

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

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

**In the Matter of:**

**Intuit Inc.**, a corporation.

**Docket No. 9408**

**INTUIT INC.’S MOTION TO FOR LEAVE TO FILE SUR-REPLY IN SUPPORT OF  
DENYING COMPLAINT COUNSEL’S MOTION FOR SUMMARY DECISION**

Pursuant to Rule 3.22(d) of the Federal Trade Commission’s Rules of Practice, 16 C.F.R. § 3.22(d), Respondent Intuit Inc. respectfully requests leave to file a Sur-Reply in support of denying Complaint Counsel’s August 22, 2022, Motion for Summary Decision, on the basis that the Commission failed to rule on the motion by the deadline set forth in its own regulations.

The Commission did not render a decision on Complaint Counsel’s motion by the December 30, 2022 deadline it set, and did not grant itself an extension to decide Complaint Counsel’s motion until after the deadline for doing so passed. The Commission’s issuance of the Order after the deadline should void any decision on the motion, as it is contrary to the Agency’s rules and would prejudice Intuit in the event of an adverse ruling. This missed deadline (coupled with other significant events in the case that have occurred since Complaint Counsel’s motion was filed even before discovery opened) constitute “recent important developments ... that could not have been raised earlier in the party’s principal brief” that should be brought to the Commission’s attention. 16 C.F.R. § 3.22(d).

Moreover, the parties have engaged in extensive discovery over the last several months, including the production of hundreds of thousands of pages of new documents and 30 depositions. As part of that discovery, Complaint Counsel have conceded under oath—contrary to their assertions in their motion for summary decision—that there are disputed issues of fact on critical issues including the claims made in the challenged ads and the net impression from those ads. Other evidence now in the record makes clear that **none** of the challenged ads were likely to mislead consumers. The Commission should consider this evidence that bears directly on Complaint Counsel’s arguments and the inappropriateness of summary decision here.

Intuit requests that this Motion for Leave be granted. A conditional copy of Intuit’s Sur-Reply has been attached hereto as Exhibit A.

Dated: January 6, 2023

Jonathan E. Paikin  
Jennifer Milici  
Derek A. Woodman  
1875 Pennsylvania Ave NW  
Washington, DC 20006  
Telephone: (202) 663-6000  
Facsimile: (202) 663-6363  
Jonathan.Paikin@wilmerhale.com  
Jennifer.Milici@wilmerhale.com  
Derek.Woodman@wilmerhale.com

Respectfully submitted,

WILMER CUTLER PICKERING HALE  
AND DORR LLP

/s/ David Z. Gringer  
David Z. Gringer  
7 World Trade Center  
250 Greenwich St.  
New York, NY 10007  
Telephone: (212) 230-8800  
Facsimile: (212) 230-8888  
David.Gringer@wilmerhale.com

*Attorneys for Respondent Intuit Inc.*

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

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

**In the Matter of:**

**Intuit Inc.**, a corporation.

**Docket No. 9408**

**[PROPOSED] ORDER GRANTING RESPONDENT INTUIT INC.'S  
MOTION FOR LEAVE TO FILE SUR-REPLY IN SUPPORT OF DENYING  
COMPLAINT COUNSEL'S MOTION FOR SUMMARY DECISION**

Upon consideration of Respondent's Motion for Leave to File a Sur-Reply,

IT IS ORDERED that Respondent is granted leave to file its Sur-Reply.

IT IS FURTHER ORDERED that Respondent's Sur-Reply shall be filed into the record  
of these proceedings.

By the Commission.

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

\_\_\_\_\_  
April Tabor

Secretary of the Commission

# EXHIBIT A

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

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

**In the Matter of:**

**Intuit Inc.**, a corporation.

**Docket No. 9408**

**INTUIT INC.’S SUR-REPLY IN SUPPORT OF DENYING  
COMPLAINT COUNSEL’S MOTION FOR SUMMARY DECISION**

Respondent Intuit Inc. respectfully submits this Sur-Reply in support of denying Complaint Counsel’s August 22, 2022, motion for summary decision on the basis that the Commission did not rule on the motion by the deadline set forth in its regulations, *see United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 266-268 (1954) (holding agency violated due process by acting “contrary to existing valid regulations”). In the alternative, Intuit respectfully requests that the Commission reconsider its decision to extend the deadline for it to rule on Complaint Counsel’s motion without affording Intuit a full evidentiary hearing based on the record developed in the last several months. The discovery record in the intervening months has made clear—in fact, Complaint Counsel have conceded under oath—that there are disputes on key factual issues like the net impression from the ads that should preclude summary decision.

**I. INTRODUCTION**

Pursuant to Rule 3.22(a), the original deadline for a decision on Complaint Counsel’s motion was October 24, 2022. *See* 16 C.F.R. § 3.22(a) (“[M]otions not referred to the

Administrative Law Judge shall be ruled on by the Commission within 45 days of the filing of the last-filed answer or reply to the motion, if any, unless the Commission determines there is good cause to extend the deadline.”<sup>1</sup> Before that deadline passed, on October 7, 2022, the Commission served an order (dated October 7, 2022) that extended the deadline by 68 days, until December 30, 2022. *See* Order Scheduling Oral Argument and Extending Deadline for Commission Ruling (Oct. 7, 2022). The Commission did not issue a decision by the December 30 deadline. Rather, on December 30, the deadline passed without any decision being issued, whether published on the Commission’s docket or served on Intuit.

After the deadline had passed, on January 3, 2023, Intuit received an email from the Office of the Secretary containing an order that purported to extend the deadline until January 31, 2023. The order was dated December 8, which was twenty-six days before it was actually served. When counsel for Intuit asked for additional information, it learned that the attorney who served the Order did not do so sooner because he was on “leave” and “overlooked a couple [of] chances” to issue the order. No explanation was provided as to why others in the office could not timely serve the Order or why nearly a month passed before the Order was issued and sent to Intuit or anyone else outside the walls of the FTC. Ex. A. In any event, the triggering date for an order to become effective is the date of service, not the date written on the order. *See* 16 C.F.R. § 3.56(a) (recognizing Commission orders “become[] effective upon the sixtieth day after service”); *id.* § 4.4(a) (recognizing “documents shall be deemed served [by the Commission] on the day of personal or electronic delivery or the day of mailing”). Thus, the

---

<sup>1</sup> Complaint Counsel’s reply in support of the motion was filed on September 8, 2022, which meant that the Commission’s initial deadline for issuing a decision was Monday, October 24, 2022.

extension to decide Complaint Counsel's motion was not actually granted until after the deadline for doing so passed.

## II. ARGUMENT

The Commission's issuance of the Order after the relevant period expired would likely void any decision on the motion because it is contrary to the Agency's rules and would prejudice Intuit in the event of an adverse ruling. *Accardi*, 347 U.S. at 266-268; *see also Fort Stewart Schs. v. Fed. Lab. Rels. Auth.*, 495 U.S. 641, 654 (1990) ("It is a familiar rule of administrative law that an agency must abide by its own regulations."); *United Steel v. Mine Safety & Health Admin.*, 925 F.3d 1279, 1287 (D.C. Cir. 2019) ("The ordinary practice is to vacate unlawful agency action."). As the Tenth Circuit has explained, when an agency fails to comply with required procedural steps, it lacks authority to act. *Jewell v. United States*, 749 F.3d 1295, 1300 (10th Cir. 2014).

The implications of moving to decide the motion in spite of the Commission's rules are significant. While the Commission has been considering the motion, the parties have been engaged in extensive discovery. Hundreds of thousands of pages of new documents have been produced by both parties since Complaint Counsel's motion was filed, and 30 depositions have been taken. Consideration of that record will demonstrate that summary decision was never appropriate.

Significantly, a predicate for Complaint Counsel's motion for summary decision (and certainly any grant of such motion) is that there is *no* dispute as to any material fact. Pivotal factual questions in this deception case include the claims made and what is the net impression consumers take away from the challenged advertisements. *See, e.g., FTC v. National Urological Group, Inc.*, 645 F. Supp. 2d 1167, 1189 (N.D. Ga. 2008) ("The meaning of an advertisement,

the claims *or net impressions communicated to reasonable consumers*, is fundamentally a question of fact.”). On December 8, 2022, the Bureau of Consumer Protection was deposed pursuant to Rule 3.36. Contrary to the fundamental premise of its motion, the Bureau’s designee admitted that there were numerous disputed issues of fact, including on the critical issue of the net impression from the ads. Ex. B at 222:6-9 (admitting the parties dispute what the net impression is from the challenged advertisements). Internal Intuit documents produced in discovery further reflect that consumers understood Free Edition’s qualifications from the challenged ads and were generally skeptical of free offers, thus undermining (and certainly disputing) Complaint Counsel’s theory of net impression. Ex. C at 20, 27-28.

Similarly, despite representing to the Commission that there were no disputes on the question of what claims are made expressly or impliedly in the ads, the Bureau conceded the opposite under oath. Ex. B at 252:22-256:18 (admitting there are disputed issues of fact regarding both the express and implied claims made in the challenged advertisements as well as consumers’ takeaways from the “free, free, free” advertisements). Of equal significance, despite arguing to the Commission that the challenged ads made the express and implied claim that “TurboTax is free,” under questioning, the Bureau conceded that no ad challenged actually made such a claim. *Id.* at 209:3-210:4 (acknowledging that Intuit’s “Auctioneer” ad, for example, does not convey that TurboTax is free).

Likewise, in its Motion, Complaint Counsel relied extensively on consumer complaints, representing to the Commission that these complaints were dispositive reflections of consumer impressions. However, under oath, the Bureau acknowledged that it had failed to vet any of the consumer complaints it relied upon in its motion for summary decision. *Id.* at 353:14-354:13

(confirming that the Bureau did not perform any independent investigation of the validity of consumer complaints relied on by Complaint Counsel).

Next, although it had argued to the Commission in its Motion that the TurboTax website obscured or hid the qualifications for TurboTax Free Edition, the Bureau conceded that the Bureau itself had determined the qualifications for TurboTax Free Edition by going to the TurboTax website. *Id.* at 211:16-212:8 (noting the TurboTax website lists information about who qualifies to file their taxes for free using TurboTax); *id.* at 251:7-252:5 (confirming that the Bureau determined that TurboTax Free Edition is free for consumers with simple tax returns because Intuit lists the eligibility requirements on the TurboTax website).

Put simply, we are now just over two months from the final hearing before Chief Judge Chappell, discovery is nearly concluded, and a detailed record that bears directly on Complaint Counsel's arguments and the inappropriateness of summary decision here has been built over many months. None of this record is presently before the Commission in evaluating Complaint Counsel's motion.

If the Commission does not outright deny the motion, the appropriate remedy for the missed December 30 deadline is to allow Complaint Counsel to refile their motion for summary decision if it so wishes. If Complaint Counsel does take that opportunity, Intuit would then be able to submit the well-developed evidentiary record as part of their opposition. If Complaint Counsel does not take the opportunity, then this matter will head to the final hearing. Under either scenario, a decision will be made with the benefit of facts and testimony rather than in isolation on an incomplete body of evidence; indeed before Intuit could even develop evidence.

Even if the Commission disagrees that the missed deadline constitutes a violation of its rules, it should still reconsider its decision to grant an extension without considering the full

discovery record. Given the extensive discovery over the last several months, it makes sense to consider the evidence rather than decide a motion briefed and argued before that evidence was developed.

### III. CONCLUSION

For the foregoing reasons, Complaint Counsel's Motion for Summary Decision should be denied.

Dated: January 6, 2023

Respectfully submitted,

WILMER CUTLER PICKERING HALE  
AND DORR LLP

/s/ David Z. Gringer

David Z. Gringer  
7 World Trade Center  
250 Greenwich St.  
New York, NY 10007  
Telephone: (212) 230-8800  
Facsimile: (212) 230-8888  
David.Gringer@wilmerhale.com

Jonathan E. Paikin  
Jennifer Milici  
Derek A. Woodman  
1875 Pennsylvania Ave NW  
Washington, DC 20006  
Telephone: (202) 663-6000  
Facsimile: (202) 663-6363  
Jonathan.Paikin@wilmerhale.com  
Jennifer.Milici@wilmerhale.com  
Derek.Woodman@wilmerhale.com

*Attorneys for Respondent Intuit Inc.*

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

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

**In the Matter of:**

**Intuit Inc.,** a corporation.

**Docket No. 9408**

**DECLARATION OF DAVID GRINGER IN SUPPORT OF INTUIT INC.’S  
SUR-REPLY IN SUPPORT OF DENYING COMPLAINT COUNSEL’S  
MOTION FOR SUMMARY DECISION**

I, David Gringer, declare as follows:

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

2. I submit this declaration in support of Intuit’s Sur-Reply in support of denying Complaint Counsel’s August 22, 2022 Motion for Summary Decision.

3. On January 3, 2023, Intuit was served with an order from the Office of the Secretary purporting to extend the deadline for a decision from the Commission until January 31, 2023. The order had a date of December 8, 2022.

4. I immediately inquired about the discrepancy between the date on the Order and the date of service via email, and an attorney in the Secretary’s office stated in response that the Order was not served for nearly a month because he was on “annual leave a number of days in December and overlooked a couple chances to serve it sooner.”

5. A true and correct excerpted transcript of the deposition of the Bureau of Consumer Protection (through William Maxson), taken by Intuit as part of this proceeding on December 8, 2022, is attached hereto as Exhibit B.

6. A true and correct copy of “TY20 Campaign Copy Testing,” bates stamped beginning with INTUIT-FTC-PART3-000490565, is attached hereto as Exhibit C.

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

Executed on this 6th day of January, 2023, in New York, NY.

By: /s/ David Gringer

DAVID GRINGER  
Wilmer Cutler Pickering Hale and Dorr LLP  
7 World Trade Center  
250 Greenwich Street  
New York, NY 10007  
Telephone: (212) 230-8800

# EXHIBIT B

CONFIDENTIAL

PUBLIC

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22

UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION

-----  
In The Matter of: )  
 ) Docket No. 9408  
Intuit Inc., )  
 a corporation, )  
 )  
 Respondent. )  
-----

- C O N F I D E N T I A L -

Videotaped Deposition of William T. Maxson  
December 8, 2022  
9:23 a.m.

Reported by: Bonnie L. Russo  
Job No. 5570324

CONFIDENTIAL

PUBLIC

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22

Videotaped Deposition of William T. Maxson held  
at:

Wilmer Cutler Pickering Hale and Dorr, LLP  
1875 Pennsylvania Avenue, N.W.  
Washington, D.C.

Pursuant to Notice, when were present on behalf  
of the respective parties:

CONFIDENTIAL

PUBLIC

1 and free and free and free and free. 14:31:43

2 BY MR. GRINGER: 14:31:47

3 Q. Makes no mention of TurboTax, 14:31:47

4 correct? 14:31:47

5 A. This line does not mention TurboTax. 14:31:51

6 Q. And it does not convey that TurboTax 14:31:52

7 is free, correct? 14:31:54

8 A. This ad -- well, this ad. This 14:31:59

9 particular sentence within this ad simply 14:32:01

10 states "and free" over and over. 14:32:04

11 Q. And my question is: Does the 14:32:06

12 sentence: "And free and free and free and free 14:32:06

13 and free" communicate that TurboTax is free? 14:32:11

14 A. Like I said, if the consumer, this 14:32:17

15 hypothetical consumer who only sees the first 14:32:19

16 sentence of the ad, is familiar with Intuit's 14:32:22

17 free advertising campaign, then I could imagine 14:32:25

18 that consumer believing that this ad was about 14:32:28

19 Intuit and TurboTax. 14:32:32

20 If this hypothetical consumer was 14:32:34

21 not familiar with that advertising campaign, 14:32:38

22 was not familiar with Intuit having a free 14:32:40

Page 209

CONFIDENTIAL

PUBLIC

1 campaign and just saw this one sentence at the 14:32:45

2 beginning of the auctioneer ad, then I think 14:32:48

3 it's unlikely the consumer would know what 14:32:51

4 product was being advertised. 14:32:54

5 Q. The first time in the auctioneer ad, 14:32:56

6 discussed in Paragraph 5 of your complaint, 14:33:00

7 mentions the word "TurboTax" is to say: 14:33:03

8 "TurboTax Free Edition is free." 14:33:08

9 Do I have that right? 14:33:09

10 A. Yes -- 14:33:10

11 Q. Okay. 14:33:10

12 A. -- the -- this auctioneer ad, the 14:33:17

13 first time TurboTax is mentioned in this 14:33:20

14 transcript is when it says: "That's right. 14:33:23

15 TurboTax Free Edition is free." 14:33:26

16 Q. And TurboTax Free Edition is free, 14:33:27

17 correct? 14:33:27

18 A. My understanding is that TurboTax 14:33:34

19 Free Edition is available for free to consumers 14:33:41

20 who qualify for it and that approximately 14:33:46

21 two-thirds of consumers do not qualify for it. 14:33:49

22 Q. And there is only one other mention 14:33:51

Page 210

CONFIDENTIAL

PUBLIC

1 of the word "TurboTax" in the entire ad in 14:33:54

2 Paragraph 5 of the complaint, correct? 14:33:57

3 A. In -- in the transcripts that's 14:34:02

4 right. There is two references to TurboTax 14:34:04

5 that are both in the voiceover portion. 14:34:08

6 Q. Right. And the first -- at the 14:34:10

7 conclusion of the ad, correct? 14:34:11

8 A. I believe this is at the conclusion. 14:34:14

9 I -- 14:34:16

10 Q. And -- and voiceover -- the first 14:34:16

11 reference says: "TurboTax Free Edition is 14:34:19

12 free," and the second reference to TurboTax in 14:34:22

13 this ad says: "See details at TurboTax.com," 14:34:24

14 correct? 14:34:28

15 A. That's correct. 14:34:28

16 Q. Okay. And, in fact, there are 14:34:29

17 details about who qualifies for TurboTax Free 14:34:30

18 Edition available on TurboTax.com, correct? 14:34:35

19 A. My understanding is that TurboTax 14:34:39

20 website within -- within the website includes 14:34:42

21 information about, among other things, whom 14:34:45

22 would qualify for free or who would qualify to 14:34:50

Page 211

CONFIDENTIAL

PUBLIC

1 file their taxes with TurboTax for free. 14:34:53

2 Q. So you can see details about 14:34:58

3 TurboTax Free Edition at TurboTax.com, correct? 14:35:08

4 A. Like I said, the TurboTax website, 14:35:14

5 my understanding is, includes within the 14:35:16

6 website somewhere information about who is able 14:35:18

7 to file for -- for free and other terms and 14:35:22

8 conditions. 14:35:26

9 MR. GRINGER: All right. Can we 14:35:31

10 show the witness Tab 189, RX 16. 14:35:32

11 THE WITNESS: I don't have it yet. 14:35:59

12 BY MR. GRINGER: 14:36:01

13 Q. Let us know when you do. 14:36:01

14 A. I'm sorry. Did you say Exhibit 16 14:36:08

15 or 116? 14:36:10

16 Q. RX 16. 14:36:11

17 A. RX 16. I see. I see the exhibit. 14:36:13

18 Q. Can we agree to call the screen on 14:36:46

19 RX 16 a title card? Is that okay? 14:36:49

20 A. Sure. It's fine with me. You can 14:36:52

21 call it whatever you want. 14:36:55

22 Q. You'll know what I mean when I say 14:36:56

Page 212

CONFIDENTIAL

PUBLIC

1 including the text and the voiceover and the 14:46:31

2 title card at the end, is that TurboTax, 14:46:34

3 whatever product name you want to give to it, 14:46:38

4 is free. That's the bureau's position. I 14:46:41

5 understand Intuit disagrees. 14:46:43

6 Q. Right. The parties dispute right 14:46:44

7 now what the net impression from the challenged 14:46:47

8 advertisements is, correct? 14:46:53

9 A. Yes, that's right. 14:46:54

10 Q. In Paragraph 6 of RX 260, it says: 14:46:56

11 "In truth TurboTax is only free for some users 14:47:09

12 based on the tax forms they need. For many 14:47:13

13 others Intuit tells them, after they invested 14:47:17

14 time and effort gathering and inputting into 14:47:20

15 TurboTax their sensitive personal and financial 14:47:24

16 information to prepare their tax returns, that 14:47:26

17 they cannot continue for free. They will need 14:47:29

18 to upgrade to a paid TurboTax service to 14:47:31

19 complete and file their taxes." 14:47:34

20 Are those the only two options when 14:47:36

21 you seek to use TurboTax, either it's free or 14:47:39

22 Intuit tells you after inputting information 14:47:44

Page 222





CONFIDENTIAL

PUBLIC

1                   So a consumer wouldn't necessarily                   15:09:03

2                   start in free edition and then end up paying in                   15:09:05

3                   free edition, but a consumer, my understanding                   15:09:11

4                   is, can start in free edition and get                   15:09:13

5                   transitioned into a premium product where they                   15:09:14

6                   would end up having to pay.                   15:09:16

7                   Q.       Thank you. I appreciate your --                   15:09:18

8                   your honesty there.                   15:09:19

9                   Does are there ways to file for free                   15:09:22

10                  using TurboTax other than TurboTax Free                   15:09:25

11                  Edition?                   15:09:32

12                  MR. ANGUIZOLA: Are you referring to                   15:09:40

13                  a specific time period?                   15:09:41

14                  BY MR. GRINGER:                   15:09:43

15                  Q.       You can answer my question.                   15:09:44

16                  A.       I know previously TurboTax offered                   15:09:45

17                  the free file program, be distinguished from                   15:09:51

18                  what I guess what TurboTax would call free                   15:09:58

19                  edition, that allowed consumers who met certain                   15:10:02

20                  income or other requirements to file for free.                   15:10:04

21                  My understanding is that Turbo -- or Intuit                   15:10:11

22                  doesn't offer that product anymore.                   15:10:14

Page 241

CONFIDENTIAL

PUBLIC

1 Q. Paragraph 14, top, says that the 15:19:37  
2 freemium version of TurboTax is available only 15:19:42  
3 to consumers with simple tax returns as defined 15:19:44  
4 by Intuit. 15:19:47  
5 Do you see that? 15:19:48  
6 A. Yes. 15:19:48  
7 Q. Okay. And how is it that the bureau 15:19:49  
8 knows who qualifies to use TurboTax Free 15:19:52  
9 Edition? 15:19:56  
10 A. I believe -- there are multiple 15:19:56  
11 places. I assume that information might have 15:20:20  
12 been available. I'm not sure which ones 15:20:22  
13 complaint counsel might have used, and I don't 15:20:26  
14 want to intrude on a work product privilege to 15:20:29  
15 the extent I discuss it. 15:20:33  
16 I can imagine that we could have 15:20:35  
17 looked at that information in -- into a 15:20:37  
18 website, and it may have also been provided as 15:20:38  
19 part of CIDs that were issued to Intuit as -- 15:20:42  
20 in the course of the investigation. 15:20:44  
21 Q. How is it that you could go to the 15:20:46  
22 TurboTax website and figure out that TurboTax 15:20:49

Page 251

CONFIDENTIAL

PUBLIC

1 Free Edition is available only to consumers 15:20:53

2 with simple tax returns? 15:20:55

3 A. I believe that, generally speaking, 15:20:57

4 Intuit has included the requirements for filing 15:21:05

5 using -- for free somewhere on its website. 15:21:12

6 MR. GRINGER: We have been going, I 15:21:18

7 think, over an hour, so why don't we take a 15:21:20

8 short break. 15:21:20

9 MR. ANGUIZOLA: Sounds good. 15:21:23

10 THE VIDEOGRAPHER: Going off the 15:21:23

11 record. The time is 15:21. 15:21:25

12 (A short recess was taken.) 15:21:28

13 THE VIDEOGRAPHER: Going back on 15:41:50

14 record. The time is 15:42. 15:41:52

15 BY MR. GRINGER: 15:41:55

16 Q. Mr. Maxson, Intuit's position is 15:41:56

17 that none of the challenged ads make the 15:41:59

18 express claim TurboTax is free. 15:42:02

19 Do you agree with that position? 15:42:06

20 A. Do I agree that that's Intuit's 15:42:08

21 position? That's my understanding. 15:42:15

22 Q. Okay. Do you agree with Intuit's 15:42:16

Page 252

CONFIDENTIAL

PUBLIC

1 position that none of the challenged ads make 15:42:19

2 the express claim TurboTax is free? 15:42:22

3 A. No, I don't believe I agree with 15:42:26

4 that position. 15:42:30

5 Q. So there is a disputed issue of fact 15:42:30

6 between Intuit and complaint counsel regarding 15:42:32

7 the express claims that are made in the 15:42:35

8 challenged ads, correct? 15:42:39

9 A. It's correct that I don't think we 15:42:41

10 agree with your position about the express 15:42:43

11 claims in the ads. 15:42:47

12 Q. Okay. And you agree that it's a 15:42:49

13 dispute on a factual question what are the 15:42:50

14 express claims made in the challenged ads, 15:42:52

15 correct? 15:42:52

16 A. I agree that we don't agree on the 15:42:58

17 express claims in -- in the ads that are 15:42:59

18 discussed in the complaint, yes. 15:43:02

19 Q. Intuit's position is that the ads do 15:43:05

20 not make the implied claim that TurboTax is 15:43:07

21 free. 15:43:12

22 Do you agree with Intuit's position 15:43:12

Page 253

CONFIDENTIAL

PUBLIC

1 on that? 15:43:15

2 A. I believe, yes, that that is 15:43:15

3 Intuit's position. 15:43:17

4 Q. That's not my question. 15:43:18

5 Do you agree with Intuit's position 15:43:20

6 that there is no implied claim in the 15:43:21

7 challenged ads that TurboTax is free? 15:43:24

8 A. No, I don't think I agree with that. 15:43:26

9 Q. Okay. So there is a disputed issue 15:43:29

10 of fact between Intuit and complaint counsel 15:43:32

11 regarding the implied claims made in the 15:43:36

12 challenged ads, correct? 15:43:38

13 A. It's correct that I think complaint 15:43:38

14 counsel and Intuit disagree about the implied 15:43:41

15 claims in the ads. 15:43:45

16 Q. It is Intuit's position that the ads 15:43:45

17 do not make the implied claim consumers can 15:43:47

18 file their taxes for free using TurboTax. 15:43:50

19 Do you agree with Intuit's position? 15:43:53

20 A. I'm sorry. Could you repeat that. 15:43:56

21 Q. Sure. It is Intuit's position that 15:43:57

22 the ads do not make the implied -- the 15:43:59

Page 254

CONFIDENTIAL

PUBLIC

1	challenged ads do not make the implied claim	15:44:01
2	consumers can file their taxes for free using	15:44:04
3	TurboTax.	15:44:06
4	Do you agree with Intuit's position?	15:44:07
5	A. I don't agree with Intuit's	15:44:08
6	position. I agree that that -- I believe that	15:44:15
7	is Intuit's position.	15:44:17
8	Q. So there is a second disputed issue	15:44:18
9	of fact between Intuit and complaint counsel	15:44:22
10	regarding the implied claims made in the	15:44:25
11	challenged ads, correct?	15:44:27
12	A. I agree that I think Intuit and	15:44:30
13	complaint counsel disagree about express and	15:44:32
14	implied claims in the ads at issue.	15:44:35
15	Q. Do you agree with Intuit that --	15:44:37
16	Intuit's position that consumers do not take	15:44:42
17	away from the free, free, free ads that they	15:44:44
18	can file their taxes for free using TurboTax?	15:44:48
19	A. I'm sorry. Could you repeat that.	15:44:51
20	Q. Sure. Do you agree with Intuit's	15:44:54
21	position that consumers do not take away from	15:44:56
22	the so-called "free, free, free ads" that they	15:44:58

Page 255

CONFIDENTIAL

PUBLIC

1 can file their taxes for free using TurboTax? 15:45:00

2 MR. ANGUIZOLA: Objection. Vague. 15:45:03

3 THE WITNESS: I don't -- I think I 15:45:06

4 understood that. I don't agree that consumers 15:45:10

5 -- I'm sorry. Could you repeat the question. 15:45:17

6 BY MR. GRINGER: 15:45:18

7 Q. I think what you're saying is you 15:45:18

8 don't agree with Intuit's position regarding 15:45:20

9 consumer takeaway on the free, free, free ads; 15:45:22

10 is that correct? 15:45:25

11 A. Yes, I think that's correct. 15:45:26

12 Q. And so that's another area of 15:45:27

13 dispute between Intuit and complaint counsel, 15:45:28

14 the consumer takeaway from the so-called free, 15:45:33

15 free, free ads; is that right? 15:45:36

16 A. Yes, I believe complaint counsel and 15:45:38

17 Intuit likely do not agree on the consumer 15:45:42

18 takeaway from these ads. 15:45:46

19 Q. Has complaint counsel shown the ads 15:45:47

20 it challenges to any consumers in the United 15:45:53

21 States and asked them what their takeaway is? 15:46:04

22 A. I mean, some consumers presumably 15:46:07

Page 256

CONFIDENTIAL

PUBLIC

1 done research into whether consumers understand 16:09:59

2 the conditions that are at the hyperlink? 16:10:03

3 Q. Yeah. Yeah. 16:10:09

4 A. I'm not aware of the bureau 16:10:13

5 conducting research on -- on the conditions 16:10:15

6 behind that hyperlink. It's possible it has 16:10:18

7 happened, but I'm not aware of it. 16:10:21

8 Q. Can I ask you to turn to Page 14 of 16:10:30

9 RX 260. 16:10:33

10 A. Okay. I'm there. 16:10:48

11 Q. And you see it's the -- at IV it 16:10:49

12 says: "Intuit's truly free version of 16:10:52

13 TurboTax: The free file version"? 16:10:55

14 A. I see that heading, yes. 16:10:58

15 Q. And by "the free file version," it's 16:10:59

16 referring to the product that was known in its 16:11:02

17 final incarnation as "IRS free file program 16:11:04

18 delivered by TurboTax"? 16:11:08

19 A. Let me read this. 16:11:09

20 Okay. Could you repeat your 16:11:58

21 question. 16:12:00

22 Q. Sure. My question was: Do you see 16:12:00

Page 277

CONFIDENTIAL

PUBLIC

1 where it says: "Intuit's truly free version of 16:12:02  
2 TurboTax: The free file version"? 16:12:08  
3 A. I see that, yes. 16:12:10  
4 Q. Okay. And the product being 16:12:10  
5 referred to was the product that was in its 16:12:11  
6 final incarnation known as "IRS free file 16:12:14  
7 program delivered by TurboTax," correct? 16:12:16  
8 A. I believe this is referring to the 16:12:19  
9 free file product that TurboTax offered. I 16:12:25  
10 don't recall all the names that were associated 16:12:29  
11 with it. 16:12:30  
12 Q. Okay. I'll stipulate, I'll 16:12:30  
13 represent to you that it was the product whose 16:12:32  
14 final name was IRS free file program delivered 16:12:36  
15 by TurboTax. 16:12:38  
16 Can -- was IRS free file program 16:12:41  
17 delivered by TurboTax free for everyone? 16:12:41  
18 A. I believe that the -- the TurboTax 16:12:45  
19 IRS free file program -- I can't recall the 16:13:00  
20 name you said -- but that product was available 16:13:04  
21 to consumers that met the eligibility 16:13:06  
22 requirements that I believe had to do primarily 16:13:10

Page 278

CONFIDENTIAL

PUBLIC

1 with AGI. 16:13:14

2 Q. So why is that product "truly free"? 16:13:15

3 A. I mean, that product is truly free 16:13:22

4 for consumers that qualify for -- for the 16:13:32

5 product that we're discussing. 16:13:37

6 Q. Right. And TurboTax Free Edition is 16:13:38

7 truly free for the people who qualify to use 16:13:42

8 TurboTax Free Edition, correct? 16:13:46

9 A. Yes. I believe TurboTax Free 16:13:49

10 Edition product TurboTax or free edition SKU is 16:13:53

11 free for consumers that qualify under the 16:13:56

12 TurboTax terms and conditions. 16:14:00

13 Q. Not just free, but by the definition 16:14:02

14 used in the complaint, it's -- TurboTax Free 16:14:04

15 Edition is truly free for those who quality, 16:14:07

16 correct? 16:14:13

17 A. For those who qualify, yes, I think 16:14:13

18 it would be fair to say truly free. 16:14:16

19 Q. Let's go to -- let me ask you this. 16:14:23

20 Let's change gears a little bit. 16:14:29

21 You're aware that Intuit reached a 16:14:33

22 settlement with state attorneys general -- all 16:14:37

Page 279

CONFIDENTIAL

PUBLIC

1 Q. Yeah. 18:16:31

2 A. -- consumers complaints that had 18:16:33

3 come into the FTC through, I believe, either 18:16:34

4 consumer sentinel or online or through the 18:16:37

5 telephone portal. 18:16:40

6 As I think I mentioned then as well, 18:16:43

7 you know, the FTC's experiences with the 18:16:45

8 complaints that we receive are just the tip of 18:16:47

9 the iceberg typically of the total universe of 18:16:51

10 aggrieved consumers consistent with what I've 18:16:55

11 discussed with respect to do-not-call, but that 18:16:58

12 same proposition applies more broadly in 18:17:00

13 consumer protection. 18:17:03

14 Q. Okay. Yeah. Okay. Did the bureau 18:17:05

15 undertake any independent investigation of the 18:17:11

16 validity of those consumer complaints? 18:17:23

17 A. I believe staff within the bureau 18:17:27

18 spoke with some of those consumers. I -- I 18:17:34

19 don't believe it was all of them. I'm not sure 18:17:37

20 if they reached out to all of them or not. 18:17:40

21 Some consumers in some cases don't respond when 18:17:42

22 we reach out to them. I -- I believe that -- 18:17:45

Page 353

CONFIDENTIAL

PUBLIC

1 that they spoke to -- to many of them. That's 18:17:49

2 my understanding at least. 18:17:52

3 Q. Other than speaking to the 18:17:53

4 consumer -- of which you -- and of course it's 18:17:54

5 hard to get people on the phone -- do you know 18:17:59

6 of any independent investigation done of the 18:18:03

7 validity of the consumer complaints being 18:18:06

8 relied on in this case? 18:18:08

9 A. Other than speaking to them and 18:18:11

10 reviewing any documents that any of them may 18:18:15

11 have given us, I'm not aware of separate 18:18:17

12 investigations of the consumers' experiences 18:18:21

13 with Intuit. 18:18:27

14 Q. Are you aware that some of the 18:18:27

15 consumer complaints in declarations complaint 18:18:29

16 counsel rely on were sent by a law firm that 18:18:32

17 was then engaged in litigation, in arbitrations 18:18:36

18 with Intuit against Intuit? 18:18:41

19 A. You are saying documents sent to the 18:18:43

20 FTC? 18:18:46

21 Q. Yes. Declarations and complaints 18:18:46

22 from this law firm who was then known as Keller 18:18:50

Page 354

CONFIDENTIAL

PUBLIC

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22

CERTIFICATE OF NOTARY PUBLIC

I, Bonnie L. Russo, the officer before whom the foregoing deposition was taken, do hereby certify that the witness whose testimony appears in the foregoing deposition was duly sworn by me; that the testimony of said witness was taken by me in shorthand and thereafter reduced to computerized transcription under my direction; that said deposition is a true record of the testimony given by said witness; that I am neither counsel for, related to, nor employed by any of the parties to the action in which this deposition was taken; and further, that I am not a relative or employee of any attorney or counsel employed by the parties hereto, nor financially or otherwise interested in the outcome of the action.

Bonnie L. Russo

Notary Public in and for  
the District of Columbia

My Commission expires: August 14, 2025

**EXHIBIT C**  
*(Submitted In Camera)*

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

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

**In the Matter of:**

**Intuit Inc., a corporation.**

**Docket No. 9408**

**[PROPOSED] ORDER DENYING COMPLAINT COUNSEL’S  
MOTION FOR SUMMARY DECISION**

On August 22, 2022, Complaint Counsel filed a Motion for Summary Decision pursuant to Commission Rule 3.24, 16 C.F.R. § 3.24. On the basis that the Commission failed to rule on the motion by the deadline set forth in its own regulations, pursuant to Rule 3.22(a),

IT IS ORDERED that Complaint Counsel’s Motion for Summary Decision is denied.

By the Commission.

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

\_\_\_\_\_

April Tabor

Secretary of the Commission

**CERTIFICATE OF SERVICE**

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

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

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

I further certify that on January 6, 2023, I caused the foregoing document to be served via email to:

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

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

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

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

Christine Todaro  
Federal Trade Commission  
600 Pennsylvania Avenue, NW  
Washington, DC 20580  
Email: ctodaro@ftc.gov  
Tel: (202) 326-3711

Thomas Harris  
Federal Trade Commission  
600 Pennsylvania Avenue, NW  
Washington, DC 20580  
Email: tharris1@ftc.gov  
Tel: (202) 326-3620

Jody Goodman  
Federal Trade Commission  
600 Pennsylvania Avenue, NW  
Washington, DC 20580  
Email: jgoodman1@ftc.gov  
Tel: (202) 326-3096

Colleen Robbins  
Federal Trade Commission  
600 Pennsylvania Avenue, NW  
Washington, DC 20580  
Email: crobbs@ftc.gov  
Tel: (202) 326-2548

Virginia Rosa  
Federal Trade Commission  
600 Pennsylvania Avenue, NW  
Washington, DC 20580  
Email: vrosa@ftc.gov  
Tel: (202) 326-3068

J. Ronald Brooke, Jr.  
Federal Trade Commission  
600 Pennsylvania Avenue, NW  
Washington, DC 20580  
Email: jbrooke@ftc.gov  
Tel: (202) 326-3484

*Counsel Supporting the Complaint*

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

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

Dated: January 6, 2023

Respectfully submitted,

/s/ Molly Dillaway  
MOLLY DILLAWAY  
*Counsel for Intuit Inc*