' many disclosures (that only those with simple tax returns qualify for the advertised free SKU). The record makes clear, however, that the challenged ads (including the unrepresentative handful on which Complaint Counsel focus) contained *numerous* disclosures, that those disclosures were presented in a form and location that reasonable consumers expect, and that reasonable consumers understood the disclosures. This and other evidence make clear that reasonable consumers took away from the challenged ads that only some taxpayers qualified for the advertised free offers and that consumers who weren't sure if they qualified could find out by visiting the TurboTax website.

Complaint Counsel try to dismiss the evidence on these points (and many others) on the ground that it is not "direct evidence" that consumers were not deceived. But even putting aside that direct evidence is not required—and Complaint Counsel offer nothing to support the notion that it is—it is *Complaint Counsel* who bear the burden of proof. Intuit thus had no burden to present any evidence, let alone satisfy Complaint Counsel's invented "direct evidence" standard.

Intuit did nevertheless present direct evidence, including reams of consumer data, real-world analysis, expert analysis, and consumer testing. That evidence shows that reasonable consumers were not deceived into believing that a TurboTax free SKU would be free for them when it was not. The evidence also makes clear that no consumers were tricked into believing that "all TurboTax is free," as Complaint Counsel allege.

Complaint Counsel similarly rely on a made-up legal standard in asserting that free claims require a "heightened standard" of disclosure. No such standard exists. This Court has already recognized that the antiquated so-called free "guides" are just that—guides. They do not have the force of law and are not something to "vindicate." Rather, Complaint Counsel must prove every element of their claim by a preponderance of the evidence, as in any other deceptive-advertising case. They never explain how they discharged that burden, instead offering various meritless arguments to diminish the strength of the evidence against them.

On top of all this, Complaint Counsel offer no persuasive response to Intuit's timeliness and constitutional defenses. They instead make conclusory and categorical assertions unsupported by their cited cases. Each of these defenses precludes relief.

Finally, Complaint Counsel's proposed remedy is unwarranted. Complaint Counsel did not—because they cannot—follow the Court's instruction to explain, with legal support, why each substantive provision of their proposed order is necessary and appropriate. The proposed order's provisions are duplicative of the Consent Order with attorneys general from all 50 states and the District of Columbia and, moreover, they are untethered to the law, impermissibly imprecise, and overbroad; would unconstitutionally compel speech; and would harm consumers. Indeed, *no* cease-and-desist order is warranted given that the fully enforceable Consent Order already enjoins Intuit from running the advertisements alleged to have been deceptive (or similar

ads), and given Intuit's demonstrated commitment to transparency and improvement in the clarity of its ads.

ARGUMENT

I. COMPLAINT COUNSEL FAILED TO PROVE THAT THE CHALLENGED ADS CONVEYED WITHOUT QUALIFICATION THAT CONSUMERS COULD FILE THEIR TAXES FOR FREE

A. The Challenged Ads Communicated That Free TurboTax Offers Were Available To Consumers Who Qualified

Complaint Counsel's brief asserts (at 50) that the challenged ads made the "unmistakable" claim that "TurboTax is free." It's not clear whether this means that the claim is that TurboTax is free to everyone or that all TurboTax products are free. Either way, Complaint Counsel offer not a single proposed finding of fact stating that any challenged ad made any such claim. That omission is fatal because "[t]he meaning of advertisements to the public" is a "question[] of fact." *Goodman v. FTC*, 244 F.2d 584, 600 n.35 (9th Cir. 1957); *accord Cinderella Career & Finishing School, Inc. v. FTC*, 425 F.2d 583, 587-589 & n.7 (D.C. Cir. 1970); *Natural Organics, Inc.*, 2001 WL 1478367, at *2 (F.T.C. Jan. 30, 2001).

Complaint Counsel's omission of any proposed findings of fact about claims made by the ads also confirms that Complaint Counsel's position is based not on evidence but on their own say-so. But "*ipse dixit* does not suffice …[to] satisfy … [the] preponderance-of-the-evidence burden of proof." *Grayned v. Walgreens*, 2022 WL 2527821, at *2 (E.D. Mo. July 7, 2022). Nor does the little evidence Complaint Counsel have offered. Instead, what the challenged ads and the extrinsic evidence here show is that the ads conveyed that specific TurboTax products (or SKUs) were free to those who qualified, that the qualifications were tied to the complexity of one's tax return, and that more information was available on the TurboTax website.

1. **Express claims.** Complaint Counsel's frontline argument—that the challenged ads *expressly* claimed either that TurboTax is free for everyone or that each TurboTax SKU is

free without qualification, CC's Post-Trial Br. 49—is indefensible. "Express claims are ones that *directly state* the representation at issue." *Thompson Medical Co.*, 104 F.T.C. 648, 788 (1984) (emphasis added). Complaint Counsel have *never* identified an ad that directly stated what they allege. PFF ¶305. To the contrary, they conceded, both before and during trial, that the challenged ads did *not* "say all TurboTax products are free," PFF ¶306, or that "all consumers can file their taxes for free with TurboTax," PFF ¶303. Complaint Counsel's brief does not attempt to square these concessions with the assertion that this is "an express claim case," PFF ¶206.

a. Of the 210 challenged ads, Complaint Counsel rest their express-claim argument on a precious "few," CC's Post-Trial Br. 49. The exact number is six—about *three percent* of all the challenged ads and a miniscule fraction of the ads that Intuit ran over the relevant period. And even that tiny cherrypicked fraction debunks Complaint Counsel's argument when the ads are considered "'in [their] entirety,'" as they "must" be, *S.C. Johnson & Son, Inc. v. Clorox Co.*, 241 F.3d 232, 238 (2d Cir. 2001); *accord FTC Policy Statement on Deception*, 103 F.T.C. 174, 176 & n.7 (1984), appended to *Cliffdale Associates, Inc.*, 103 F.T.C. 110 (1984).

For example, Complaint Counsel assert (Br. 49) that a video ad from 2015 (GX321) said consumers could "file on TurboTax for absolutely nothing." But when those words were spoken, the ad displayed not only the name of the product being advertised, but also the words "for simple U.S. returns only" and "See offer details at TurboTax.com." PFF ¶226. The same words appeared in another ad Complaint Counsel highlight (Br. 49), a 2016 video ad (GX323) in which Anthony Hopkins said, "TurboTax Absolute Zero lets you file your taxes for free." Even that excerpted claim, moreover, because it is about Absolute Zero only, does *not* expressly say that all TurboTax is free.

Next, Complaint Counsel assert (Br. 49) that in one 2017 ad (GX325), "Intuit told consumers: 'At least your taxes are free.'" On its face, that is an express claim not that *TurboTax* is free, but that the single individual in the ad's taxes are free. Moreover, those words are spoken (by one character to another) only *after* a written disclosure stated that the ad was for the "AbsoluteZero product only," that that product was "For simple U.S. returns," and that consumers could "See offer details at TurboTax.com." (GX325). Finally, Complaint Counsel target (Br. 49) an ad from Intuit's "Free, Free, Free" ad campaign (GX329). But as Intuit's post-trial brief explained (at 38-39)—in the words of the FTC's own designee—the word "free" by itself is not an express claim that TurboTax is free, and each "Free, Free, Free" ad considered in its entirety conveyed that only a specific TurboTax SKU was free, that the SKU covered simple tax returns only, and that more details were available at TurboTax.com. PFF ¶¶221-223.

Equally unsupportive of Complaint Counsel's express-claim argument are the two non-video ads they attack. First, Complaint Counsel's selective quotation (Br. 49) of a paid-search ad (GX168) omits the ad's statement that "Over 50 Million Americans Can File With TurboTax® Free Edition," PFF ¶267—language making clear that a TurboTax product was free (which it was and is) and that only some Americans are eligible for it (which they are). Second, Complaint Counsel's quoted excerpt (Br. 49) from a TikTok ad (GX175-A) likewise disregards text in that ad stating that the advertised product was "TurboTax Free Edition," that that product "is for simple U.S. returns only," and that consumers could "See if you qualify at turbotax.com." PFF ¶248.

b. Even if any of the ads just discussed supported Complaint Counsel's express-claim theory, that would say nothing about the other 97% of the ads at issue here. Complaint Counsel nowhere support their assertion (Br. 49) that the "few" ads on which they focus—four

antiquated video ads out of 56, one paid-search ad out of 15, one display ad out of 102, and none of the 19 email ads and four radio ads—are "similar" to "many" others. They are not. The words Complaint Counsel excerpt from their leading examples (GX321 and GX323) were not repeated in any other challenged ad over the last seven years. PFF ¶¶214-301. And nearly all the challenged video display ads that made audible "free" claims (including TikTok ads) included a voiceover stating that the free offer was available for "simple tax returns only." PFF ¶252. Of the challenged paid-search ads, meanwhile, most stated in writing that the advertised product was for "simple tax returns only." PFF ¶267. In sum, Complaint Counsel do not remotely support their express-claim theory as to the *vast* majority of the challenged ads.

2. Implied claims. Complaint Counsel's back-up argument—that the challenged ads implied that all TurboTax is free without qualification (Br. 49)—fares no better. Complaint Counsel's brief confirms what Intuit's post-trial brief argued (at 40): Complaint Counsel's implied-claim theory impermissibly relies on "'disputatious dissection,'" *S.C. Johnson*, 241 F.3d at 238, rather than on the "overall net impression" left by the ads, *Fanning v. FTC*, 821 F.3d 164, 171 (1st Cir. 2016). In particular, Complaint Counsel rely (Br. 50) exclusively on five "Free, Free, Free" video ads that can never run again (to the exclusion of the other 205 ads challenged in this case), and within those ads focus exclusively on the repetition of the word "free." But as explained, and as conceded by the FTC's designee, the message conveyed by the word "free" "depends [on] whether there is any other context for the person that is hearing" it. PFF ¶221. And in each ad on which Complaint Counsel rely (as in the other 126 challenged video ads), that context included a written disclosure identifying the specific SKU being advertised, stating that the offer was for "simple U.S. returns," and inviting consumers to "see details at Turbotax.com." PFF ¶215. Moreover, as the lone quoted excerpt in Complaint Counsel's implied-claim

argument shows (Br. 50), even the representative ad they cite included a *voiceover* stating that the advertised product was "TurboTax Free Edition" and inviting consumers to "see details at turbotax.com," PFF ¶218. Other evidence Complaint Counsel rely on further confirms that consumers not only did not have the takeaway Complaint Counsel argue, but in fact did not even associate the "free, free, free" repetition with TurboTax. Complaint Counsel's failure to even *acknowledge* these facts in their implied-claim argument dooms their claim under the cases cited at the start of this paragraph.

Perhaps recognizing that, Complaint Counsel misstate the law in suggesting (Br. 49) that courts may—as an *alternative* to considering an ad's overall net impression—discern an implied claim by focusing myopically on an isolated "representation [by] itself." Complaint Counsel draw this argument from the FTC's Policy Statement on Deception, but they omit the words immediately following those they quote, which confirm that examination of an ad must "includ[e] an evaluation of … the entire document" and "the juxtaposition of various phrases in the document." *FTC Policy Statement on Deception*, 103 F.T.C. at 176. Complaint Counsel also falsely attribute to *Pom Wonderful LLC*, 155 F.T.C. 1 (2013), the proposition (Br. 49) that a court "may *also* find deception 'based on the "net impression" created by a representation'" (emphasis added). *Pom Wonderful* does not contain the quoted language at all; it says (consistent with Intuit's position) that "[i]n determining what claims may reasonably be attributed to an advertisement, the Commission examines the entire advertisement and assesses the overall 'net impression' it conveys." 155 F.T.C. at 12. The language Complaint Counsel quote comes instead from *FTC v. Stefanchik*, 559 F.3d 924 (9th Cir. 2009)—except that the critical word "also" (on which Complaint Counsel rest their suggestion that overall-net-impression analysis is optional) is not part of the quote. That word (and the concomitant

suggestion) have *no* supporting authority. They come from Complaint Counsel alone. Because the suggestion contradicts a long line of consistent contrary authority—which Complaint Counsel offer no reason to disregard—it should be rejected.

Under the law as it actually stands, Complaint Counsel's implied-claim theory fails. As explained in Intuit's post-trial brief (at 39-45), when one considers "the interaction of all of the constituent elements" in the challenged ads, *Telebrands Corp.*, 140 F.T.C. 278, 429 (2005), the most Complaint Counsel proved is that the message each challenged ad conveyed was that (1) a particular, identified TurboTax SKU was free, PFF ¶¶215, 250, 266, 281-282, 294, 317, 319; (2) only certain consumers would qualify for it and those qualifications were tied to the complexity of the individual's tax returns, PFF ¶¶215-217, 248-249, 252, 267-268, 281-282, 294; and (3) consumers could obtain additional details at the TurboTax website, PFF ¶¶215, 218, 294.

Complaint Counsel also ignore the challenged ads' inclusion of a specific product name, nowhere acknowledging that that *is* qualifying language—despite unrebutted evidence that that language *alone* prevented reasonable consumers from misunderstanding that all TurboTax products were free. PFF ¶319. As for the ads' language limiting each offer to simple tax returns and inviting consumers to see if they qualify at the TurboTax website, Complaint Counsel shunt it to a separate section of their brief (at 58-65), as if it could be severed from the ads of which it is a part. Whether or not that divide-and-conquer approach is permissible under Complaint Counsel's misstated version of the law, it is not permissible under the law as it actually stands. Rather, "all of the constituent elements" in the ads must be considered together. *Telebrands*,

140 F.T.C. at 429. When they are, the challenged ads do indeed "speak for themselves," CC's Post-Trial Br. 50, and in so doing refute Complaint Counsel's case.[1]

Like their express-claim argument, moreover, Complaint Counsel's implied-claim argument completely disregards most of the challenged ads. Complaint Counsel cite (Br. 50) only 5 out of 56 challenged video ads, and ignore *all* 102 challenged display ads, 19 challenged email ads, 15 challenged paid-search ads, and 4 challenged radio ads. Each of Complaint Counsel's selected five video ads, moreover, was a so-called "Free, Free, Free" ad, whereas the overwhelming majority of the challenged ads (including the challenged video ads) did *not* similarly contain the complained-of repetition of "free." PFF ¶220. In any event, as Intuit's post-trial brief described (at 16-20), all the challenged video ads identified the specific product being advertised and stated in writing that the advertised offer was available only to taxpayers with "simple" returns, and *all* of the challenged ads (video or otherwise) stated that there were qualifications for the free offer or product. PFF ¶¶215, 248, 266-267, 281, 294. Every challenged video ad also informed consumers (in writing, audio, or both) that they could find additional information at the TurboTax website. PFF ¶215. And quite obviously, in the space-constrained format in which most of the challenged ads ran, any free claim conveyed by the ads was necessarily less prominent. (*Cf.* Hauser (Intuit) Tr. 857-858, 1027; RX1391 (Hauser (Intuit) Dep.) at 95-96; Golder (Intuit) Tr. 1106-1108; RX1018 (Golder Expert Report) ¶120). In short, even were it permissible to isolate language *within* the five ads Complaint Counsel cite, those

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[1] To be clear, Intuit's statements that the ads speak for themselves in its answer was in response to allegations in the Complaint misquoting the advertisements. It was not nor was it intended to be a suggestion that Complaint Counsel could satisfy their burden of proof through say-so and nothing else.

cherrypicked ads could not satisfy Complaint Counsel's burden of proof as to the vast majority of the challenged ads.

Finally, although nowhere discussed in Complaint Counsel's implied-claim argument, "intent is powerful evidence" of whether an allegedly implied claim "in fact was conveyed to consumers," *Telebrands*, 140 F.T.C. at 304. And as explained in Intuit's post-trial brief (at 46-49), the unrebutted evidence of Intuit's intent—including testimony from every Intuit executive who testified, PFF ¶¶167-169, 171, 174, 852, 860, 870, together with the instructions Intuit supplied to its ad agencies in the normal course of business, PFF ¶¶172-173—strongly undercuts any notion that the challenged ads implied the claim that Complaint Counsel allege.

3. Extrinsic evidence. Complaint Counsel assert (Br. 50) that "[n]o extrinsic evidence is needed" to satisfy their burden to prove that the challenged ads conveyed a misleading claim. Commission precedent makes clear, however, not only that extrinsic evidence offered by a party *must* be considered, *Telebrands*, 140 F.T.C. at 334—and Intuit offered such evidence here—but also that, except where a court can "conclude with confidence" based on "the advertisement itself" that a particular alleged claim is conveyed, the court "'will not find the ad to have made the claim unless extrinsic evidence allows [it] to conclude that such a reading of the ad is reasonable,'" *id.* at 429. For the reasons just explained, the only thing a court could "conclude with confidence" based on the challenged ads themselves is that they do *not* convey that all TurboTax is free without qualification. That alone means Complaint Counsel cannot prevail. But at a minimum, it means this Court should "'not find the [ads] to have made the claim'" that all TurboTax is free without qualification "'unless extrinsic evidence'" supports such a finding. *Id*. It does not.

a. Contrary to Complaint Counsel's contention (Br. 51), Professor Novemsky's survey does not support their implied-claims argument. That Complaint Counsel even mention that survey in the section of their brief (III.A.1) about the "representation[s]" made by the challenged ads is remarkable, given that Professor Novemsky did not perform a claims test and did not show any of his survey participants any of the challenged ads. PFF ¶¶534-536. His survey instead tested participants' memory of "whatever they saw in the world," which may well *not* have been the challenged ads. PFF ¶538. This kind of "memory test" is "useless." *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) (excluding survey that was "little more than a memory test"). The survey is thus not probative of what representations were made in any of the challenged ads. And even if it *could* be probative on that point, the survey's myriad flaws would make it unreliable evidence on the point (as on every other). Those flaws, which are discussed at length in Intuit's post-trial brief (at 71-82), include:

First, the survey did not employ a test-and-control design, PFF ¶¶531-540, and thus, in Professor Novemsky's own words, it is "impossible" to "draw any causal inference" from it, PFF ¶532—including whether the challenged ads made claims that caused consumers to wrongly believe they could file for free with TurboTax. Second, the survey's results derive entirely from questions that were "contaminated by bias [in that] their wording primed respondents to" give particular responses, *Fish v. Kobach*, 309 F.Supp.3d 1048, 1060 (D. Kan. 2018), a*ff'd sub nom. Fish v. Schwab*, 957 F.3d 1105 (10th Cir. 2020). PFF ¶¶566-578. Indeed, when asked why they thought they could file for free with TurboTax, survey participants answered with the likes of "Because this survey is suggesting that I can file it for free," "Because you keep yelling [sic] me I can," and "It is evident form [sic] the past questions that it is free." PFF ¶¶575-576. Third,

Professor Novemsky's survey population was fatally flawed due to the survey's less-than-five-percent response rate. PFF ¶542; *In re Autozone, Inc.*, 2016 WL 4208200, at *17 (N.D. Cal. Aug. 10, 2016), *aff'd*, 789 F.App'x 9 (9th Cir. 2019), Professor Novemsky's multiple efforts to include only respondents who were likely unfamiliar with TurboTax's advertising, PFF ¶¶543-552; *Citizens Financial Group, Inc. v. Citizens National Bank of Evans City*, 383 F.3d 110, 118-121 (3d Cir. 2004), and his decision to permit participants to opt out of the survey after he informed them that it was "being conducted on behalf of the [FTC]" in order to assess "advertisements by Intuit, the maker of TurboTax" and thereby "help [the FTC] further [its] mission under the FTC Act to protect consumers," PFF ¶¶555-557; *see also* PFF ¶558. And finally, Professor Novemsky's purported results do not pass the "smell test relative to the numbers … elsewhere" in evidence, PFF ¶612.

In sum, it is difficult to imagine a survey that runs afoul of more widely accepted indicia of reliability, or one more clearly designed to reach its desired outcome. Each of the defects just discussed would alone render the survey scientifically invalid; together, they leave no doubt that the survey should be given no weight at all (including regarding what the challenged ads claimed), and certainly not the talismanic weight Complaint Counsel place on it.

b. Complaint Counsel's position is equally unsupported by the other extrinsic evidence they cite:

i. *Complaints*. Complaint Counsel remarkably rely (Br. 51) on a paltry set of consumer complaints received by the Consumer Sentinel Network in support of their argument that the challenged ads made misleading claims. Even if all 228 complaints identified by Complaint Counsel were both relevant and reliable (which Complaint Counsel failed to establish, PFF ¶¶633-634, presenting *no* evidence to that effect at trial), this small number proves that

reasonable consumers did *not* take away the alleged misleading message. PFF ¶631. The 228 complaints are microscopic compared to the number of views, impressions, and clicks that the challenged ads received during the relevant time period, PFF ¶637, and represent just 0.0003% of the 86.4 million TurboTax customers who completed at least one return between Tax Years 2015 and 2021, PFF ¶¶631-632.

Complaint Counsel's criticisms of Professor Peter Golder's analysis of the complaints, CCFF ¶¶722-737, meanwhile, are baseless. Complaint Counsel first criticize Professor Golder—who concluded that consumers have not complained about Intuit at rates that reflect deception, PFF ¶636—for "only consider[ing] complaints in Consumer Sentinel placed into evidence by Complaint Counsel or that were made to the Better Business Bureau" (BBB). CCFF ¶722. That is an odd critique indeed: Complaint Counsel themselves identify the relevance of those complaints—the complaints were put forward by Complaint Counsel, and therefore one would expect them to be Complaint Counsel's "best evidence" of consumer misunderstanding. (RX1394 (Golder (Intuit) Dep.) at 120). Professor Golder, in other words, addressed the evidence *Complaint Counsel* adduced in seeking to carry their burden. That the evidence does not support Complaint Counsel's theory (Golder (Intuit) Tr. 1059-1060; RX1394 (Golder (Intuit) Dep.) at 73, 116-117, 119-120, 126-128, 229-233) is unquestionably bad for Complaint Counsel, but it is not a basis to criticize Professor Golder.

Next, Complaint Counsel fault Professor Golder for not considering complaints made directly to Intuit and found in the company's CRM database. CCFF ¶¶722-724. After moving the Court to require the production of these data, Complaint Counsel presented no evidence of its contents, at trial or otherwise. The only plausible inference is that these data only further undermined Complaint Counsel's theory of deception—otherwise, the Court surely would have

heard about it. Complaint Counsel also appear to discredit the FTC's own consumer-complaint database, as their expert claims (without support) that the Sentinel Network and the BBB are "not the main location[s] where a consumer would complain." CCFF ¶724; (Novemsky (FTC) Tr. 1774). It is surprising that the nation's own consumer-protection agency puts so little stock in its own tool for gathering and addressing potential consumer grievances. PFF ¶¶627-630. Where Complaint Counsel believed it would be helpful to them, moreover, their rebuttal witness Erez Yoeli pointed to an academic study relying solely on complaint figures in the Sentinel database. PFF ¶624. In any event, Professor Golder would not have been able to perform an informative benchmarking analysis by reviewing complaints made directly to Intuit and found in the CRM database, because an equivalent source of complaints was not available for other benchmark companies (and because Complaint Counsel refused to produce such data in discovery). Analysis of the complaints on the BBB website, by contrast, provided a reliable comparison of equivalent data. (RX1394 (Golder (Intuit) Dep.) at 121, 229-232). Finally, Complaint Counsel's assertion that the inclusion of all complaints about Intuit on the BBB website "inappropriately dilutes any effect of complaints related to TurboTax," CCFF ¶734, is incorrect. Professor Golder accounted for this concern by standardizing the rate of complaints for Intuit against the number of all Intuit customers—in other words, he used the appropriate denominator. (Golder (Intuit) Tr. 1237). By matching the complaint source with the total number of customers, Professor Golder eliminated any inconsistency and allowed for an accurate comparison of Intuit's complaint rate relative to benchmark companies. (Golder (Intuit) Tr. 1238).

ii. *Deposed consumers*. Complaint Counsel wrongly rely (Br. 31, 51) on testimony from 16 deposed consumers—who either filed a BBB complaint against Intuit or signed a

declaration at Complaint Counsel's request articulating their dissatisfaction with TurboTax—as evidence that the challenged ads conveyed the alleged misleading claims. That testimony, which is not remotely from a representative sample of the population, does not support Complaint Counsel's case. For example, Complaint Counsel say (Br. 31) deponents testified that the cost of tax-preparation services was important to them, but ignore ample testimony from consumers that cost was not the primary or even a significant factor when deciding which tax-prep product to use. *See* Intuit's Response to CCFF ¶665; (GX130 (Tew (Consumer) Dep.) at 15-16 (citing familiarity as the "key driver"); GX132 (Dougher (Consumer) Dep.) at 24 (citing accuracy as the "most important"); GX137 (DuKatz (Consumer) Dep.) at 22-23 (citing the user interface and clear instructions as "really important")). Complaint Counsel also say (Br. 31) that consumers testified that they remembered Intuit's free advertising. But the point that consumers remembered about the advertising was that Intuit's free TurboTax product was specifically for simple tax returns only. *See* Intuit's Response to CCFF ¶666; (GX135 (Phyfer (Consumer) Dep.) at 79-80; GX136 (Schulte (Consumer) Dep.) at 27-28)). Complaint Counsel also cite (Br. 31) deposition testimony claiming that consumer deponents did not understand Intuit's eligibility criteria for Free Edition, but they disregard testimony from the same consumers showing that they understood that the qualifications for TurboTax Free Edition were based on tax complexity and that the product was for taxpayers with simple returns. *See* Intuit's Response to CCFF ¶669; (GX124 (Bodi (Consumer) Dep.) at 15-16, 38; GX130 (Tew (Consumer) Dep.) at 21; GX137 (DuKatz (Consumer) Dep.) at 67-68; GX135 (Phyfer (Consumer) Dep.) at 89-90)). And again, these were the consumers *Complaint Counsel* pointed to as having information to *support* their claims.

On top of the testimony discussed above, the consumers Complaint Counsel identified testified that: free TurboTax advertising was not what led them to use TurboTax, *see* Intuit's Response to CCFF ¶¶667-668; they understood that the qualifications for TurboTax Free Edition are based on tax complexity, *see* Intuit's Response to CCFF ¶¶669-670; they did not spend significant time or effort preparing their taxes with TurboTax and did not find it difficult to switch between tax-preparation providers, *see* Intuit's Response to CCFF ¶¶671-673; they considered disclosures in TurboTax advertising and on the TurboTax website to be both easy to read and noticeable, *see* Intuit's Response to CCFF ¶674; and they are familiar with disclosures providing additional information that are available by clicking a hyperlink including those available on the TurboTax website, *see* Intuit's Response to CCFF ¶675.

iii. *Internal complaint tracking.* Complaint Counsel next rely (Br. 31, 51) on a very small number of individual consumer sentiments ("verbatims") and customer-interaction records, contending they show that Intuit was aware of negative customer feedback and complaints. But Intuit has not denied such awareness; as Intuit's witnesses explained, "there will always be some reviews that include some negative things or complaints." (Rubin (Intuit) Tr. 1504-1505). Intuit's witnesses also explained, however, that selecting one negative review to the exclusion of many positive ones surrounding it yields little value. (Rubin (Intuit) Tr. 1504-1505). Thus, Complaint Counsel's approach at trial—highlighting a single negative review surrounded by 20 positive one—was not probative. (*See* Johnson (Intuit) Tr. 669-671; GX475). The cherry-picked examples in Complaint Counsel's post-trial filings are no more insightful. One negative customer review says little, for example, when surrounded by 94 positive ones. (*See* CCFF ¶647; RX816 (Intuit)).

The most important fact regarding Intuit's internal complaint-tracking data is that the complaint rates in both the Tax Year 2020 CRM data and Tax Year 2021 customer-review data that Complaint Counsel invoke had exceedingly low rates of negative customer feedback— [redacted] and [redacted] of TurboTax's Tax Year 2020 and Tax Year 2021 customers bases, respectively. *See* Intuit's Response to CCFF ¶¶635, 642. These low rates (which align with Intuit's high retention rates, PFF ¶650) fall well short of the evidence required to prove that consumers took away from the challenged ads the misleading claims Complaint Counsel allege. *See Telebrands*, 140 F.T.C. at 447-448 ("FTC cases suggest that the Commission would be justified in considering levels of ten percent net takeaway sufficient," and citing cases holding similarly).

iv. *Internal marketing-strategy documents.* Complaint Counsel wrongly contend (Br. 53) that certain Intuit documents "admit" their theory of the case. Fairly read, those documents *undermine* Complaint Counsel's contention that misleading claims were conveyed, showing that Intuit targets its free-product-marketing campaigns at the demographics most likely to qualify for Free Edition, and that Intuit communicates effectively that its free offers are truly free to those who qualify. (GX428 (Intuit) at 20-24). For example, Intuit's Fiscal Year 2019 Go-To-Market White Paper states:

[redacted]

The cited documents thus show that Intuit clearly communicated the qualifications for free TurboTax SKUs while offering a legitimately free product to millions of consumers.

v. Documents prepared by outside ad agencies. Complaint Counsel next rely (Br. 31, 51) on a document prepared by an external advertising agency (Wieden+Kennedy). But that document reflects messaging considered by the agency, not by Intuit; Complaint Counsel offer no basis to conclude that Intuit adopted (or even agreed with) any portion of the document. Indeed, Intuit offered unrebutted trial testimony that it provided Wieden+Kennedy (and other ad agencies) with instructions that free TurboTax advertisements should not only target consumers likely to qualify for the free offer but also (Ryan (Intuit) Tr. 783; Johnson (Intuit) Tr. 620-621). That unchallenged testimony is supported by scores of normal-course business documents. Even the document Complaint Counsel cite contains a litany of slides showing Intuit's clear guidance to Wieden. (GX688 (WK) at -4847-4848, -4856, -4892). One slide notes, for example, that TurboTax's free advertising was (GX688 (WK) at -4848, -4856).

vi. *Marketing research.* Finally, Complaint Counsel invoke (Br. 51) "Intuit's own marketing research" as evidence that the challenged ads conveyed the misleading claims they allege, but they fail to explain how that research supports that theory. Complaint Counsel later invoke the same research (Br. 57) as purported evidence that reasonable consumers were likely to be deceived by the challenged ads. To the extent the research is relevant at all to the issue of what claims were conveyed, it does not help Complaint Counsel on that issue for the same reasons it does not help them prove that reasonable consumers were likely to be deceived. Those reasons are detailed further below. *See* Part II.B.2-4.

* * *

The challenged ads themselves and extrinsic evidence both make clear that no ad claimed—either expressly or implicitly—that all TurboTax was free.

B. Complaint Counsel Failed To Prove That The Challenged Ads' Claims About Qualified Free Offers Were Likely To Mislead A Substantial Minority Of Reasonable Consumers

Aside from Professor Novemsky's survey (which as explained is irrelevant and unreliable), Complaint Counsel offer just one point in support of their two-paragraph argument (Br. 52) that the challenged ads were likely to mislead a substantial minority of reasonable consumers: "TurboTax was not free for about two-thirds of taxpayers in recent years." That is unavailing because Complaint Counsel's burden was to prove that a significant minority of consumers was likely to be deceived by the ads, *see* 16 C.F.R. §3.43(a), not that some population of consumers did not qualify for the advertised offer. The latter in no way proves the former.

Moreover, the "two-thirds" figure on which Complaint Counsel rely does not reflect the population of consumers at issue. In fact, this Court rightly observed at trial that Complaint Counsel's use of "all tax filers" as the denominator in that fraction "makes [the] number pretty much meaningless." PFF ¶463. As Professor Golder confirmed, the "appropriate denominator"

to "assess who qualifies" for free TurboTax products is not "all U.S. taxpayers" because "many consumers," such as those who file "through paid preparers" like "CPAs," are "not … in the market for an online tax preparation product." PFF ¶464. The correct denominator is consumers who are in that market—which is approximately 75 million. PFF ¶129. And as Greg Johnson testified, of those consumers—that is, "of those who [actually] use software [do-it-yourself] solutions"—"a majority" have a "simple return" and thus are eligible to file their taxes for free using TurboTax Free Edition. PFF ¶464; *see also* PFF ¶129. Of the remaining minority, moreover, some are "very complex filers," PFF ¶464, who could not reasonably believe they could use a product available for "simple tax returns only." And critically, the percentage of new TurboTax customers who file their taxes for free each year using Free Edition outpaces the roughly 50% of consumers in the online tax-preparation market who qualify to use that product, reflecting that Intuit is successful at reaching qualifying consumers with its free advertising. (PFF ¶¶659-660).

Complaint Counsel make (and made at trial) no attempt to assess the likelihood of deception with respect to the relevant population of consumers. That leaves a gaping and dispositive hole in their case.

II. THE CHALLENGED ADVERTISEMENTS WERE NOT DECEPTIVE TO REASONABLE CONSUMERS

Complaint Counsel's claim fails for the additional reason that they failed to prove that the challenged ads' supposed claim (that all TurboTax is free) was likely to mislead a substantial minority of consumers acting reasonably under the circumstances. Indeed, Complaint Counsel largely just offer the unsupported conclusory assertion (e.g., Br. 52) that it would be "reasonable" for consumers to believe they could file their taxes for free using TurboTax after seeing a challenged ad. Needless to say, Complaint Counsel's *opinion* is not proof of what is

reasonable, and it is apparent that Complaint Counsel's opinion gives consumers far too little credit.

Complaint Counsel rely in vain (Br. 53) on the principle that ads "'should be construed against the advertiser'" if they are "'capable of being interpreted'" as conveying a misleading claim (quoting *Resort Car Rental Systems, Inc. v. FTC*, 518 F.2d 962, 964 (9th Cir. 1975) (per curiam)). The Commission has warned that that principle should not be "applied uncritically or pushed to an absurd extreme," *Heinz W. Kirchner*, 63 F.T.C. 1282, 1290 (1963), and later clarified that an ad is capable of a "misleading interpretation" only if it actually "conveys" a misleading claim, *Telebrands*, 140 F.T.C. at 291. As explained, *see supra* Part I.A, the challenged ads are *not* capable of a misleading interpretation. This is thus not a circumstance where the ads conveyed a false or misleading statement (like "Dollar-A-Day" when *nobody* paid only $1 per day, *Resort Car*, 518 F.2d at 964).

In any event, regardless of how the challenged ads are "construed," CC's Post-Trial Br. 53, the record does not support Complaint Counsel's argument that they were deceptive to reasonable consumers.

To start, the evidence establishes that reasonable consumers are familiar with free tax-preparation offers, understand that such offers are qualified, know that the availability of free offers is tied to a tax return's complexity, and do research before selecting a tax-preparation product. Complaint Counsel's contrary argument takes evidence out of context and otherwise distorts the record. It also ignores reliable survey evidence and consumer-experience data indicating that reasonable consumers were not likely to be deceived.

A. Complaint Counsel Distort Or Disregard The Evidence About Reasonable Consumers In The Online Tax-Preparation Market

Complaint Counsel's argument that the challenged ads were likely to deceive reasonable consumers disregards those consumers' experiences and familiarity with the tax-preparation industry. To the extent Complaint Counsel address these topics at all, they mischaracterize the record and impermissibly fail to credit the "expectations and understandings of the typical" consumer, *FTC Policy Statement on Deception*, 103. F.T.C. at 179, a topic on which they have offered no evidence.

Complaint Counsel first wrongly assert (Br. 53) that the existence of "at least one" TurboTax competitor that offers an online tax-preparation service for free means that reasonable consumers believe that all TurboTax products are free. To start, when Complaint Counsel say "at least one," they mean "one," as they identified only one competitor that they contend offered a free tax-preparation product to all consumers. And as to that one, Cash App Taxes, Complaint Counsel ignore Jack Rubin's uncontested trial testimony and the accompanying uncontroverted documents showing that "all consumers" could *not* file for free using Cash App Taxes. In fact, many consumers cannot. (Rubin (Intuit) Tr. 1536); PFF ¶496. Even if that were not the case, Cash App Taxes engages in [REDACTED] and is used by few consumers. PFF ¶495. It is thus unlikely that reasonable consumers would even be aware of that offer, let alone rely on it to form their understanding of the practices of other companies in the industry. PFF ¶¶495-498. And if reasonable consumers *were* aware of Cash App Taxes, then they were surely equally or more aware of everyone else's practice in the industry of offering free products for simple tax returns only.

Complaint Counsel next suggest (Br. 53-54) that Intuit's decision to donate a product to the IRS Free File program led reasonable consumers to believe that all TurboTax products were

free or that all consumers could use TurboTax for free. But Complaint Counsel offer no evidence or even explanation for that suggestion. In fact, they acknowledge (Br. 53) that the software Intuit and other companies donated to the Free File program was available only to certain "low-income consumers," in accordance with the program's rules. PFF ¶59; (Rubin (Intuit) Tr. 1515-1519, 1611-1612; Chappell (ALJ) Tr. 1511; RX301 (Intuit) at 3, 6; RX1259-A (Intuit)). Moreover, the TurboTax software donated to the program was kept separate from TurboTax's commercial offerings, including Free Edition, (Ryan (Intuit) Tr. 710; Rubin (Tr.) 1510-1515, 1519-1520), such that reasonable consumers would not confuse them. And given the Free File program's relatively minor usage (RX321 (Intuit) at 35), it is hard to understand how it could have formed consumer expectations. It simply makes no sense to suggest that the existence of TurboTax software available only to qualifying taxpayers through the IRS program would lead reasonable consumers to believe that a separate free TurboTax offering available on the TurboTax commercial website was available to all taxpayers without qualification.

But even if this argument had merit, that would *absolve* Intuit of responsibility, because the IRS bore sole responsibility for marketing the software donated to the program. (RX301-A at 2); *see also* (Rubin (Intuit) Tr. 1612). If in so doing, the *IRS* created the expectation that TurboTax free products were free for those who did not qualify, that is the IRS's fault. In fact, the Court heard and saw evidence that the IRS's marketing of Free File lacked the copious disclosures in TurboTax's advertising. PFF ¶¶278-279.

Likewise untenable is Complaint Counsel's evidence-free argument (Br. 54) that reasonable consumers would be deceived by the ads into believing all TurboTax is free because there are "many online products and services … routinely offered to consumers completely free of charge"—such as Google, Facebook, YouTube, and Spotify. If this were true, Complaint

Counsel had to *prove it*, not just *say it*. They could not because none of these other companies' products is like a tax-preparation product, and hence the availability of their products says nothing about what is commonplace in this industry. In any event, Complaint Counsel recognize that the free products these other companies offered are limited in some way (for example, requiring consumers to view ads) and that those companies offer paid versions of those services in addition to the basic free offering. *See* CCFF ¶490; PFF ¶500. (Complaint Counsel also point to Facebook as an example of a completely free product (Br. 54), but the FTC has argued that Facebook is not really free, PFF ¶501.) Unrebutted evidence, moreover, shows that reasonable consumers understand that free offers generally have limitations. PFF ¶¶473-488. Even the FTC's "free" guidelines, which this case supposedly seeks to "vindicate," recognize that the "public understands" that free offers are usually coupled with the requirement to purchase paid products. PFF ¶476.

Complaint Counsel's contention regarding other products is also refuted by the substantial evidence Intuit offered about reasonable consumers in the tax-preparation industry. PFF ¶¶471-484. Much like the "subscription satellite television services" discussed in *FTC v. DirecTV, Inc.,* 2018 WL 3911196 (N.D. Cal. Aug. 16, 2018), online tax-preparation products are high-involvement products, for which consumers typically make a "considered purchase" only after they "go through [an extended] process," *id.* at *3. They are high-involvement products because they relate to significant financial transactions that involve substantial risk for consumers—such as making a costly mistake preparing one's tax return or failing to maximize deductions. PFF ¶502; (Golder (Intuit) Tr. 1074-1076; RX1018 (Golder Expert Report) ¶144). Complaint Counsel present no evidence that consumers are *not* likely to invest time and conduct research to ensure they are selecting the right online tax-preparation product. PFF ¶¶503-504.

Complaint Counsel instead offer the unsupported assertion that it is "not necessarily true" that consumers undertake a high-involvement process before buying a tax-preparation product. CCFF ¶738; *see also* CCFF ¶¶739-742. But Complaint Counsel cannot carry their burden to prove deception simply by suggesting that Intuit's evidence might not conclusively refute their claim.

Finally, Complaint Counsel disregard myriad other evidence that reasonable consumers were not likely to be deceived. All major players in the tax-preparation industry offer a basic free product for consumers with simple tax returns and paid products for more complex tax situations. PFF ¶¶481-482. That model's ubiquity leads reasonable consumers to expect free tax-preparation offers to have qualifications tied to the complexity of one's tax returns—even if those qualifications are not expressly stated. PFF ¶¶483-484; *see also* PFF ¶¶488-490. And many consumers are familiar in particular with TurboTax's free and paid offerings, preventing those consumers from believing that all TurboTax products are free. PFF ¶¶48, 93, 669-671. Those consumers would at a minimum understand that they need to check their availability each year. PFF ¶671. Moreover, reasonable consumers understand that information conveyed at the top of the "marketing funnel"—such as in television and other ads designed to reach consumers early in the buying process—is limited, and that more information is available. PFF ¶511. They are thus not likely to be misled by top-of-funnel advertising. PFF ¶¶510-513; *see also* PFF ¶¶156-160, 180-181, 183, 188-190. Similarly, consumers viewing online ads—including display, paid-search, and email ads—understand based on experience that they can get additional information by clicking on the ads. PFF ¶¶520, 522, 524. That understanding reinforces that consumers do not expect that all information will be provided in an online ad or immediately jump to the conclusion that they will qualify for a free offer, meaning consumers would not

likely be deceived by the challenged ads even if those ads had any misleading claims. PFF ¶¶522-524, 527.

B. Complaint Counsel's Reliance On Intuit's Documents And A Podcast Is Misplaced

Complaint Counsel rely (Br. 53) on five categories of evidence to support their argument that the challenged ads were likely to deceive a substantial minority of reasonable consumers. But they read that evidence out of context, ignore trial and deposition testimony about the evidence, and otherwise mischaracterize what the evidence shows. When fairly and fully considered, the evidence shows that reasonable consumers were not deceived by the challenged ads.

1. 2015 Boston Tea Party Research. Complaint Counsel's reliance (Br. 10-11, 49, 53, 57) on a summary of consumer feedback about a draft of Intuit's 2015 Boston Tea Party ad is misplaced. To start, the survey speaks only to a single ad that is not properly before the Court because it aired outside the period covered by the FTC's complaint and the statute of limitations. *See* Intuit's Response to CCFF ¶66. In any event, it lends no support to Complaint Counsel's assertion (Br. 48, 53, 57) that reasonable consumers took away from that ad—or any other—that "TurboTax is free" without qualification. This "last minute" survey of 26 people "grabbed off the street" in San Francisco (Ryan (Intuit) Tr. 713) was conducted to test whether the Tea Party ad's political subject matter or bayonet scene would alienate audiences. (Ryan (Intuit) Tr. 713; GX159 (Ryan (Intuit) Dep.) at 11; *see also* GX341 (FTC) at -6897). As Ms. Ryan testified, assessing consumer understanding of the qualifications for the advertised product (TurboTax AbsoluteZero) was "not the intent of this research." (GX159 (Ryan (Intuit) Dep.) at 53). And the notation in Intuit's survey summary that consumers took away that "TurboTax is free" is properly "characterize[d] as shorthand" for the takeaway that AbsoluteZero is free (which it

was). (GX159 (Ryan (Intuit) Dep.) at 53). Complaint Counsel have not disputed that testimony. Moreover, the summary itself does not include each consumer's individual response, or even the questions they were asked. (GX341 (Intuit).

Further, no matter how construed, the survey does not show that even the draft ad misled survey participants. The participants "[s]kewed younger" than the general population and included members of the military (GX341 (FTC) at -6899)), meaning they were disproportionately likely to be eligible to file for free with TurboTax, PFF ¶¶85, 151-152, 193. Indeed, it is possible that "TurboTax [was] free" (Br. 10-11, 48, 53, 57) for most or even all of them.

Finally, as noted, the version of the ad that was shown was a draft, which subsequently underwent substantive revisions before airing. (Ryan (Intuit) Tr. 713-715; GX159 (Ryan (Intuit) Dep.) at 12-13). Most critically, the survey was conducted before the ad's disclosure screen was finalized; indeed, the draft version likely did not include any disclosure at all. (Ryan (Intuit) Tr. 713-714; GX159 (Ryan (Intuit) Dep.) at 12-13). Thus, even if the survey showed that consumers were misled by the pre-disclosure draft ad (which, for the reasons just explained, it does not), it says nothing about consumers' understanding of the ad that actually aired.

In sum, the summary of consumer feedback on the 2015 Boston Tea Party ad says nothing about consumer understanding of the challenged ads, much less that the ads were likely to mislead consumers who did not qualify for Free Edition into believing that they did. (Ryan (Intuit) Tr. 715; GX159 (Ryan (Intuit) Dep.) at 53; *see also* GX341 (Intuit)).

2. Tax Year 2018 Copy Test. Complaint Counsel fare no better in pointing (Br. 13, 29, 53, 57) to copy testing from Tax Year 2018 (the "TY18 Test") as evidence that reasonable consumers took away from the challenged ads the misleading claims Complaint Counsel allege

were conveyed. The TY18 Test was designed to evaluate consumers' "emotional connections" to certain ad concepts, not whether the ads effectively conveyed free product qualifications. (Ryan (Intuit) Tr. 723-724, 817, 820; GX146 (Ryan (Intuit) Dep.) at 96-97). In fact, although a draft version of one Free Edition ad ("Spelling Bee") was included in the testing, Intuit commissioned this research for the purpose of testing its new TurboTax Live campaign, which did not advertise any free product or offer. (Ryan (Intuit) Tr. 723-724; *see also* GX340 (Intuit) at 2; GX146 (Ryan (Intuit) Dep.) at 96-97). The survey thus was not designed to test—and does not accurately reflect—consumer understanding of the qualifications for free TurboTax products. (GX159 (Ryan (Intuit) Dep.) at 53). That is underscored by the fact that the draft version of the one Free Edition ad shown to survey participants did not yet include the written disclosures that would be added to its end card before airing. (Ryan (Intuit) Tr. 725; *see also* GX340 (Intuit) at 43 (showing end cards in the tested draft ads)).

In any event, the result Complaint Counsel cite (Br. 29)—that "73% of respondents associated '[t]hat i [sic] can file my taxes for free' with the [draft 'Spelling Bee'] ad"—does not indicate that any respondents were likely to be misled. Participants in the TY18 test were "much more likely" to qualify for Free Edition than the general population because they skewed young and considered their taxes "simple to moderately complex." (Ryan (Intuit) Tr. 724-725; *see also* GX340 (Intuit) at 3; PFF ¶¶85, 193). It therefore is likely that the vast majority of the 73% of the participants correctly took away from the ad that they could file for free. Complaint Counsel offer no contrary evidence.

Finally, Complaint Counsel are wrong to suggest (Br. 13) that their deception claim is supported by the statement in the test results that "[a]ds communicate the parent brand, TurboTax well, however, only about ~5% take away the sub brand (TurboTax Free, TurboTax

Live)." This statement merely reflected responses to the question: "Which brand do you think this ad was for?" (GX340 (Intuit) at 14). Understandably, most consumers would consider the relevant "brand" to be TurboTax (which it is). TurboTax Free Edition is a specific SKU, which respondents were not asked to identify.

3. Tax Year 2020 Copy Test. Complaint Counsel are wrong to point (Br. 30) to copy testing from Tax Year 2020 (the "TY20 Test") as evidence that reasonable consumers took away from the challenged ads the misleading claims Complaint Counsel assert were conveyed. Complaint Counsel's use of the TY20 Test results is misplaced because the ads shown to participants in that test were draft ads, not ads that actually ran. PFF ¶691. In fact, unlike the ads that actually ran in Tax Year 2020, three of the four tested ads had no written disclosures, and the fourth included Tax Year 2018 disclosure language that did not run in Tax Year 2020. PFF ¶699. Hence, contrary to Complaint Counsel's suggestion (Br. 30), the results do not indicate how consumers would have reacted to ads that actually aired, let alone in Tax Year 2020. Moreover, the percentage of participants who said they believed TurboTax would allow them to file for free after viewing a (draft) ad was not substantially greater than the percentage *not* shown an ad who expressed the same belief, and was less than the approximately 50% of consumers in the market for online tax-preparation products who do in fact qualify to use TurboTax Free Edition. PFF ¶695. The survey population, moreover, skewed younger than the general population, meaning an outsized proportion of them likely qualified for Free Edition. PFF ¶689. And the test group results from the TY20 Test depict only the *short-term* impact of an ad immediately after exposure, which would be expected to diminish over time. PFF ¶700.

Complaint Counsel also ignore the results from the control group in the TY20 Test. As Dr. Hauser explained, those results are the TY20 Test's only evidence of the *long-term* impact of

TurboTax advertising. PFF ¶700. Even though control-group participants were not shown any ads during the test itself, they were "consumers who ha[d] seen ads natively in the environment" (Hauser (Intuit) Tr. 882); indeed, the test was conducted multiple years after Intuit had begun advertising its free software. PFF ¶696. Thus, Dr. Hauser and Professor Novemsky agreed that the control-group results measured the cumulative impact of "anything [the survey participants] would have seen prior to entering the study," including TurboTax ads. (Novemsky (FTC) Tr. 505; *see also* Hauser (Intuit) Tr. 882 (control group measures "the cumulative impact of all the marketing that's come up to that point")). And only 33% of control-group participants reported believing that TurboTax allowed them to file for free. PFF ¶¶691, 695. That percentage matches the approximately 33% of taxpayers in the general population who qualify to use TurboTax Free Edition, and it is significantly less than the roughly 50% of consumers in the market for online tax-preparation products who qualify to use Free Edition. PFF ¶695. Furthermore, like the test group, the control group's 33% figure is likely lower than the percentage of respondents who actually were eligible to use Free Edition, because the survey population skewed young. PFF ¶¶689-690, 695.

In sum, the results from the control group, and the TY20 Test more broadly, indicate that TurboTax advertising did not cause consumers who did not qualify for Free Edition to believe that they did. PFF ¶¶690, 696, 697, 699.

4. Market research. Complaint Counsel's reliance on Intuit's market research (Br. 53) is similarly misplaced. Complaint Counsel cite only two documents (from Tax Year 2018), and neither shows that a substantial minority of reasonable consumers was likely to be deceived. Complaint Counsel note that one document showed that 49% of consumers were "'confident that Free Edition is truly free.'" CCFF ¶597. But it is uncontested that TurboTax Free Edition was

and is truly free. PFF ¶69. That only 49% of respondents were confident that Free Edition was "truly free," even though it indisputably is (RX597 (Intuit) at -1665); *see also* PFF ¶¶488, 490, shows that reasonable consumers are skeptical of free offers and do not automatically assume that a free offer will be available for them even when it is.

Complaint Counsel also misrepresent the market research on which they rely. They say, for example, that the research "showed that TurboTax brand awareness of 'free' increased from 37% to 44% year-over year." CCFF ¶599. The research says no such thing; it states that awareness of TurboTax *Free Edition* increased from pre-tax season to mid-tax season in Tax Year 2018. (RX595 (Intuit) at -2711, -2725). Further, that modest increase in awareness of Free Edition is not evidence that the challenged ads were likely to mislead reasonable consumers. It is instead consistent with the fact that most TurboTax users who paid to use TurboTax were not aware that Free Edition existed, which necessarily precludes a finding that those consumers could have been deceived. *See* Intuit's Response to CCFF ¶¶497-499.

5. Mary Ann Somers' podcast statements. Finally, Complaint Counsel misleadingly quote (Br. 13, 53) Mary-Ann Somers, a former Intuit executive, as saying on a podcast that when consumers view a particular television ad for TurboTax Free Edition, "'what they hear is free.'" Complaint Counsel suggest that this was an admission that Intuit told consumers they could file for free with TurboTax when they couldn't. That is not what Ms. Somers said. In a part of the podcast Complaint Counsel skip with an ellipsis (Br. 13), she said that the ad she discussed conveyed the "truth" that TurboTax's "free product" (i.e., Free Edition) was free. (GX357 (Complaint Counsel); GX358 (Complaint Counsel)). When asked in her deposition what product she was discussing on the podcast, Ms. Somers confirmed that it was "Free Edition." (GX148 (Somers (Intuit) Dep.) at 48-49, 56); GX357 (Complaint Counsel);

GX358 (Complaint Counsel)). The only message reasonable consumers could have taken away from the podcast regarding TurboTax and "free" is the accurate message that TurboTax Free Edition is free. As Ms. Somers put it, her podcast statements evince only that "there were millions" of people "able to file for free" with TurboTax, that that was "something [Intuit took] pride in," and that Intuit "want[ed] to be able to serve more and more of [its] customers with [its] free product." (GX148 (Somers (Intuit) Dep.) at 48).

C. Reliable Survey Evidence And Data Concerning Consumers' TurboTax Experiences Reflect That A Significant Minority Of Reasonable Consumers Was Not Likely To Be Deceived

Complaint Counsel ignore much of the substantial evidence Intuit has offered that disproves their theory of deception; the few arguments they do make about that evidence lack merit. Indeed, those arguments largely involve improperly flipping the burden of proof in this case, faulting Intuit for purportedly failing to put forward "direct evidence" to counter the so-called "obvious conclusion" that Intuit's ads deceived reasonable consumers. CC's Post-Trial Br. 54. Of course, a plaintiff does not discharge their burden by stating their theory and saying it is "obvious." Complaint Counsel cannot carry that burden; the evidence manifestly shows that a substantial minority of reasonable consumers was not deceived.

1. Customer Metrics. Complaint Counsel say nothing regarding the various consumer metrics about which Intuit's witnesses testified, which refutes the notion that reasonable consumers were likely to be deceived by the challenged ads. For instance, while Complaint Counsel speculate that consumers who abandon TurboTax do so because they were deceived, the fact that abandonment rates for TurboTax's paid and free products are the same (22%) shows that consumers are abandoning TurboTax not because they feel misled about whether they could file for free but for a reason (or reasons) common to all products. PFF ¶¶656-658.

TurboTax's high customer-retention rate for its paid products (which Complaint Counsel ignore) likewise reflects that consumers were not misled into believing that all TurboTax products were free. PFF ¶¶91-92, 649. In fact, TurboTax's retention rate with paying customers—the ones supposedly misled by the challenged ads—is 83%, higher than the Free Edition rate. PFF ¶650.

Complaint Counsel likewise ignore other data showing that most new TurboTax customers each year file their taxes for free using TurboTax. PFF ¶659. That majority figure exceeds the proportion of consumers in the online tax-preparation market who qualify, PFF ¶129, demonstrating that eligible consumers are getting the message that free TurboTax SKUs are free, PFF ¶660. Moreover, most TurboTax customers, including those using Free Edition, start and finish in the same SKU. PFF ¶¶82, 434, 661; *see also* PFF ¶662. Those statistics are not consistent with a wide-ranging deceptive advertising campaign that tricked consumers to visit the TurboTax website with the promise of free tax preparation only to later tell them they have to pay.

Finally, TurboTax's consistently high customer ratings and positive reviews suggest the absence of deception, because such deception would engender negative reviews and low ratings. PFF ¶652. Indeed, both paid and free TurboTax products have consistently received overwhelmingly positive customer feedback. PFF ¶¶653-654.

2. Tax Year 2020 NPS Study. Like other data Intuit introduced, Complaint Counsel ignore the Net Promoter Score survey from Tax Year 2020 (the "TY2020 NPS study"). But clear evidence disproving Complaint Counsel's theory cannot be wished away. The survey asked over 2,000 TurboTax customers whether they were aware of a free TurboTax product before they decided to use TurboTax. PFF ¶716. Roughly half of respondents (48%) answered

affirmatively, barely more than the 44% who did in fact file for free with Free Edition. PFF ¶717. By contrast, only ███ of respondents who had used a paid TurboTax product indicated that they were even aware that TurboTax had a free offering. PFF ¶719. These results demonstrate that Intuit largely succeeded in having its free TurboTax advertisements reach qualifying consumers. PFF ¶720. They also demonstrate that consumers who come to the TurboTax website expecting to file for free *are* filing for free, while those who visit expecting to pay to file their taxes are finding TurboTax's paid offerings. PFF ¶721. That is inconsistent with Complaint Counsel's deception claim.

3. Analysis Of TurboTax Customer Base. Bruce Deal's detailed analysis of Tax Year 2021 customer-level data further refutes that claim. As explained in Intuit's post-trial brief (at 89-92), those data reflect that only 510 customers out of 55.5 million, or 0.0009%, exhibited behavior consistent with believing they had been deceived. PFF ¶¶679-682. That microscopic percentage does not support finding that a significant minority of consumers were likely deceived.

Complaint Counsel's criticisms of Mr. Deal's opinions are meritless. The primary criticism (Br. 40) is that Mr. Deal "cannot answer the fundamental inquiry: whether consumers were deceived." But Complaint Counsel surely are not suggesting that proof of actual deception is necessary to establish liability; if it were, their case would be dead on arrival. Likewise, Intuit had no burden to conclusively determine for each and every customer whether or not they were actually deceived. What Mr. Deal did was assess whether Intuit's consumer data are consistent with Complaint Counsel's deception theory. PFF ¶663. He found, in essentially unrebutted testimony, that they do not. Among the 55.5 million Intuit consumers who created or logged into an existing TurboTax account in Tax Year 2021, he found approximately 97.6% exhibited

characteristics or behaviors inconsistent with the alleged deception. PFF ¶674. These include customers who actually used TurboTax to file for free in Tax Year 2021, PFF ¶665; customers who switched from TurboTax to another form of tax preparation in Tax Year 2021, PFF ¶¶666-668; and customers for whom the data showed either familiarity with or preference for paid TurboTax SKUs or services, PFF ¶¶669-673. He next examined the remaining 1.3 million paying TurboTax customers, focusing on those most susceptible to the deception Complaint Counsel allege: new Free Edition customers who found it through a TurboTax advertisement, spent at least 60 minutes using the product before being told they were not eligible for Free Edition, and switched to a paid TurboTax SKU. PFF ¶¶675-678. Mr. Deal found just 510 customers—1% of the relevant population (and *far* less than 1% of Intuit's Tax Year 2021 customer base)—for whom there was evidence of possible deception in the data. PFF ¶¶679-682.

Complaint Counsel have no direct response to that finding. They say (Br. 40-41) that customers *outside* of the group Mr. Deal most closely examined *could* have been deceived. But their own rebuttal witness, Erez Yoeli—who did "very little new analysis" in developing his opinions and failed to consider most of the materials Mr. Deal relied on, PFF ¶930—conceded at trial that his assertion that such customers "could" have been deceived was "not … very strong." PFF ¶¶930-931. Consistent with that concession, Complaint Counsel do not explain why customers outside the group on which Mr. Deal focused (e.g., customers who visited the TurboTax website but did not use a TurboTax product) were more likely to have been deceived. Complaint Counsel assuredly offer no actual evidence to support their argument. Speculation that consumers *could* have been deceived is not proof that a substantial minority of reasonable customers was *likely* deceived, which is what Complaint Counsel had to provide.

Complaint Counsel next criticize (Br. 40) Mr. Deal's opinion that consumers can easily detect and punish deception, including by pointing to a tiny sampling of consumer reviews they assert are inconsistent with that opinion. But those reviews say nothing about whether these dissatisfied customers actually *did* punish Intuit by switching to a different form of tax preparation the following year. The fact is that consumers switch between providers every year. For Intuit's competitors, it is [REDACTED]. (*See* RX50 (Intuit) at -6548). That a smaller number of paying TurboTax consumers switch thus reinforces the absence of deception.

Complaint Counsel advance a similarly cursory rebuttal (Br. 40) to Mr. Deal's opinions about Intuit's economic incentives in the tax-preparation industry. Complaint Counsel devote just three sentences to Mr. Deal's opinions concerning these incentives, arguing that deception could—once again, "could"—have occurred even if it was inconsistent with Intuit's economic interests. But Mr. Deal's opinion—supported by pages of trial testimony—was not that the relevant economic incentives made deception *impossible*. It was that the alleged deception would have made no sense for a rational profit-seeking business like Intuit. Complaint Counsel do not disagree with that opinion, even though it would make this the first "accidental" deception case in history.

4. Disclosure Efficacy Survey. Dr. John Hauser's Disclosure Efficacy Survey debunks Complaint Counsel's deception claim even more. PFF ¶¶722-723; *see also* Intuit's Post-Trial Br. 93-94. If the challenged ads were deceptive, revising them to reduce the emphasis on "free" and to provide consumers more information about Free Edition's qualifications should discourage consumers from even considering the brand, much less from starting in Free Edition.

PFF ¶742. But Dr. Hauser's survey shows that such a revised ad had no effect on consumer behavior. PFF ¶722.

Complaint Counsel argue (Br. 65) that the revised ad in the survey was still deceptive because it included "'free' claims" and employed "equally flawed disclaimers." But Intuit's post-trial brief already explained (at 94) why that contention is not credible. For one thing, it would make no sense for the revised ad to omit any use of the word "free," because TurboTax Free Edition is a genuinely free product for those who qualify; consumers cannot pay to use it. (Hauser (Intuit) Tr. 857; PFF ¶69). And the revised ad prominently qualified its "'free' claims" by informing viewers—verbally and in enlarged written text—that "[n]ot all taxpayers qualify" and inviting them to "[s]ee if [they] qualify at Vertax.com." PFF ¶¶730-731. The revised ad thus was comparable to the current (Tax Year 2022) TurboTax ads, which copy testing establishes are not deceptive, PFF ¶731, and which Complaint Counsel have not challenged as deceptive. The survey results therefore *do* demonstrate that the challenged ads were not deceptive either.

Complaint Counsel's remaining arguments about the survey are equally unpersuasive. They contend, for example, that the survey "did not measure the effects of a multiyear, multichannel, multi-ad advertising and marketing campaign" and thus failed to capture the ads' true impact. CC's Post-Trial Br. 39. This contention fails because the survey measured consumers' response immediately after exposure to an ad, when that ad's impact would have been most powerful. (Hauser (Intuit) Tr. 885, 890-891; RX1017 (Hauser Expert Report) ¶31). As Dr. Hauser explained, it is "well established" that this immediate response will decay over time, and "simple repetition alone" in a multiyear, multichannel, multi-ad campaign would not combat that decay. (Hauser (Intuit) Tr. 884, 891). To the contrary, such repetition could lead to

a "wear[-]out" effect, in which the ads' impact would decrease over time. (Hauser (Intuit) Tr. 891). Thus, if anything, the survey *overmeasures* the effect of TurboTax's ads, and yet it still shows that the percentage of consumers likely to start in Free Edition is comparable to the percentage who qualify to use it. (RX1017 (Hauser Expert) ¶31; PFF ¶¶743-744). Moreover, Dr. Hauser used a test-control design, meaning any overmeasurement effect would be present in both of his survey groups, allowing him to reliably compare the results from both groups and draw valid causal conclusions. (Hauser (Intuit) Tr. 848-849, 1030-1031).

Complaint Counsel next say that all the website stimuli in the Disclosure Efficacy Survey "explicitly state[d] that respondents can 'Start for Free' any of the three Vertax paid products," CCFF ¶772. But that is not a basis for criticism because real-life consumers likewise can start for free in TurboTax's paid SKUs. In any event, the "Start for Free" links were present in both of Dr. Hauser's survey groups, meaning that here too, the bias Complaint Counsel posits would be controlled for, and the survey results thus still reliable.

Finally, Complaint Counsel's argument (Br. 39) that the Disclosure Efficacy Survey suffers from a "demand artifact[]," because participants "may have understood the purpose of the survey to be an examination of a tax brand called Vertax" (CCFF ¶771), is unavailing. As Professor Novemsky explained, if that were true, it would have led participants to answer the survey questions in a manner *favoring Complaint Counsel*, causing them "to indicate that they *would* consider starting their taxes with Vertax." (GX749 (Novemsky Rebuttal Report ¶140 (emphasis added)). Furthermore, any criticisms along these lines could be asserted far more persuasively against Professor Novemsky. PFF ¶¶570-578, 594-595. He, unlike Dr. Hauser, did not disguise the real purpose of his survey from respondents (thereby creating serious risks of population bias), PFF ¶726, and did not use a control group. (Hauser (Intuit) Tr. 848-849, 1030-

1031). These safeguards that Dr. Hauser did use ensured that any demand artifacts did not affect the reliability of his results.

5. Kirk Fair Survey. The survey conducted by Rebecca Kirk Fair further confirms that Intuit's ads were not deceptive. *See* Intuit's Post-Trial Br. 95. If consumers started using TurboTax because they were deceived into believing they could file for free, one "would expect to see a substantial, statistically significant reduction in respondents' selection of a TurboTax [p]aid product … after learning [of an] additional free option." PFF ¶755. The survey, however, showed the opposite. PFF ¶756. Moreover, the fact that consumers recognized they could use non-TurboTax products yet still largely remained with TurboTax is inconsistent with the notion that they explored only TurboTax because they believed they could file for free. PFF ¶759.

Complaint Counsel attack Ms. Kirk Fair (Br. 41) for not being a psychologist and for conducting a survey that did not assess deception and "suffer[ed] from significant design and methodological flaws." These critiques are baseless. Ms. Kirk Fair—an expert whom the FTC has used previously—has over twenty-five years of experience designing and implementing consumer surveys using various methodologies. (RX1555 (Kirk Fair (Intuit) Trial Dep.) at 6-7; RX 1016 (Kirk Fair Expert Report) ¶¶1-3, Appendix A). And here her survey assessed whether information provided on an upgrade screen on the TurboTax website influenced consumers' choice of tax solutions—a question that directly addresses Complaint Counsel's allegations that consumers were deceived by the challenged ads and that TurboTax's upgrade screens played a role in that deception. (RX1555 (Kirk Fair (Intuit) Trial Dep.) at 11-13; *see also* PFF ¶¶904-911). Ms. Kirk Fair also used best practices and generally accepted survey guidelines. (RX1555 (Kirk Fair (Intuit) Trial Dep.) at 16; RX1016 (Kirk Fair Expert Report) ¶18; *see also* RX 709 (Intuit), RX714 (Intuit)). That included using a randomized test-and-control study, randomly

assigning respondents one of three upgrade screens, and double-blind methodology to prevent the introduction of bias in the questions asked. (RX1555 (Kirk Fair (Intuit) Trial Dep.) at 17-19). Ms. Kirk Fair also: (1) conducted a thorough pretest; (2) presented clear questions and answer choices; (3) asked balanced questions; (4) rotated answer options; (5) used open- and closed-ended questions; and (6) utilized blind coding procedures to evaluate open-ended answer options—which collectively avoided other forms of bias. (RX1555 (Kirk Fair (Intuit) Trial Dep.) at 17-18; RX1016 (Kirk Fair Expert Report) ¶18, Appendix D).

Undeterred, Complaint Counsel stress (Br. 41; CCFF ¶895) that Ms. Kirk Fair did not ask respondents whether they believed they could file their taxes for free using TurboTax. But as Ms. Kirk Fair explained, doing so would have *introduced* bias into the survey, causing respondents to focus on this consideration instead of the preexisting understanding they had about their tax situation. (RX1555 (Kirk Fair (Intuit) Trial Dep.) at 25). In designing and conducting a survey, it is crucial that the results not be attributed to the survey stimuli; it therefore would have been inappropriate for Ms. Kirk Fair to ask this question. (RX1555 (Kirk Fair (Intuit) Trial Dep.) at 25).

Complaint Counsel also assert (Br. 41; CCFF ¶899) that Ms. Kirk Fair did not address psychological factors that may prevent consumers from switching tax-preparation providers. In reality, she specifically took such factors into consideration. (RX1555 (Kirk Fair (Intuit) Trial Dep.) at 61). Her survey revealed that one of the top two reasons respondents chose to switch from a free TurboTax product to a paid one is brand preference and/or trust for Intuit products, which results from TurboTax's positive reviews and high-quality products. (RX1555 (Kirk Fair (Intuit) Trial Dep.) at 46-47). These results indicate that "switching costs" or feeling "lock[ed]-

in" are *not* reasons consumers decide to switch to a TurboTax paid product. (RX1555 (Kirk Fair (Intuit) Trial Dep.) at 49-50; RX1016 (Kirk Fair Expert Report) ¶36, Figure 4, Exhibit 6).

Put simply, Ms. Kirk Fair's survey does not suffer from any of the design and methodological flaws that Complaint Counsel claim. Ms. Kirk Fair offered credible expert opinions about consumer behavior upon encountering a TurboTax upgrade screen, and her survey revealed that consumers shown Free Edition ads did not feel they were misled after being told they did not qualify. (PFF ¶756).

III. COMPLAINT COUNSEL HAVE NOT ESTABLISHED THAT THE CHALLENGED ADS' CLAIMS WERE MATERIAL

Complaint Counsel fare no better in arguing that the allegedly deceptive claims in the challenged ads were material. They cite no evidence that any such claim was "likely to affect a consumer's choice of or conduct regarding a product," *FTC Policy Statement on Deception*, 103 F.T.C. at 182. Instead, they reason (Br. 55) that "[w]hether TurboTax is free is important to consumers." That mistakes the claim at issue, ignores the record, and misapplies the law.

This case is not about "[w]hether TurboTax is free." It is undisputed that consumers using any of the free TurboTax SKUs do not—and cannot—pay a penny to do so. CCFF ¶9; PFF ¶¶67, 69. This case is instead about whether Intuit adequately disclosed the *qualifications* for consumers to use the free TurboTax SKUs. The claim at issue thus is not, as Complaint Counsel posit (Br. 55 n.28), "about the *cost* of TurboTax." *See* Intuit's Post-Trial Br. 101. More than a year ago, in fact, U.S. District Judge Charles Breyer called out Complaint Counsel for eliding the distinction between price and qualifications, recognizing that Complaint Counsel were actually arguing about the adequacy of disclosures and not about whether TurboTax Free Edition was in fact free. (RX73 (Intuit) at 15-16). The conflation continues unabated.

Complaint Counsel's erroneous view that the claims at issue pertain to price infects most of their materiality arguments. For example, they state (Br. 55 n.28) that "claims about the cost of a product or service … are presumptively material." Given the dearth of evidence Complaint Counsel presented on materiality, it is unsurprising that they seek to win via a presumption. But because their theory of deception rests on qualifications, not price, no presumption applies. Relatedly, Complaint Counsel spend pages of their post-trial brief explicating (at 55-57) how "[c]ompanies may not make deceptive claims that product or services are 'free' when that is not the case." This is true but irrelevant, as TurboTax's free SKUs are without a doubt free.

Complaint Counsel likewise score no points by invoking (Br. 57) presumptions that express claims and intentional implied claims are material. As to the former, Complaint Counsel's express-claim theory is, presumption or no, thoroughly flawed for the reasons already given. *See* Intuit's Post-Trial Br. 37-39; *supra* pp.5-8. And as to the latter, Intuit's intent was always for the challenged ads to convey that the advertised free offer was available for consumers who qualify; it *never* intended to convey that all TurboTax SKUs were free. Inuit's Post-Trial Br. 46-49. Complaint Counsel try (Br. 57) to infer materiality from Intuit's purported knowledge that consumers perceived the challenged ads as conveying "TurboTax" is free. But as explained, the evidence does not reflect any such perception by consumers, much less Intuit's knowledge of such a perception. *Supra* pp.28-31, 33-34.

Even if any of Complaint Counsel's arguments about a presumption applying here were correct, the Supreme Court has recently reiterated that a "presumption … is just that—a presumption." *Arellano v. McDonough*, 143 S.Ct. 543, 547 (2023). And as Intuit's post-trial brief recounted (at 99-101), there is ample evidence to rebut any presumption here, including evidence that: consumers typically have not decided to purchase a TurboTax SKU at the time

they arrive at the TurboTax website, at which point they are exposed to extensive information about the various SKUs, PFF ¶782; many consumers are inclined to visit the TurboTax website even before encountering ads, PFF ¶784; at most the ads prompt consumers to spend a handful of minutes on the TurboTax website, which does not rise to the level of actionable materiality, PFF ¶¶668, 790-793; and consumers' decisions to purchase tax-preparation products are not driven solely by ads, PFF ¶¶505, 736-742, 786-787.

Complaint Counsel marshal only two pieces of evidence to rebut this conclusion, neither of which is persuasive. The first (Br. 57) is a finding from Dr. Hauser's Purchase Driver Survey that price was an important consideration to many respondents. But Complaint Counsel ignore that the very same survey found that under one in every 40 respondents suggested that ads played a role in their purchase decision. PFF ¶786. This suggests that any claims raised in the advertisements, even those related to price, were not material to reasonable consumers. Second, Complaint Counsel cite (Br. 57 n.30) a 2019 Intuit study showing [REDACTED] [REDACTED]. That too is unavailing. Even if that study suggests that price is generally important to consumers, it does not establish that Intuit's ads were somehow material. In fact, the study suggests that free advertising may not have impacted consumers choices because they felt comfortable seeking out and choosing among competing free options. (*See* RX765-A (Intuit) at 7 (noting that most "[REDACTED] [REDACTED] [REDACTED])). Given that this study said nothing about the impact Intuit's advertisements might have had on consumers, it cannot support a materiality finding.

Finally, Complaint Counsel assert (Br. 56) that Intuit's advertising was subject to "a heightened standard of disclosure … to avoid any possibility that consumers will be misled or deceived." That sentence notably lacks a citation, and the citations in the balance of the paragraph containing the sentence recite the commonplace (not "heightened") standards governing deceptive advertising. The Court should reject Complaint Counsel's invitation to apply a standard with no basis in the law.

IV. THE CHALLENGED ADS EFFECTIVELY CONVEYED THE FREE OFFERS' QUALIFICATIONS

Complaint Counsel's criticisms of the challenged ads' disclosure of the qualifications to use TurboTax Free Edition is *ipse dixit*. That cannot overcome the evidence that the ads effectively conveyed the advertised offers' qualifications.

At the outset, two of Complaint Counsel's threshold assertions require correction:

First, Complaint Counsel are wrong in claiming (Br. 58) that "Intuit has made many of its 'free' claims without any qualification whatsoever." This claim is in fact astonishing given Complaint Counsel's concession at trial that "there is a [']simple []tax returns only'" qualifier in "most, if not all" of the challenged ads. PFF ¶308. To support their claim now, Complaint Counsel cite (Br. 58) just three paid-search ads. But even putting aside that those three constitute roughly 1% of the ads challenged in this case, the three *did* include qualifications. PFF ¶267. That Complaint Counsel open their argument about disclosures with this egregious misstatement is telling.

Second, Complaint Counsel falsely assert (Br. 58) that Intuit argues its "disclaimers" are "cures" to the "'free' claims" in the challenged ads. As an initial matter, Complaint Counsel's premise here—that one part of an ad (viewed in isolation) must "cure" or "disclaim" a misimpression allegedly left by another part (also viewed in isolation)—is the height of

"'disputatious dissection,'" *S.C. Johnson*, 241 F.3d at 238. As explained, ads must be considered "'in [their] entirety.'" *Id*. Moreover, Complaint Counsel have not established that the ads would have been deceptive absent what Complaint Counsel incorrectly call "disclaimers"; Complaint Counsel simply *assume* that. But as discussed, reasonable consumers understand that companies in the tax-preparation industry offer both free and paid products for tax situations of differing complexity, and they know that any free tax-preparation offers are qualified, even if qualifications are not expressly stated. *See supra* Part II.A. Reasonable consumers therefore would not have seen the TurboTax ads and come away with the misimpression that all TurboTax products are free, even if the ads did not include any qualifications.

In any event, even the snippets of language Complaint Counsel characterize as deceptive "'free' claims"—i.e., the language Complaint Counsel say needed to be cured or disclaimed—virtually always *themselves* included a qualification: the name of the specific product being advertised, PFF ¶¶102-103, 173, 212, 215, 223, 226-228, 250-251, 281, 294, 306, 310. Complaint Counsel disregard that, in violation of the FTC's ".com Disclosures" guidelines, which require consideration of the "product name" in "identifying the[] claims" in an ad. PFF ¶320. As Professor Golder explained, the inclusion of the specific product name was itself sufficient to convey to consumers that there were multiple TurboTax SKUs and that only one was being advertised as free. PFF ¶319. Complaint Counsel's entire "cure" framing thus not only violates binding precedent, but also fails on its own terms, because there is nothing to cure.

A. Intuit's Television And Video Ads

Complaint Counsel's argument (Br. 58-61) that "Intuit's Television and Video Advertising Disclaimers Are Insufficient" is a nearly verbatim recital of that same argument in Complaint Counsel's pretrial brief (at 38-41), and before that in Complaint Counsel's motion for summary decision at 25-30 (May 6, 2022). It is as if the trial never happened; Complaint

Counsel just continue to assert that the qualifications in Intuit's video ads were inadequate in some way (or several). But those assertions were not substantiated at trial.

For example, Complaint Counsel's post-trial brief declares (at 59-60) that the written qualifications in the challenged video ads were too small, too faint, and too quick. But Complaint Counsel did not support that assertion at trial (or any other time) with *evidence* that the qualifications could not be seen (or heard) by reasonable consumers. PFF ¶¶230-231, 255-256, 271, 286, 295. Over the course of their three-year investigation, Complaint Counsel easily could have tested whether consumers could see the disclosures, but they didn't. That may be because Complaint Counsel's own witnesses confirmed that the qualifications were "legible" (or audible), *FTC Policy Statement on Deception*, 103 F.T.C. at 180, by repeatedly acknowledging that they saw (or heard) them, PFF ¶¶223, 233, 306-307, 317. In fact, when Complaint Counsel failed to acknowledge the qualifications in several of the challenged ads shown during their opening statement, the Court interjected to point them out. PFF ¶208. That Complaint Counsel's witnesses—like Judge Breyer at the preliminary-injunction hearing a year ago—noticed the qualifications in the challenged ads demonstrates that those qualifications were sufficiently prominent to be "'seen and read'" (or heard). CC's Post-Trial Br. 59 (quoting FTC, *Enforcement Policy Statement in Regard to Clear and Conspicuous Disclosure in Television Advertising* (Oct. 21, 1970)).

Complaint Counsel likewise failed to provide at trial (or otherwise) any basis for assessing the prominence of the written qualifications in the challenged video ads. Intuit, however—though not required to do so—presented evidence that the challenged ads compare favorably to other ads consumers see on television, based both on the metrics Complaint Counsel single out as bases for criticism and on other metrics drawn from the FTC's ".com Disclosures"

guidelines, PFF ¶235. Professor Golder's benchmarking analysis revealed that the qualifications in the challenged ads were at least comparable to the qualifications in benchmark companies' ads. PFF ¶¶234-236, 258. And for two metrics—height and duration, both of which Complaint Counsel highlight in their post-trial brief (at 59-60) as bases for criticizing Intuit's ads—Intuit's qualifications were statistically *superior*. PFF ¶237. And Professor Golder's analysis did not even account for the largest written qualification in many of the challenged video ads: the text disclosing that the ads were for TurboTax *Free Edition*, PFF ¶¶215-216. As noted, that language is a significant qualification under the FTC's ".com Disclosures" guidelines, PFF ¶319, and by itself suffices to convey that there were multiple TurboTax SKUs and that only one was being advertised as free, PFF ¶319.

Professor Golder's benchmark analysis supported his opinion that the challenged ads' qualifications were (1) in line with FTC guidelines and (2) presented in the form and manner consumers expect. PFF ¶¶238, 259. Complaint Counsel have never rebutted that evidence. The only response their expert gave was that compliance with the FTC's ".com Disclosures" guidelines does not *necessarily* mean an ad is not deceptive. PFF ¶927. That assertion is dubious at best, and if true would raise due-process concerns. *See Daubert v. City of Lindsay*, 2011 WL 3917369, at *5, *7 (E.D. Cal. Sept. 6, 2011) (holding that "due process principles preclude[d] liability" under the Americans with Disabilities Act "since the [defendant] facility complie[d] with the" Americans with Disabilities Act Accessibility Guidelines promulgated by the Architectural and Transportation Barriers Compliance Board, the body charged with "establish[ing] and maintain[ing] minimum guidelines and requirements for the standards issued pursuant to" the ADA). But more fundamentally, it was not Intuit's burden to prove that the ads are necessarily *not* deceptive; it was Complaint Counsel's burden to prove that the ads *are*

deceptive. *See* 16 C.F.R. §3.43(a). Not only does Professor Novemsky's assertion amount to moving the goalpost, it's moving the goalpost in an attempt to disadvantage the team that doesn't even need to score.

Complaint Counsel's conclusory argument—again, untethered to any measuring stick—that the challenged qualifications were too "small" or "faint" (Br. 59-60) is weaker still in light of the many cases approving qualifications that were "smaller than most of the text in the advertisement," *DirecTV*, 2018 WL 3911196, at *8; *see, e.g.*, *Castagnola v. Hewlett-Packard Co.*, 2012 WL 2159385, at *10 (N.D. Cal. June 13, 2012) (qualifications were sufficient even though they appeared in a smaller and less prominent font than the rest of the promotion). Likewise, Complaint Counsel's conclusory argument (Br. 60) that the challenged qualifications were too short in duration is unavailing in light of case law approving qualifications that appeared only "in the closing seconds of the commercial," as that is "consistent with the 'norm of reasonable business practice,'" such that "anyone familiar with television ads for consumer products knows that" qualifications "are often presented at the end of the ad," *Estrella-Rosales v. Taco Bell Corp.*, 2020 WL 1685617, at *2 (D.N.J. Apr. 7, 2020).

The cases Complaint Counsel cite (Br. 58-59 & n.34) are inapposite. For instance, in *Daniel Chapter One*, 2009 FTC LEXIS 157 (Aug. 5, 2009), the challenged ads' qualifying language was "buried in copyright disclosures," *id*. at *214. Here, there could be no serious argument that the qualifying language was "buried" among other disclosures. In *FTC v. Fleetcor Technologies, Inc.*, 620 F.Supp.3d 1268 (N.D. Ga. 2022), the challenged ads contained "no indication *anywhere*" of the relevant qualification, *id*. at 1293—again, a circumstance that is not alleged here. The same goes for *FTC v. Cyberspace.Com LLC*, 453 F.3d 1196 (9th Cir. 2006), in which the front side of the challenged ads "lacked *any* indication" of the relevant qualification,

id. at 1201 (emphasis added), and *FTC v. Grant Connect, LLC*, 827 F.Supp.2d 1199 (D. Nev. 2011), *aff'd in part and vacated in part*, 763 F.3d 1094 (9th Cir. 2014), in which the ads "did not mention" the relevant qualification, *id*. at 1220. In short, Complaint Counsel cite no case disapproving of the display of qualifications even close to those here.

Complaint Counsel's criticism (Br. 59) that the qualifications in the challenged ads "[a]re frequently in writing only" is likewise meritless. There is no requirement that qualifications be read aloud; the "TV Ad Policy Statement" Complaint Counsel cite (like the Guide Concerning Use of the Word "Free" and Similar Representations, 16 C.F.R. §251.1, and the FTC's ".com Disclosures" guidelines) "do[es] not constitute binding law," Order Denying Intuit's Mot. for Discovery Pursuant to Rule 3.36 at 4 (Nov. 7, 2022); *see also FTC v. Mary Carter Paint Co.*, 382 U.S. 46, 47-48 (1965) (FTC guidelines are "guides, not fixed rules"). In any event, beginning in Tax Year 2020, many of Intuit's video ads stated verbally that the advertised offer was for "simple returns," PFF ¶217, and in Tax Year 2021, Intuit's video ads began verbally inviting consumers to "see details at turbotax.com," PFF ¶¶218, 361. Moreover, the Consent Order now requires Intuit to verbally disclose "that not all taxpayers qualify" in all video ads longer than eight seconds, which it does. PFF ¶814. This inclusion of audio disclosures actually sets Intuit's ads apart from most on television. (RX1521 (Intuit) at 8).

Complaint Counsel's argument (Br. 6) that the qualifications in the challenged video ads were insufficient because they required consumers "to understand the term 'simple U.S. returns,'" which Complaint Counsel assert consumers "do not," is wrong on multiple levels. To start, there is every reason to conclude that reasonable consumers do understand the term (including variants like "simple tax returns"). The phrase originated with the IRS, PFF ¶119; has long been used by federal and state agencies, PFF ¶¶122-123, 142; and is pervasive in the online

tax-preparation industry, used by all of Intuit's major competitors to describe the qualifications for their free offers, PFF ¶¶141, 143, 453-454, 458-459. Both Cathleen Ryan and Professor Golder testified that this phrase's ubiquity contributes to reasonable consumers understanding what it means. PFF ¶122 (Ms. Ryan), ¶¶143-144 (Professor Golder). Intuit's internal testing, PFF ¶¶134, 869; consumer deposition testimony, PFF ¶635; and the statements of consumers who participated in Professor Novemsky's survey, PFF ¶136, confirmed that reasonable consumers understood the phrase.

Moreover, testimony from Intuit's experts and executives demonstrated that the level of detail provided by the phrase "simple tax returns only" was appropriate for both the particular medium and the stage of the buying process in which the phrase was used. PFF ¶¶122-123, 134-140, 160, 241, 313, 315-316, 512. Lengthier phrasing would have been ineffective, overwhelming consumers with a block of inscrutable text that they likely would have ignored, PFF ¶¶138-140, 332-333, 523, 833-835, 840-842, 845-846, and "[redacted]" consumers with "tax speak" that they "don't really understand," PFF ¶333; *see also MHC Mutual Conversion Fund, L.P. v. Sandler O'Neill & Partners, L.P.*, 761 F.3d 1109, 1117 (10th Cir. 2014) ("[r]equiring more extensive disclosure" by securities issuers might "do more to invite information overload than materially benefit the consumer"). Qualitative consumer feedback gathered by Intuit in 2017 illustrates that consumers appreciated that TurboTax disclosures did not contain "complicated tax terminology" but were instead worded in "laymen's terms." PFF ¶140. All this helps explain why "reasonable consumer[s]" are deemed *as a matter of law* to "understand[]" concepts that—like "simple tax returns" in this case—"are commonplace in the [relevant] market." *Ebner v. Fresh, Inc.*, 838 F.3d 958, 965 (9th Cir. 2016).

Complaint Counsel's only proffered reason why consumers might *not* understand "simple U.S. returns [only]"—that "[w]hat 'simple' means is subject to Intuit's reinterpretation nearly every tax season"—is false. CC's Post-Trial Br. 60; *see also id.* at 8. Intuit aligns its use of "simple returns" with the IRS's definition. PFF ¶¶119-123, 147. And as Complaint Counsel concede (Br. 8), the only change in what tax forms were deemed "simple" under the IRS's (and thus Intuit's) definition during the period when the challenged ads ran was instigated by the federal government, not Intuit. PFF ¶121; *see also* PFF ¶¶119-120, 124. Intuit had no control over those changes, and if Intuit had not continued to align its use of the word "simple" to the IRS's change in tax forms, *no one* would have qualified to use TurboTax Free Edition. PFF ¶125. Nor do Intuit's decisions to expand who could use free TurboTax SKUs in response to the COVID-19 pandemic and student-debt crisis reflect that Intuit changed the definition of "simple" (let alone that any such changes would mean consumers did not understand the term). The eligibility expansion meant that a taxpayer with an "[redacted]" would not "[redacted] [redacted]." PFF ¶148.

Complaint Counsel's only proffered evidence that consumers did not understand the meaning of "simple" returns—Professor Novemsky's survey supposedly showing that a majority of people who he said did not have a simple return and who had not used TurboTax in the last three years thought their return was "simple" (Br. 60)—does not show that the challenged ads' use of that term made the ads misleading to a substantial minority of reasonable consumers. For one thing, Professor Novemsky admitted that many of his survey participants understood that eligibility for TurboTax's free SKUs was based on the "complexity or simplicity" of their tax returns. PFF ¶136. In any event, the survey is not evidence that Intuit's use of "simple" was

misleading to consumers because Professor Novemsky did not supply his respondents with the context in which Intuit used that term or any of the additional information accessible to consumers who encountered it in the real world. (RX1017 (Hauser Expert Report) ¶66). As reflected in Intuit's proposed findings (PFF ¶¶214-301), Intuit's use of "simple tax returns" (or similar) was almost always accompanied by language inviting consumers to see additional information about the advertised product and its qualifications on the TurboTax website (or a hyperlink taking consumers directly to the TurboTax website), as well as language specifying the TurboTax SKU being advertised.

Ignoring these additional qualifications is another example of Complaint Counsel's improper "'dissection'" of the challenged ads, *S.C. Johnson*, 241 F.3d at 238. *Supra* pp.8-9. Complaint Counsel's failure to grapple with this additional qualifying language is particularly misguided because they concede (Br. 17) that the TurboTax website—and all the additional information it provides about "simple tax returns"—is "integrated" into the challenged ads. *See also* CCFF ¶455; PFF ¶¶364-418.

In sum, Professor Novemsky prevented survey participants from engaging in the information-search process consumers naturally undertake, and instead asked them to make a low-stakes judgment (his survey participants were not making an actual purchase decision) without the information they would have at their fingertips when actually choosing a tax-preparation product. (RX1017 (Hauser Expert Report) ¶66 ("respondents in the Novemsky Survey … are not given any means or incentives to obtain information")).

All that said, even if consumers did not understand precisely what constitutes a simple return, the qualifications in free TurboTax ads were still effective. As noted, the challenged ads included additional qualifications. *Supra* pp.6-9. And the fact that the advertised product was

for "simple tax returns only" conveyed that there was *some* eligibility limitation for that product and that the limitation was tied to the complexity of one's tax return. As Professor Golder put it, both "simple" and "only" mean (at the very least) not "all." PFF ¶135. Moreover, if a reasonable consumer was uncertain about whether she had a "simple tax return," she would not merely assume that she did. PFF ¶131. Professor Novemsky's contrary assertion—that consumers are "cognitive misers" (i.e., lazy), CC's Post-Trial Br. 60—is as unsupported as it is offensive. The evidence shows that reasonable consumers uncertain about whether they have a simple return would do the research necessary to find out. PFF ¶¶131-133, 503-509, 513, 782, 786. That research was in fact easy: A basic Google search for "what is a simple tax return turbotax" would have provided the answer (drawn from the TurboTax website) in less than half a second. PFF ¶¶131-132.

Finally, Complaint Counsel's "power of *free*" rhetoric (Br. 60-61)—suggesting that an advertiser's false use of the word "free" can never be corrected—is irrelevant. Intuit's use of "free" was not false, and hence did not need to be corrected. That distinguishes this case from the two Complaint Counsel cite, both of which involved products that were advertised as "free" but were *not* free for anyone: In *Book-of-the-Month Club*, 48 F.T.C. 1297 (1952), acceptance of the book advertised as "free" required consumers to either "assume the obligation to purchase at least four [other] books" or "pay[] for the so-called 'free' book," *id*. at 1299. And in *FTC v. Mary Carter Paint*, the advertised offer—"that for every can of … paint purchased by a buyer, the [seller] would give the buyer a 'free' can of equal quality and quantity," 382 U.S. at 47—was false because "[t]he second can of paint was not … 'free'"; rather, the seller was "allocating what [was] in fact the price of two cans to one can, yet calling one 'free,'" *id*. at 48. Unlike in those cases, the terms of Intuit's free offers have never contradicted the claims in Intuit's ads that

the advertised product was free. Thus, Professor Novemsky's opinion that it is difficult to "disclaim[] a free claim," CC's Post-Trial Br. 61, is simply irrelevant here.

Equally off-base is Complaint Counsel's reliance (Br. 61) on Dr. Hauser's Disclosure Efficacy Survey. Complaint Counsel cannot credibly contend that the revised disclosures in that survey "fail[ed] to correct the falsities and misimpressions that Intuit's ads leave with consumers," *id.*, because those disclosures were revised specifically to address Complaint Counsel's criticisms, PFF ¶728. The fact that Dr. Hauser found no difference between consumers' reaction to the challenged and revised disclosures thus shows that the challenged ads were clear, not that the revised ads were somehow still not good enough.

In sum, even taking Complaint Counsel's attempt to separate the challenged ads' discussion of the qualifications for Free Edition from the rest of the advertisements at face value, their argument falls short. Ample evidence demonstrates that the ads' qualifications were more than sufficiently prominent and understandable to convey that a particular advertised SKU was free, that there were qualifications to use that SKU, that those qualifications were tied to the complexity or simplicity of one's tax return, and that further information could be found at the TurboTax website. Nothing more was required.

B. Intuit's Website And Online Ads

Like their argument about the challenged video ads, Complaint Counsel's argument that "Intuit's Website and Online Disclaimers Are Insufficient" (Br. 61-63) is a nearly verbatim repeat of the corresponding argument in Complaint Counsel's pretrial brief (at 41-44), and before that in Complaint Counsel's motion for summary decision (at 30-32). Again, this argument, which was already unpersuasive before trial, is completely untenable after it.

Putting aside for a moment the TurboTax website, Complaint Counsel devote all of two conclusory sentences (Br. 61-62) to Intuit's "other online ads," by which Complaint Counsel

presumably mean the 102 challenged display ads and 15 challenged paid-search ads. (Complaint Counsel offer *no* argument challenging the clear and conspicuous qualifications in the 19 challenged email ads, PFF ¶¶281, 284, or the four challenged radio ads, PFF ¶¶294, 299.) Complaint Counsel declare (Br. 61) that the qualifications in these "other online ads" were "similar[]" to those in the challenged video ads and thus "inadequate." That argument fails for all the reasons just given regarding the video ads. *See supra* Part IV.A; *see also* Intuit's Post-Trial Br. 17-19 (discussing the multiple qualifications in the challenged display and paid-search ads). But it fails for other reasons too. With respect to the challenged display ads, Professor Golder performed a benchmark analysis similar to that for the challenged video ads, and found that the display ads' qualifications were in line with those of the benchmark companies' on every metric. PFF ¶259. With respect to the challenged search ads, Complaint Counsel's own witness testified that a search ad for the IRS Free File program was not deceptive even though it did not even disclose (as Intuit's search ads did) that "only some taxpayers can file for free" with the Free File program. PFF ¶¶278-279. A review of the search ads also demonstrates that the free claims were relatively muted and information about Free Edition's qualifications was directly at hand. And of course, unlike TV, those who see search ads are actively searching for information about tax-preparation options. It is reasonable to expect some degree of research associated with that search.

Complaint Counsel's argument that the challenged display and paid-search ads' qualifications were inadequate also fails because every one of those ads (and the challenged email ads) either included or were themselves links to TurboTax.com. PFF ¶¶253, 269. As with the ads' express invitation to visit the TurboTax website to "see if you qualify," PFF ¶¶328, 893, this linking meant that the detailed product information on the TurboTax website was

"integrated" into the challenged display and paid-search ads. CC's Post-Trial Br. 17. That integrated information further prevented consumers from being misled by the challenged ads.

Turning to the TurboTax website, Complaint Counsel's arguments (Br. 62-63) are frivolous. As explained in Intuit's post-trial brief (at 21-24, 96-98), the website promptly, clearly, and repeatedly disclosed both the existence and the specifics of the qualifications for TurboTax's free SKUs. PFF ¶367. These disclosures appeared at every stage of the TurboTax website, including on the homepage, PFF ¶¶374-379; the Free Edition landing page, PFF ¶¶388-398; the "See if you qualify" page, PFF ¶¶399-407; the Products & Pricing page, PFF ¶¶411-418—a page Complaint Counsel's brief mentions only once, in a footnote—and various other blog and FAQ pages, PFF ¶¶436-441. As Intuit's fact witnesses explained, the website disclosed that free SKUs were for simple tax returns only, with detailed descriptions of what this meant that appeared so many times it was difficult to keep track of the number. PFF ¶133. Even several of Complaint Counsel's witnesses acknowledged the extensive nature of the website's disclosures and how quickly consumers would see the qualifications for free TurboTax offers. PFF ¶¶369, 370.

Complaint Counsel's arguments about the website are not only unsupported, but also thoroughly refuted by FTC guidance, case law, and record evidence. Complaint Counsel contend (Br. 62-63) that the detailed discussion of qualifications on the website was inadequate because the qualifications (1) were "hidden behind a hyperlink," (2) were "less prominent than the advertising claims on the page" where they appeared, and (3) "use[d] the phrase 'simple tax returns.'" The third critique fails for the reasons already discussed, *see supra* pp.51-55, and for the additional reason that a detailed explanation of the term "simple tax returns" was accessible

by clicking on those words where they appeared on the website, PFF ¶¶378-379. Their other two critiques are equally infirm.

As to hyperlinks, Complaint Counsel are incorrect in claiming (Br. 62) that Intuit's use of hyperlinks violates the FTC's ".com Disclosures" guidelines—even putting aside both that, as noted, such FTC guidelines are "not fixed rules," *Mary Carter Paint*, 382 U.S. at 47-48, and that this Court has held that the guidelines "do not constitute binding law and" that violations thereof "do not establish a violation of the FTC Act," Order Denying Intuit's Mot. for Discovery Pursuant to Rule 3.36 at 4. Intuit's use of hyperlinks is consistent with the guidelines because the guidelines state only that "[d]isclosures that are an *integral part of a claim* or inseparable from it should not be communicated through a hyperlink." CC's Post-Trial Br. 62 (quoting FTC, *.com Disclosures: How to Make Effective Disclosures in Digital Advertising* 10 (Mar. 2013)). The integral point here, that TurboTax's free SKUs have qualifications, is communicated by the hyperlinked text itself, including the "see if you qualify" or "simple returns only" language. (That is the integral point because it makes clear that not *all* TurboTax is free.) Intuit's use of hyperlinked disclosures is thus unlike the "[s]ymbols or icons" that the FTC's guidelines disapprove, which "by themselves are not likely to be effective" because they do "not provide sufficient clues about why a claim is qualified or the nature of the disclosure." (RX96 (Intuit) at 12). Intuit's hyperlinked disclosures instead mimic the examples of *acceptable* hyperlinked disclosures in the guidelines. (RX96 (Intuit) at 33-34, A-7-A-8). Professor Novemsky's opinion that "consumers are unlikely to click on such a hyperlink," CC's Post-Trial Br. 62, is at odds with the FTC's guidance approving similar hyperlinks; with the testimony of Complaint Counsel's own witnesses, PFF ¶369; and with case law about these very hyperlinks, *see Dohrmann v. Intuit Inc.*, 823 F.App'x 482, 484 (9th Cir. 2020) ("TurboTax's website …

provided sufficient notice to a reasonably prudent internet user" in part because the relevant "hyperlink" was "conspicuous.").

In fact, the evidence reflects that Intuit's use of hyperlinks *increased* the likelihood that consumers would notice and comprehend the qualifications for the free TurboTax SKUs. Intuit uses pop-ups as "a way of disrupting the consumer's viewing pattern to draw their attention to something that's really important." PFF ¶383. The TurboTax website's use of hyperlinks announcing the existence of qualifications leading to pop-up windows with further detail also allowed "consumers [to] control the pace at which they [saw] that information," and thus reduced the risk that consumers would "tune out" the relevant qualifications. PFF ¶379. Contrary to Complaint Counsel's assertion (Br. 21-22), moreover, the pop-ups did not just "*possibly* shed[] *some* light on the limitations of TurboTax Free Edition" (emphases added). As Complaint Counsel have conceded, the pop-up screen instead provided consumers with "detailed information about the tax situations covered by Free Edition." PFF ¶379.

Complaint Counsel's remaining argument (Br. 63)—that the qualifications on the TurboTax website were inadequate because they were "less prominent than the advertising claims on the page"—likewise fails. Complaint Counsel offered no evidence that consumers failed to notice the many qualifications on the TurboTax website. PFF ¶368. Quite the opposite: Complaint Counsel's own witnesses, as noted, consistently acknowledged those qualifications. PFF ¶369. And as even a casual perusal of the various pages on the TurboTax website makes clear, PFF ¶¶377 (homepage), 388 (Free Edition landing page), 403 ("See if you qualify" page), 418 (Products & Pricing page), qualifications were presented "immediately next to" any mention of free TurboTax SKUs, such that "no reasonable [viewer] could ignore" them, *Freeman v. Time, Inc.*, 68 F.3d 285, 289 (9th Cir. 1995).

Case law shows that ads bearing such repeated disclosures are, as a matter of law, not deceptive. *See Freeman*, 68 F.3d at 287, 289; *Davis v. HSBC Bank Nevada, N.A.*, 691 F.3d 1152, 1162 (9th Cir. 2012). Complaint Counsel in fact cite no case disapproving of the disclosure of product qualifications on a website like those here. Indeed, the situations in which courts have found website disclosures *in*adequate are quite different. For example, in *FTC v. Johnson*, 96 F.Supp.3d 1110 (D. Nev. 2015), the relevant qualification appeared not on the website's "landing page," nor on its "intermediary page," but only "at the bottom of the order page," which was the "third and final stage" of the website, *id.* at 1126, 1140. Similarly, in *FTC v. Willms*, 2011 WL 4103542 (W.D. Wash. Sept. 13, 2011), the relevant qualification did not appear "until the user land[ed] on the sixth page" of the website, *id.* at *6. Here, the "detailed" discussion of the qualifications occurs before a consumer must give TurboTax their name.

Complaint Counsel offer two other critiques regarding the website, and specifically of the Products & Pricing page. *First*, they identify (Br. 22 n.12) "one scenario"—and only one—in which the page's SKU selector tool would have recommended that consumers with children or dependents begin in Free Edition even though Free Edition did not cover a particular tax form for crediting child and dependent care expenses. That has nothing to do with whether consumers see the multiple disclosures on the Products & Pricing page. (Nor is it even a valid criticism of the page's SKU selector tool: As Mr. Rubin testified, "the overwhelming majority of [taxpayers] who have children" take the standard deduction, with "[v]ery, very few" taxpayers "claim[ing] the child and dependent care tax credit" instead. (Rubin (Intuit) Tr. 1576-1577). The SKU selector thus appropriately "help[ed] the overwhelming majority who qualify for Free Edition to start in Free Edition." (Rubin (Intuit) Tr. 1577).) *Second*, Complaint Counsel assert (Br. 22 n.12) that "in tax year 2019, only an estimated 60% of consumers interact with the Products and

Pricing screen." That is wrong. Roughly 60% of consumers interacted with *the SKU selector tool* in Tax Year 2019. PFF ¶429. That says nothing about how many consumers visited the Products & Pricing page, where details about TurboTax's full product lineup are provided. In fact, *one hundred percent* of consumers who began a TurboTax return encountered the Products & Page, as anyone had to encounter it in order to begin. PFF ¶408. The FTC's Policy Statement on Deception explains that qualifications presented in similar circumstances are adequate, highlighting a case in which the Commission held that qualifications in the text of an ad for a contest were sufficient to defeat any claim of deception "because in order to enter the contest, the consumer had to read the text." 103 F.T.C. at 180 n.33 (citing *D.L. Blair Corp.*, 82 F.T.C. 234, 255-256 (1973)).

Complaint Counsel have not met their burden to prove that the qualifications on Intuit's website and in online ads were inadequate. FTC guidance, case law, and record evidence introduced by both parties conclusively show the opposite.

C. Complaint Counsel's Door-Opener Theory Fails

Complaint Counsel alternatively attempt to cut the TurboTax website out of this case by relying on a "deceptive door-opener" theory. Under that theory, Intuit's ads were deceptive simply by virtue of driving consumers to the TurboTax website. PFF ¶467. Complaint Counsel's post-trial brief repeats (at 63-64), verbatim, the "door-opener" argument in their pretrial brief (at 44-45). But as Intuit explained it its pretrial brief (at 49-53); at trial, PFF ¶¶737-738; and in its post-trial brief (at 49-56), the "door-opener" concept is misplaced in this case. Despite multiple opportunities, Complaint Counsel have not provided any response to that explanation.

They have no response, for example, to case law that slams the door shut here. As stated by this Court, the theory is that "it doesn't matter what a consumer sees at the website." PFF

¶467. But that is impossible to square with precedent holding that "deceptive advertising claims should take into account all the information available to consumers," *Bell v. Publix Super Markets, Inc.*, 982 F.3d 468, 477 (7th Cir. 2020), or at least all "information *readily available* to the consumer," *Moore v. Trader Joe's Co.*, 4 F.4th 874, 882 (9th Cir. 2021) (emphasis added). It is indisputable that here the relevant qualifications were "readily available to the consumer" at the TurboTax website. *Id*. Every single challenged ad either expressly directed consumers, or itself directly linked, to the website. PFF ¶¶215, 218, 222, 244, 253-254, 269-270, 284-285, 294, 299. And Complaint Counsel's expert acknowledged that it takes only "a few seconds" to get to the website and encounter detailed qualifications, PFF ¶790, which happens before consumers "have to input their name or any other personal information," PFF ¶469. Unlike, say, renting a car, moreover, consumers *must* go to the TurboTax website to use TurboTax. PFF ¶329.

Complaint Counsel's post-trial brief does not so much as mention *FTC v. DirecTV*, even though Intuit's *pre*trial brief explained (at 51) that the two reasons the court there rejected the door-opener concept apply equally (or more forcefully) here. Those two reasons were that (1) "nothing in [the challenged advertisement] contradict[ed] the true terms of [the advertiser's] provision of services" and (2) the advertisement was "for a complex product" and in a constrained format such that "a reasonable consumer would understand the limitations of how information is presented." 2018 WL 3911196, at *15. So too here: Nothing in the challenged ads contradicted the true terms of the advertised offers. *See supra* Part I; Intuit Post-Trial Br. Part I. And as Complaint Counsel's expert testified, "the level of information … in the eligibility requirements" for Intuit's free TurboTax offers "could not be effectively communicated in a" constrained format. PFF ¶841. Accordingly, more detailed disclosures would have been "out of step with what consumers" expect. PFF ¶845.

Nor do Complaint Counsel mention the cases cited in Intuit's pretrial brief (at 51) in which courts rejected deception claims where price disclosures occurred on a website at the point of sale, i.e., much *later* than consumers see detailed qualifications on the TurboTax website. *See Washington v. Hyatt*, 2020 WL 3058118, at *5 (N.D. Ill. June 9, 2020); *Harris v. Las Vegas Sands L.L.C.*, 2013 WL 5291142, at *2, *5-6 (C.D. Cal. Aug. 16, 2013). As Intuit's post-trial brief explained (at 54), these cases demonstrate that the door-opener concept is not applicable online. That is confirmed by Complaint Counsel's failure to cite a single case applying the concept in that context.

Complaint Counsel likewise have no response to Intuit's argument that the case law from which they derive the door-opener theory only confirms that the theory is inapposite here. As explained at length in Intuit's pretrial brief (at 51-52), at trial (Gringer (Intuit) Tr. 81), and again in Intuit's post-trial brief (at 53), the theory comes from *Resort Car Rental Systems, Inc. v. FTC*, a case far afield from this one. There, a car advertised as costing a dollar per day in fact cost *every* consumer much more than that, and consumers did not learn that fact until they physically traveled to a brick-and-mortar facility (presumably without their car). *Resort Car Rental Systems, Inc.*, 83 F.T.C. 234, 281-282 (1973). Here, the product advertised as free *is* free for tens of millions of consumers, PFF ¶¶69, 113-114, 117; no one can pay to use it, PFF ¶69; and obtaining full information about the product, including price and eligibility information, entails virtually no time or effort and is expected by consumers from the ads themselves, PFF ¶¶364-370, 484, 526-527, 790-791. Complaint Counsel's other cited cases, meanwhile, involved consumers literally opening their front doors so that door-to-door salesmen could "gain entrance into [their] homes." *Encyclopaedia Britannica, Inc.*, 87 F.T.C. 421, 496 (1976); *see also Grolier, Inc.*, 99 F.T.C. 379, 383 (1982). Complaint Counsel's attempted analogy between

visiting a website and inviting a stranger into one's home only reinforces their fundamental misunderstanding of consumers' experiences online.

Finally, Complaint Counsel have no answer to Dr. Hauser's Disclosure Efficacy Survey, the results of which are "inconsistent with the hypothesis that TurboTax's ad[s] served as misleading door openers." PFF ¶737. As Dr. Hauser explained, Complaint Counsel's door-opener theory portended that he would "see fewer people statistically considering" TurboTax if he "change[d] the advertisements" in the manner Complaint Counsel seek to require. PFF ¶737. Instead, Dr. Hauser found "no statistical difference." PFF ¶738; *see also* PFF ¶¶739-745. Complaint Counsel's door-opener "hypothesis is rejected scientifically by the[se] results" because they show that the allegedly deceptive characteristics of the challenged ads are not what cause consumers to consider using TurboTax. PFF ¶738; *see also* PFF ¶¶739-745.

D. Intuit's Expert Evidence Proved That The Challenged Qualifications Were Effective

Complaint Counsel's challenges to the expert evidence regarding the effectiveness of the challenged ads' disclosures are baseless. For starters, Complaint Counsel fault *Intuit* (Br. 64) for "not put[ting] forward any direct evidence that the TurboTax advertising disclaimers prevent deception." As noted at the outset, however, Complaint Counsel offer no support for their invented "direct evidence" standard, nor any explanation for why expert surveys and opinions would not meet such a standard if it existed. And again, it was Complaint Counsel and not Intuit that had the burden to "put forward" evidence here. 16 C.F.R. §3.43(a).

Nonetheless, Intuit adduced ample evidence, including from its experts, showing that the challenged qualifications were effective. Complaint Counsel first attack that evidence with the repeated observation (Br. 37, 39-41) that Intuit's experts were not psychologists. It's an odd but irrelevant point: this case is not about psychology. It is about advertising and the effect of that

advertising on reasonable consumers. Intuit's experts thus appropriately included a marketing professor at the MIT Sloan School of Management (Dr. Hauser), PFF ¶878, a marketing professor at Dartmouth College's Tuck School of Business (Professor Golder), PFF ¶886, an experienced business economist (Mr. Deal), PFF ¶898, and a past expert for the FTC with extensive experience designing, conducting, and evaluating consumer surveys (Ms. Kirk Fair), PFF ¶905. Intuit, that is, put forward *experts* with relevant expertise. Complaint Counsel never explain why only psychologists could serve as reliable experts here.

The other critiques Complaint Counsel level regarding Intuit's expert evidence on disclosures are equally unavailing:

Complaint Counsel's criticisms of Dr. Hauser's Disclosure Efficacy Survey have already been addressed. *See supra* pp.38-41.

As for Professor Golder, his opinions and benchmarking were not, as Complaint Counsel suggest (Br. 37), based merely on his subjective views; they rested on years of professional experience and well-established "principles derived from marketing research showing [how] consumers generally respond … to advertisements … presented in a particular way," *Kraft, Inc.*, 114 F.T.C. 40, 121-122 (1991); *see also Thompson Medical*, 104 F.T.C. at 790; (RX570 (Intuit) at 183-192). This is precisely the type of evidence the Commission has recognized in comparable cases as useful.

Complaint Counsel next fault Professor Golder (Br. 37, 65) for not asking consumers whether they could see or understand the challenged ads' qualifications. But as the party with the burden of proof, that is what *Complaint Counsel* should have done to support their theory. *See supra* p.5. Professor Golder's analyses, while anchored in the ads themselves (unlike Professor Novemsky's survey), accounted for how reasonable consumers would understand

those ads. (Golder (Intuit) Tr. 1059). With that framework in mind, Professor Golder constructed reliable benchmarking analyses to compare the qualifications in Intuit's TV and social-media ads to qualifications in the ads of 18 benchmark companies, in order to "understand whether these disclosures were consistent with what consumers would be seeing in other platforms." PFF ¶¶234-238; (Golder (Intuit) Tr. 1133). And as noted, Professor Golder crafted his analysis using metrics for assessing the adequacy of disclosures based on the FTC's own guidelines. PFF ¶¶235-236.

Lastly, Complaint Counsel are also wrong in asserting (Br. 37) that Professor Golder's "comparative study" is irrelevant or faulty. Professor Golder selected the most appropriate research method to address the question he sought to answer: whether the disclosures in the challenged ads were deficient. (Golder (Intuit) Tr. 1058-1059). Appropriate methodology, he stressed at trial, is "critical" for constructing any research study or analysis. (Golder (Intuit) Tr. 1109-1110). Hence, in line with reliable and established research methods, Professor Golder began his analysis by identifying a set of criteria for possible benchmark companies based on key characteristics of the tax-preparation industry: that it involves (1) a task required for nearly all Americans; (2) repeated, annual purchases; and (3) products purchased by both individuals and households. (Golder (Intuit) Tr. 1133-1137; RX1018 (Golder Expert Report) ¶86). He then identified a variety of industries that shared those characteristics, yielding a set of 18 benchmark companies that provide useful points of comparison to Intuit. (Golder (Intuit) Tr. 1133-1137; RX1018 (Golder Expert Report) ¶86). These benchmarks provide insight not only into established advertising practices, but also into the form and manner of disclosures that reasonable consumers are familiar with and expect. PFF ¶¶238-239, 259; (Golder (Intuit) Tr. 1163). Professor Golder similarly used reliable and established methods to develop a set of

metrics to assess the disclosures in Intuit's and the benchmark companies' ads (Golder (Intuit) Tr. 1137-1139)—based on key factors that the FTC's guidelines suggest are important for assessing the quality of advertisements, PFF ¶235—before finally conducting his analysis measuring the disclosures in each ad, PFF ¶236. It was this relevant and methodologically sound analysis that produced Professor Golder's conclusion that Intuit's TV and social-media ads contained disclosure and design elements that were (1) consistent with FTC guidelines and (2) comparable or superior to relevant benchmarks and thus in line with industry standards to which reasonable consumers are accustomed. PFF ¶¶238-239, 259; (Golder (Intuit) Tr. 1163; RX1018 (Golder Expert Report) ¶¶127-138, 231).

V. Complaint Counsel's Proposed Order Is Unwarranted And Inappropriate

A. A Cease-And-Desist Order Is Unwarranted

Complaint Counsel have failed to meet their burden to "satisfy the court that [a cease-and-desist order] is needed," *United States v. W. T. Grant Co.*, 345 U.S. 629, 633 (1953), *quoted in Benco Dental Supply Co.*, 2019 WL 5419393, at *75 (F.T.C. Oct. 15, 2019). They offer *no* evidence of a "cognizable danger of recurrent violation," *id.* Instead, they effectively concede that Intuit's current ads are not deceptive, mischaracterize or ignore unrebutted evidence of Intuit's intent to remain in compliance with the law, and disregard the existing Consent Order that already prohibits the conduct they seek to cease and desist. None of that justifies the entry of any remedial order here.

1. Complaint Counsel fail to explain why a cease-and-desist order is warranted even though Intuit's current (Tax Year 2022) ads are not deceptive. Complaint Counsel have not challenged those ads as deceptive, asserting that they are "relevant to remedy" only. PFF ¶803; *see also* PFF ¶336. But their post-trial briefing on remedy fails to mention even a single current ad, let alone explain how any current ad supports their requested relief. Complaint Counsel thus

effectively concede that Intuit "'is currently complying with the … laws.'" CC Post-Trial Br. 65 (quoting *SEC v. Murphy*, 626 F.2d 633, 655 (9th Cir. 1980)). And with good reason: A review of current ads makes plain that they are not deceptive. PFF ¶¶340 (video), 341 (video), 344 (display), 346 (display), 349 (paid-search), 352 (email). Copy testing confirms as much, as [redacted] , and far less than the 50% of consumers in the market for online tax-prep who qualify. [redacted] given that the tested population both skewed young (making them more likely to qualify) and [redacted] PFF ¶¶695, 702, 705, 709-711.

To be sure, that a respondent "is currently complying with the … laws" does not automatically preclude relief. *Murphy*, 626 F.2d at 655. But again, it is Complaint Counsel's burden to "satisfy the court that [a cease-and-desist order] is needed," *W. T. Grant*, 345 U.S. at 633, and current compliance goes far to show that they have not carried that burden. Indeed, Complaint Counsel's exclusive focus on Intuit's "substantially outdated" past ads, *FTC v. Merchandise Services Direct, LLC*, 2013 WL 4094394, at *3 (E.D. Wash. Aug. 13, 2013), demonstrates that they seek "to fasten liability on [Intuit] for past conduct," *FTC v. Cement Institute*, 333 U.S. 683, 706 (1948), which is impermissible because the Commission "is not empowered to issue a cease and desist order as punishment for past offenses," *Coro, Inc. v. FTC*, 338 F.2d 149, 153 (1st Cir. 1964).

2. The *only* evidence regarding intent shows that Intuit has always sought to be fully honest and transparent with consumers. Complaint Counsel conceded before trial that they lack evidence of intent to deceive. PFF ¶175. And at trial, Intuit's former and current executives

testified that Intuit's foundational values, goals, and business interests are inconsistent with deception, PFF ¶¶30, 33-38, 73, 167, 647, 850-852, and that Intuit "would have stopped" running any ad it had reason to believe was deceptive, PFF ¶174; *see also* PFF ¶¶169-173, 176, 769, 860, 870. That testimony is corroborated by the "mandatory" instructions Intuit gave its ad agencies—when no government regulator was investigating and no litigation was ongoing—to "drive absolute clarity around who … TurboTax Free Edition was meant for." PFF ¶¶172-173. It is also corroborated by expert testimony that economic incentives in the online tax-prep industry make deception a losing strategy, PFF ¶¶39, 89, as well as by case law recognizing "the importance of reputation and brand in driving consumer behavior in purchasing" online tax-prep products, *United States v. H&R Block, Inc.*, 833 F.Supp.2d 36, 75 (D.D.C. 2011).

The evidence Complaint Counsel highlight (Br. 66) actually shows Intuit's good faith. As explained, *see supra* pp.14-21, 28-34, Intuit's marketing research, strategy documents, and customer feedback reflect Intuit's longstanding and successful commitment to clarity, not any awareness that its ads conveyed a misleading message. And Complaint Counsel are wrong in claiming (Br. 66) that Intuit improved its ads only "under substantial scrutiny." Intuit's advertising evolved both before and after the Commission launched its investigation (in 2019), PFF ¶¶356-362—a result of the company's ongoing efforts to evaluate and improve the clarity of its ads each year, PFF ¶353. Last year, moreover, Intuit further demonstrated its commitment to clarity by pulling its "Free, Free, Free" ads after meeting with FTC Chair Khan, even though doing so "was extremely disruptive" and required Intuit to "work[] across multiple agencies and across hundreds of contacts across [its] media partners." PFF ¶¶7-8. Complaint Counsel's suggestion (Br. 11, 42, 46) that that action was somehow overdue and thus evidence of *bad* intent is baseless, as the meeting was the first time the Commission articulated specific concerns

with the "Free, Free, Free" ads. *See* Intuit's Mot. to Withdraw Matter from Adjudication at 123 (May 4, 2022). Similarly, Complaint Counsel do not explain how deceptive intent is shown by the facts that Intuit "launch[ed] the TurboTax Live free promotion in TY 2020" and has [redacted] CC Post-Trial Br. 66. Intuit's provision—and expansion—of free products and services is a public good, not a sign of bad faith.

3. Finally, the legally binding Consent Order—enforceable by the attorneys general of all 50 states and the District of Columbia, PFF ¶805—leaves "nothing for this court to enjoin" and thus moots this case, *Wold v. Robart*, 2018 WL 1135396, at *5 (E.D. Wis. Feb. 28, 2018). Even if the case were not moot, the order would provide powerful "assurance[] of future compliance" with the FTC Act, eradicating any "cognizable danger" of future violation and thus foreclosing a cease-and-desist order, *TRW, Inc. v. FTC*, 647 F.2d 942, 954 (9th Cir. 1981).

The Consent Order precludes Intuit from engaging in the advertising practices challenged here. For example, it bars the "Free, Free, Free" television ads and any substantially similar ads, PFF ¶213, and it requires "Clear and Conspicuous" disclosures in all ads, including written disclosures that not all taxpayers qualify, as well as corollary verbal disclosures in all video ads eight seconds or longer, PFF ¶¶809-819. Intuit's executives also testified that Intuit has complied and will continue to comply with the Consent Order, PFF ¶¶823-828; that Intuit has in fact charged an internal team with ensuring compliance, PFF ¶821; and that all relevant Intuit employees now receive comprehensive training on the Consent Order's provisions, PFF ¶822. In light of all this, any notion that Intuit might fail to comply with the Consent Order is far too speculative to avoid mootness, *see iMortgage Services, LLC v. Louisiana Real Estate Appraisers*

Board, 2023 WL 2254528, at *4 (M.D. La. Feb. 27, 2023), let alone support the finding of "cognizable danger" required to justify a cease-and-desist order, *TRW*, 647 F.2d at 954.

Complaint Counsel's critiques of the Consent Order are unavailing.

First, Complaint Counsel carp (Br. 66) that the Consent Order "allows for 'Space-Constrained Advertisements' in which Intuit need only disclose that 'eligibility requirements apply' and provide a hyperlink to more fulsome disclosures." Complaint Counsel say these requirements contradict the Commission's ".com Disclosures" guidance. But again, those guidelines "do not constitute binding law." Order Denying Intuit's Mot. for Discovery Pursuant to Rule 3.36 at 4; *see also Mary Carter Paint*, 382 U.S. at 48. And regardless, the Consent Order comports with the guidelines, which acknowledge that "details … too complex to describe adjacent to [a] price claim … may be provided by using a hyperlink," (GX316 (FTC) at 10). Consistent with that, the Consent Order requires "Clear and Conspicuous" hyperlinks—or that the *entire ad* be a hyperlink—taking consumers directly to "Clear and Conspicuous" full disclosures. (RX261 (Intuit) at 7-8). Complaint Counsel assert (Br. 67) that the Consent Order does not "specify[] that information integral to the claim cannot be hidden behind a hyperlink." But it does, requiring Intuit to clearly and conspicuously disclose, even in space-constrained ads, "that eligibility requirements apply." (RX261 (Intuit) at 7). That eligibility requirements apply *is* the integral information. To the extent Complaint Counsel are suggesting that every detail of a free offer must be disclosed in each space-constrained ad, that is not the law, not feasible, and would be harmful to consumers, *see infra* p.79.

Second, Complaint Counsel object (Br. 66) that the Consent Order "allows for visual-only disclosures in 'Space-Constrained Video Advertisements,' allowing the audio portion to disclose only 'that not all taxpayers qualify.'" But as noted, there is no legal requirement that

video ads contain verbal disclosures *at all*, let alone verbal disclosures that provide every detail about a product's qualifications. And requiring a more comprehensive voiceover disclosure—a purported requirement that Complaint Counsel draw from a 50-year-old policy statement lacking the force of law, *see* Order Denying Intuit's Mot. for Discovery Pursuant to Rule 3.36 at 4; *Mary Carter Paint*, 382 U.S. at 48—is not necessary to avoid deception. In the decades since it issued that policy statement, the Commission has recognized both that the written and/or verbal disclosures needed "[d]epend[] on the circumstances," and that "[l]ess elaborate disclosures" than those in the statement "may also suffice." *FTC Policy Statement on Deception*, 103 F.T.C. at 180-181. In fact, most television commercials, as noted, do not include *any* audio disclosures. (RX1521 (Intuit) at 8).

Third, Complaint Counsel suggest (Br. 66) that space-constrained video ads shorter than eight seconds are necessarily deceptive if they do not include verbal disclosures. But again, Complaint Counsel's only support is non-binding guidance from 1970, which, in addition to lacking the force of law, has nothing to say about TikTok ads or the other equally short ads to which Complaint Counsel's concern could possibly apply. And despite their space and time constraints, Intuit's TikTok ads (like all other challenged ads) made the relevant qualifications abundantly clear. Indeed, text on the screen stated "Simple returns only. See if you qualify at turbotax.com" during the *entirety* of a five-second ad. (RX1483 (Intuit)). Furthermore, Intuit's latest TikTok ads do not make a verbal free claim at all (RX1483 (Intuit)), meaning Complaint Counsel's purported requirement that disclosures appear in the same medium as the free claim is not even implicated. Intuit's current ads that *do* include verbal free claims also include voiceovers explaining that the advertised SKUs are for simple returns only, PFF ¶343, thus complying with the non-binding guidance on which Complaint Counsel rely.

Fourth, Complaint Counsel quibble (Br. 66) that one provision of the Consent Order "sunsets after ten years." But the Commission itself recently agreed to a ten-year order in another case. *See Mastercard, Inc.*, 2022 WL 17975182, at *6 (F.T.C. Dec. 23, 2022). The possibility that, more than ten years from now, Intuit could engage in deceptive conduct provides no basis for the Court to enter a cease-and-desist order now. Again, to establish a "cognizable danger" of future violations, *W. T. Grant*, 345 U.S. at 633, Complaint Counsel "must go beyond 'a speculative risk'"—which assuredly includes conjecture about how Intuit "might" act a decade (or more) from today, *Allen v. Williams*, 2022 WL 17551564, at *10 (D. Colo. Dec. 8, 2022) (quoting *Winzler v. Toyota Motor Sales U.S.A., Inc.*, 681 F.3d 1208, 1215 (10th Cir. 2012)).

Fifth, Complaint Counsel gripe (Br. 67 n.42) that the Consent Order's monetary relief is available only to certain consumers "harmed from 2016 to 2018," whereas an order in this case would empower the Commission to seek additional monetary relief in a section 19 proceeding. This proceeding, however, is only about a cease-and-desist order; any consideration of monetary relief would be deeply improper. Again, a cease-and-desist order cannot serve "to fasten liability on respondents for past conduct." *Cement Institute*, 333 U.S. at 706. Complaint Counsel disregard that principle by premising their claim partly on the supposed need to obtain monetary relief for years-old conduct. In any event, Complaint Counsel's desire for retrospective monetary relief does not justify a prospective injunction. Complaint Counsel have not even pleaded the requisite "dishonest or fraudulent" conduct that would be necessary. 15 U.S.C. §57b(a)(2). And the record refutes any suggestion that Intuit intended to deceive consumers. *See supra* p.44.

Finally, Complaint Counsel's assertion (Br. 67) that the Consent Order "undermine[s] consumer welfare" is, for all the reasons just discussed, as baseless as it is offensive to the

attorneys general of all 50 states and the District of Columbia who signed on to the order obviously believing it was good for the people of their respective jurisdictions. The Consent Order serves the public interest, providing "an opportunity" for Intuit to "be even more clear" in its advertising while "continu[ing] to offer TurboTax Free Edition to millions and millions of people who have simple tax returns." PFF ¶808.

To sum up, no cease-and-desist order is warranted because Complaint Counsel have effectively (and correctly) conceded that Intuit's current ads are not deceptive, the record amply and exclusively reflects Intuit's intent to ensure clarity in it advertising, and the existing Consent Order already prohibits the conduct Complaint Counsel seek to enjoin.

B. The Proposed Order Is Inappropriate

Complaint Counsel's post-trial briefing fails to follow this Court's repeated instruction to "include briefing in support of … each and every provision of the proposed order (other than definitions, boilerplate, or non-substantive provisions)." Order on Post-Trial Filings at 2 (Apr. 24, 2023); *see also* (Chappell (ALJ) Tr. 1835). Instead, Complaint Counsel merely quote or paraphrase only some of their proposed order's provisions and wrongly declare (Br. 67-68), without any explanation or legal support, that those provisions would vindicate "the law" and hence that this Court "should" adopt them. That is not what this Court asked for, and it does not justify issuance of the proposed order.

1. Findings

The findings in Complaint Counsel's proposed order are each refuted by the evidence:

- Intuit did not make "express 'free' claims about TurboTax," CC's Post-Trial Br. 67; *see also* CC Proposed Order at 2. Intuit's ads expressly—and truthfully—stated that a particular TurboTax SKU was free and available to taxpayers with simple returns, and that consumers could "see if they qualify" on the TurboTax

website. *See supra* pp.5-8; Intuit's Post-Trial Br. 37-39; PFF ¶¶206, 209-210, 212.

- Intuit's claims were not "likely to mislead reasonable consumers acting reasonably under the circumstances," CC's Post-Trial Br. 67; *see also* CC Proposed Order at 2. Intuit's ads effectively conveyed the advertised offers' qualifications. *See supra* Part IV; Intuit's Post-Trial Br. Parts II.C, II.E; PFF ¶¶119-145; 205-301, 364-452. The ads were appropriately calibrated for the expectations, knowledge, and skepticism of reasonable consumers. *See supra* Part II.A; Intuit's Post-Trial Br. Part II.B; PFF ¶¶470-527. And reasonable consumers were in fact not likely to be deceived. *See supra* Parts II.B-C; Intuit's Post-Trial Br. Part II.D; PFF ¶¶623-766.
- It is "meaningless," PFF ¶463, to say that TurboTax "was not free for about two-thirds of taxpayers," CC's Post-Trial Br. 67; *see also* CC Proposed Order at 2. Of the people actually in the market for online tax-preparation software, a majority have simple returns and thus are eligible to file for free using TurboTax Free Edition. PFF ¶¶129, 464.
- Intuit's claims were not "inconsistent with the meaning of 'free,'" CC's Post-Trial Br. 67; *see also* CC Proposed Order at 2. The TurboTax SKUs Intuit advertised as free were "truly free." PFF ¶69; *see also* Intuit's Post-Trial Br. 11-12. In fact, every year during the relevant period, between 11 and 14 million taxpayers used TurboTax's free products to file their taxes without having to pay Intuit a penny. PFF ¶113.

- There is no evidence that the challenged ads' claims about qualified free offers "were material to consumers," CC's Post-Trial Br. 68; *see also* CC Proposed Order at 2. The evidence shows the opposite. *See supra* Part III; Intuit's Post-Trial Br. 98-101; PFF ¶¶779-801.
- There was nothing to "cure" because Intuit's ads ensured "reasonable consumers' understanding" of the advertised products' qualifications, CC's Post-Trial Br. 68; *see also* Proposed Order at 2. No part of the ads conveyed that TurboTax was free without qualification. *See supra* Part I. The qualifications were part and parcel of the ads, not severable disclaimers, *see supra* pp.46-47, and the ads effectively conveyed the relevant offer's qualifications, *see supra* Part IV; Intuit's Post-Trial Br. Parts II.C, II.E; PFF ¶¶119-145; 205-301, 364-452.

2. Conduct Provisions

Complaint Counsel again disregard the Court's instructions when it comes to their proposed order's conduct provisions, merely reciting or paraphrasing only some of the provisions and again asserting without argument or support that they would vindicate "the law." CC's Post-Trial Br. 68. In any event, each proposed conduct provision is untethered to the law, duplicative of the Consent Order, impermissibly indeterminate, and/or would harm consumers. Each should be rejected.

The conduct provisions in sections I and II of the proposed order would not, as Complaint Counsel assert (Br. 68), vindicate "the law." To start, most of the "law" Complaint Counsel reference (Br. 69) "do[es] not constitute binding law," Order Denying Intuit's Mot. for Discovery Pursuant to Rule 3.36 at 4. As noted, FTC guidelines are "guides, not fixed rules." *Mary Carter Paint*, 382 U.S. at 47-48. The free guides themselves discuss only buy-one-get-one

free offers, which are not at issue here. Moreover, Complaint Counsel provide no argument as to *how* the provisions of their proposed order would vindicate the non-binding authorities they cite. Such conclusory statements as "this provision requires Intuit to follow the law," CC's Post-Trial Br. 68, are not the "legal support" and "argument" this Court asked for (Chappell (ALJ) Tr. 1825), and they do not discharge Complaint Counsel's burden to prove that their proposed order is warranted, *see W. T. Grant*, 345 U.S. at 633. Indeed, one significant provision in the proposed order (provision I.C's compelled speech requirement that Intuit affirmatively state that a majority of taxpayers do not qualify to use Free Edition) is so obviously untethered to any legal authority (binding or non-binding) that Complaint Counsel do not even mention it in their post-trial brief—again, in contravention of this Court's order to "include briefing in support of … *each and every* provision of the proposed order (other than definitions, boilerplate, or non-substantive provisions)," Order on Post-Trial Filings at 2 (emphasis added). Complaint Counsel paraphrase (Br. 68) the conduct provisions in section I of their proposed order as "requir[ing] Intuit to cease and desist from advertising any product or service as 'free' unless it [is] truly free to all consumers" (paraphrasing provision I.A), though with "an exception allowing Intuit to represent goods or services as 'free,' even when they are not free for all consumers, if Intuit clearly and conspicuously discloses all the relevant terms, conditions, and obligations" (paraphrasing provision I.B). But they never mention proposed provision I.C, which requires that "if the goods or services are not Free for a majority of U.S. taxpayers, such a fact [must be] disclosed Clearly and Conspicuously at the outset of any disclosures required by II.B." (The reference to "II.B" in the provision just quoted appears to be a typo; for the provision to make sense, it should refer to "I.B.") That provision does not in any way "track the Commission's guidance in its Guide Concerning Use of the Word 'Free' and Similar Representations, 16 C.F.R. § 251.1," as

Complaint Counsel (wrongly) represent is true of "[t]he conduct provisions in section I," CC's Post-Trial Br. 68. Nor does it track any other authority, binding or not.

In addition to being untethered to law (or even non-binding FTC guidance), Complaint Counsel's proposed provision I.C is inappropriate for two independent reasons:

First, the provision would harm consumers. As Professor Golder explained, telling consumers that most taxpayers cannot file for free with TurboTax (as provision I.C would require) would cause many taxpayers to assume—often incorrectly—that they do not qualify for the free TurboTax product being advertised, PFF ¶843, thus causing eligible consumers to disengage with the ads, PFF ¶¶842, 844. That is especially pernicious because, as noted, of consumers actually in the market for online tax-preparation software, most *do* have simple returns and thus are eligible to file for free using TurboTax. PFF ¶¶129, 464. Proposed provision I.C would therefore perversely exacerbate the skepticism that reasonable consumers already bring to offers for free products or services, resulting in fewer consumers filing for free. PFF ¶¶485-501.

Second, provision I.C is unconstitutional. The government may not compel commercial speech—as provision I.C would—unless the speech is "noncontroversial" and not "unjustified or unduly burdensome." *National Institute of Family & Life Advocates v. Becerra*, 138 S.Ct. 2361, 2372 (2018) (hereafter *NIFLA*). Provision I.C fails both elements. It is far from "noncontroversial," *id*., as the parties vigorously dispute whether the entire taxpayer population is the appropriate metric for measuring TurboTax Free Edition's qualifications. And again, a majority of taxpayers actually in the market for online tax-prep *do* qualify to use TurboTax for free. PFF ¶¶129, 464. Next, imposing provision I.C on Intuit but not its competitors—who market similar free offers, PFF ¶¶453-460—would be "unjustified or unduly burdensome,"

NIFLA, 138 S.Ct. at 2372; certainly Complaint Counsel made no attempt to justify it. "The Supreme Court made clear in *NIFLA* that a government-compelled disclosure that imposes an undue burden fails for that reason alone." *American Beverage Ass'n v. City & County of San Francisco*, 916 F.3d 749, 757 (9th Cir. 2019). Provision I.C would impose such a burden by disadvantaging Intuit relative to its competitors.

Each of the proposed order's other conduct provisions is inappropriate because each is materially duplicative—in large part word for word—of a term in the Consent Order. As a threshold matter, the definition of "Clearly and Conspicuously" that is incorporated into the proposed order's conduct provisions (at 3-4) is virtually identical to the Consent Order's definition of that term (RX261 (Intuit) at 2-3). As for the conduct provisions themselves, proposed provisions II.A and II.D are duplicative of the Consent Order's provision 6.E (RX261 (Intuit) at 7)—indeed, they are identical except that proposed provisions II.A and II.D would apply to products or services other than TurboTax, which is improper for the reasons explained in the following subsection. Proposed provisions II.B and II.C, meanwhile, are entirely duplicative of their nearly verbatim counterparts in the Consent Order provisions 6.A and 6.B, respectively, (RX261 at 6). Finally, proposed provisions I.A and I.B—which are connected by "or" and thus in effect boil down to I.B's requirement that "[a]ll the terms, conditions, and obligations upon which receipt and retention of [a] 'Free' good or service are contingent" be "set forth Clearly and Conspicuously at the outset of the offer"— are duplicative of a number of the Consent Order's more detailed and comprehensive provisions, including:

- For "non-Space-Constrained" ads for free tax-preparation products, Intuit "must disclose, Clearly and Conspicuously, and in Close Proximity to the representation that the product is free: (1) the existence and category of material limitations on a

consumer's ability to use that free product; and (2) that not all taxpayers qualify for the free product." PFF ¶812.

- For "Space-Constrained" ads (other than Space-Constrained video ads), Intuit "must disclose that eligibility requirements apply," and "[i]f made online, … must also (1) Clearly and Conspicuously include a hyperlink to a landing page or webpage on a TurboTax Website that Clearly and Conspicuously contains full disclosure of all material eligibility restrictions or (2) link by clicking on the Advertisement itself to a landing page or webpage on a TurboTax Website that Clearly and Conspicuously sets forth full disclosure of all material eligibility restrictions." PFF ¶813.
- In Space-Constrained video ads, for the next ten years, "Intuit must visually disclose, Clearly and Conspicuously, and in Close Proximity to the representation that the product is free: (1) the existence and category of material limitations on a consumer's ability to use that free product; and (2) that not all taxpayers qualify for the free product." Additionally, for the same period, in Space-Constrained video ads except those 8 seconds or shorter, "Intuit must verbally disclose, Clearly and Conspicuously and in Close Proximity to the representation that the product is free, that not all taxpayers qualify." PFF ¶814.
- The TurboTax website must "disclose (1) Clearly and Conspicuously and very near to [any free] representation all material limitations on a consumer's ability to use that free product, including, but not limited to, eligibility criteria for that free product, or (2) through a hyperlink (i) that is very near to the representation, (ii) that indicates that there are material limitations on a consumer's ability to use that

free product, and (iii) that links to a landing page or webpage that Clearly and Conspicuously sets forth all material limitations on a consumer's ability to use that free product, including, but not limited to, eligibility criteria for that free product." PFF ¶815.

To the extent proposed provision I.B sweeps more broadly than these (much more precise) provisions, it is inappropriate both because it is impermissibly imprecise and because it would harm consumers.

A cease-and-desist "order's prohibitions must be stated with clarity and precision." *LabMD, Inc. v. FTC*, 894 F.3d 1221, 1235 (11th Cir. 2018). One reason for this "requirement of reasonable definiteness" is that "[t]he imposition of penalties upon a party for violating an imprecise cease and desist order" would "constitute a denial of due process." *Id*. Another reason "specificity is crucial," *id.*, is that "[t]he practical effect of" enforcing an unspecific order "would be as if the Commission was [the respondent's] chief executive officer and the court was its operating officer"; such "micromanaging is beyond the scope of court oversight," *id*. at 1237.

Unlike the provisions of the Consent Order quoted above, Complaint Counsel's proposed provision I.B is anything but precise, and thus would be "unenforceable," *LabMD*, 894 F.3d at 1236. The provision reads in full: "All the terms, conditions, and obligations upon which receipt and retention of the 'Free' good or service are contingent are set forth Clearly and Conspicuously at the outset of the offer so as to leave no reasonable probability that the terms of the offer might be misunderstood." Proposed Order at 5. Like the Consent Order, provision I.B purports to require the clear and conspicuous presentation of relevant qualifications. But *un*like the Consent Order, it "says precious little about how this is to be accomplished," *LabMD*, 894 F.3d at 1237. Complaint Counsel refuse to clarify what they intend to require with provision I.B,

admitting at trial that they "are not advocating particular disclosures." (Complaint Counsel (FTC) Tr. 1002). One likely interpretation is that provision I.B would require Intuit to include the 157-word disclosure found in the "simple tax returns" pop-up on the TurboTax website. PFF ¶839. It is anyone's guess, however, whether even that impractically burdensome requirement would satisfy provision I.B: Complaint Counsel contradict themselves by both conceding that the pop-up provides consumers with "detailed information about the tax situations covered by Free Edition," PFF ¶379, and asserting that it only "*possibly* sheds *some* light on the limitations of TurboTax Free Edition," CC's Post-Trial Br. 21-22 (emphases added). Complaint Counsel's expert doesn't know either; when asked if the proposed order would require inclusion of the 157-word pop-up text, he responded: "I don't know." (Novemsky (FTC) Tr. 1818-1819). Because Complaint Counsel's proposed provision I.B is "devoid of any meaningful standard," it would be "unenforceable" and thus should not be adopted. *LabMD*, 894 F.3d at 1236.

Finally, whether it requires inclusion of the 157-word pop-up text or something similar (or something even *more* burdensome), proposed provision I.B would be inappropriate because it would harm consumers. Explaining all of Free Edition's qualifications in a 30-second television ad—much less the shorter ads typical of platforms like YouTube or TikTok—would result in "information overload" and thus be counterproductive to consumer understanding. PFF ¶¶138, 383, 834-835; *see also* Intuit's Post-Trial Br. 55, 67. Even Complaint Counsel's expert agreed that consumers cannot effectively process "lots of complicated information" in a 30-second television ad. PFF ¶841. Professor Golder agreed. PFF ¶¶842, 844. So did Intuit's fact witnesses. PFF ¶833. Mr. Johnson, for example, explained that "includ[ing] each and every detail regarding various tax situations" covered by free TurboTax offers "would be incomprehensible" to consumers, in part because the font would need to be "so small," and that

doing so would be inconsistent with consumer behavior and expectations because consumers were not yet "looking for that information." PFF ¶846. Ms. Ryan likewise testified that including the full eligibility details for free TurboTax products in ads would be impractical because they simply would not fit, and many consumers would not know which tax forms they use. PFF ¶846. And Mr. Rubin echoed these concerns, adding that enumerating every tax situation covered and not covered in TurboTax ads would "be more confusing for consumers" because tax forms change from year to year. PFF ¶846. Complaint Counsel did nothing to rebut any of that testimony, nor offered evidence that the proposed order would help consumers better understand free TurboTax advertising. PFF ¶832.

In sum, the proposed order's conduct provisions are inappropriate because they are untethered to the law and because each would be either duplicative of the existing Consent Order or impermissibly indeterminate and harmful to consumers.

3. Scope Of The Order

Complaint Counsel insist (Br. 69) that it is appropriate for their proposed order to "cover Intuit's … marketing beyond TurboTax." But a cease-and-desist order is limited to the challenged practice. *See American Home Products Corp. v. FTC*, 695 F.2d 681, 710-711 (3d Cir. 1982). And Complaint Counsel have made no allegations and provided no evidence concerning any product other than TurboTax. They point (Br. 69) to the facts that Intuit "launch[ed] the TurboTax Live free promotion in TY 2020" and has [redacted] [redacted] (emphasis added). But that concerns Intuit's plans to *provide* free offers, not to *advertise* them. As explained, moreover, Intuit's provision of free products and services to tens of millions of consumers is a public good. One would think Complaint Counsel would welcome Intuit's consideration of ways to provide even more consumers with free options. In any event, Intuit's [redacted] (*id.*) is nowhere near concrete enough to

support prospective relief. *See W. T. Grant*, 345 U.S. at 633; *Allen*, 2022 WL 17551564, at *10. Finally, Complaint Counsel wrongly assert (Br. 70) that a sweeping prophylactic order is supported by evidence that Intuit "deliberately" deceived consumers. As discussed, the evidence shows that Intuit's intention was and remains committed to communicating clearly and honestly with consumers. *See supra* p.44.

4. Compliance-Monitoring Provisions

The proposed order's compliance-monitoring provisions are inappropriate not only because the order's substantive provisions are improper but also because the existing Consent Order includes provisions to ensure compliance with its (far more detailed) substantive provisions. (RX261 (Intuit) at 13-15). The string cite that constitutes the entirety of Complaint Counsel's argument regarding compliance monitoring (Br. 70-71) does not include a single case in which a pre-existing consent order (dealing comprehensively with the precise conduct sought to be enjoined again) already provided for compliance reporting and monitoring. To the extent Complaint Counsel's proposed order would monitor compliance with substantive provisions that sweep beyond those of the Consent Order, such monitoring is inappropriate because those substantive provisions are, again, themselves improper. *See supra* Part V.B.2.

VI. THE PROCEEDING IS LATE AND UNCONSTITUTIONAL

Complaint Counsel's responses (Br. 72-75) to Intuit's timeliness and constitutional defenses (Post-Trial Br. 113-125) lack merit.

A. The Complaint Is Untimely

Intuit's post-trial brief explained (at 113-116) why the complaint is untimely on both statute-of-limitations and laches grounds. Complaint Counsel's answers fail.

Complaint Counsel argue (Br. 72) that "[t]he government is not subject to" laches. That is wrong. Several decisions, including a recent one from the D.C. Circuit, recognize that government agencies, including the FTC, are subject to laches. *See* Intuit's Post-Trial Br. 116.

As for the statute of limitations, Complaint Counsel offer two arguments (Br. 73). One—that "Intuit's deception from January 6, 2019, to the present … would be covered by this action"—is consistent with Intuit's position that "any advertisement that last ran before January 5, 2019[,] … may not be considered," Intuit's Post-Trial Br. 113. The other—that Congress did not provide for a statute of limitations for section 5 actions—ignores Supreme Court precedent holding that where "there is no federal statute of limitations expressly applicable," courts "'borrow' the most suitable statute or other rule of timeliness from some other source," *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151, 158 (1983), *quoted in* Intuit's Post-Trial Br. 113. The one case Complaint Counsel cite likewise ignored this binding precedent. *See FTC v. Ivy Capital, Inc.*, 2011 WL 2470584, at *2 (D. Nev. June 20, 2011). For the reasons explained in Intuit's post-trial brief (at 113-115), a three-year statute of limitations must be borrowed (from either federal or state law) and applied here.

B. The Proceeding Is Unconstitutional

Four constitutional defects plague this proceeding. Complaint Counsel's counterarguments on each are unavailing.

1. The Due Process Clause is violated when "'a disinterested observer may conclude that the agency has in some measure'" prejudged the case. *Fast Food Workers Committee v. NLRB*, 31 F.4th 807, 815 (D.C. Cir. 2022). Chair Khan's prejudgment of this case is evinced by two events, each of which occurred while the Part 3 "wall" was up and the Commission was required to play the role of neutral adjudicator. First, she published a tweet asserting that Intuit's "TurboTax 'free' filing campaign" was "deceptive" and that "Intuit's deceptive ads" required an

"immediate halt." PFF ¶932. Second, she singled out Intuit in a public interview as an example of a company that had engaged in "law-breaking." PFF ¶933.

Complaint Counsel first contend (Br. 73) that Chair Khan's prejudgment is irrelevant because Intuit did not seek to disqualify her. They cite no authority for that argument. Regardless, Intuit has *consistently* pressed the issue. *See, e.g.*, Answer and Affirmative Defenses of Respondent Intuit Inc. 25 (Apr. 14, 2022); Respondent Intuit Inc.'s Opposition to Complaint Counsel's Motion for Summary Decision 28-29 (Aug. 30, 2022); Respondent Intuit Inc.'s Pretrial Brief 84-87 (Mar. 17, 2023). The Commission has accordingly long been aware of Intuit's objection.

Nor can Complaint Counsel cloak themselves (Br. 74) with any "presumption" "that adjudicators are … unbiased." As Intuit's post-trial brief explained (at 85-87), Chair Khan's actions went beyond simply voting out a complaint and publicizing that fact, instead mirroring conduct that appellate courts have held constitutes impermissible prejudgment. These facts overcome the presumption Complaint Counsel invoke. Complaint Counsel's failure to grapple with Chair Khan's conduct, let alone the cases showing why that conduct violates due process (all of which Intuit flagged in its pretrial brief as well (at 84-87)), speaks volumes.

2. The fusion of accusatory and adjudicative functions within the Commission independently creates an "unconstitutional potential for bias." *Williams v. Pennsylvania*, 579 U.S. 1, 8 (2016); *see* Intuit's Post-Trial Br. 117-119. The main case Complaint Counsel rely on (Br. 74) to argue otherwise, *Withrow v. Larkin*, 421 U.S. 35, 47 (1975), specifically recognized that "special facts and circumstances present in the case" may demonstrate "that the risk of unfairness is intolerably high," *id.* at 58. Two "special facts" exist here. The first is the Commission's perfect win rate before itself. *See* Intuit's Post-Trial Br. 117-118. The second is

that Intuit's private rights are being adjudicated here outside an Article III tribunal. *Id.* at 118-119. Complaint Counsel's conclusory invocation of *Withrow*—especially in light of *Williams* providing a recent example of what an improper combination of functions looks like—does not absolve the Commission of the due-process problems its administrative process poses.

3. As to Congress's impermissibly indeterminate delegation to the Commission of the legislative authority to assign disputes to either administrative or judicial adjudication, Complaint Counsel say (Br. 74) that choosing to proceed in one forum over another is "a classic exercise of prosecutorial discretion." To the contrary, this choice determines whether a defendant will "receive *certain legal processes*"—"a power that Congress uniquely possesses." *Jarkesy v. SEC*, 34 F.4th 446, 462 (5th Cir. 2022), *petition for cert. filed*, No. 22-859 (U.S. Mar. 8, 2023). Nor can Complaint Counsel shield the impermissible delegation by citing (Br. 75) the Supreme Court's observation that the FTC Act is a "coherent enforcement scheme," *AMG Capital Management, LLC v. FTC*, 141 S.Ct. 1341, 1349 (2021). *AMG Capital* did not present a non-delegation question and so it carries no weight on that issue. In any event, "coherent" and "constitutional" are not synonymous. Whatever the merits of the FTC Act's enforcement scheme, that scheme reflects an improper delegation of legislative authority to the Commission. Coherent or not, that is unlawful.

4. Complaint Counsel's defense (Br. 75) of the FTC's impermissible tenure protections for commissioners and ALJs is most notable for what is missing: any defense of the ALJ tenure protections. That is unsurprising, as such protections are foreclosed by Supreme Court precedent. *See* Intuit's Post-Trial Br. 119-120. Instead, Complaint Counsel point (Br. 75) to a nearly 100-year-old Supreme Court decision upholding the commissioners' tenure protections. *See Humphrey's Executor v. United States*, 295 U.S. 602, 626 (1935). In the

ensuing decades, however, that holding has been "repudiated [in] almost every aspect." *Seila Law v. CFPB*, 140 S.Ct. 2183, 2212 (2020) (Thomas, J., concurring in part and dissenting in part).

Complaint Counsel also overread *Humphrey's Executor*. That decision rested on the notion that that "the FTC (*as it existed in 1935*) … exercis[ed] 'no part of the executive power.'" *Seila Law*, 140 S.Ct. at 2198 (emphasis added). Whatever the merits of the Supreme Court's understanding of the FTC's authorities in 1935, *Seila Law* recognized that *Humphrey's Executor*'s characterization of the FTC "has not withstood the test of time." *Id.* at 2198 n.2.

Finally, Complaint Counsel reprise (Br. 75) the argument that any removal-power violation is of no moment because the commissioners have all been properly appointed. But proper appointment does not inoculate the actions of an official with improper tenure protections from invalidation if the tenure protections helped cause the harm those actions inflicted. *See Collins v. Yellen*, 141 S.Ct. 1761, 1789 (2021). That is the situation here: As Intuit explained (Post-Trial Br. 120-121), the commissioners' improper tenure protections increase the likelihood of procedural unfairness because, without them, these actors would risk presidential removal for straying from the evidence and the law.[2]

[2] Intuit preserves for subsequent proceedings the argument that the Commissioners did not vote out the final complaint. Complaint Counsel argue (Br. 72) that the Commission did vote out the final complaint, citing a press release announcing the Complaint. But Complaint Counsel earlier informed Intuit's counsel that after the Commissioner vote, the Secretary's office continued making changes to the complaint because Complaint Counsel did not have much experience in Part 3 and had made numerous errors in drafting. Thus, whatever the commissioners voted on was not the final complaint, and the action may not proceed. Order, *FTC v. Libbey Inc.*, No. 1:02-cv-00060-RBW (D.D.C. Apr. 3, 2002), Dkt. 76. However, Intuit was not allowed discovery to support Complaint Counsel's representation to it, Order Denying Respondent's Motion for Discovery Pursuant to Rule 3.36 (Nov. 7, 2022), and thus did not advance this argument in its post-trial papers.

CONCLUSION

The Court should find in Intuit's favor and dismiss the Complaint.

Dated: June 20, 2023

Respectfully submitted,

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