



# *In the Matter of Intuit Inc.*

Docket No. 9408

Respondent's Opposition to Complaint Counsel's Motion for Summary Decision

October 31, 2022

# Summary of Argument

- Complaint Counsel concede Intuit advertised only TurboTax Free Edition—a completely free product that was used by 14 million people each year—as free, and in each ad disclosed Free Edition’s qualifications.
- The Commission “may not weigh conflicting evidence.” *Buending v. Town of Redington Beach*, 10 F.4th 1125, 1130 (11th Cir. 2021). “If the record presents disputed issues of fact,” the Commission “may not decide them; rather, [it] must deny the motion and proceed to trial.” *Id.*
  - The alleged claims made by Intuit’s ads are DISPUTED
  - Allegations that consumers were misled are DISPUTED
  - Allegations that the supposedly deceptive ads were material are DISPUTED
- May 4 Settlement Agreement already provides full relief
- Existence of Intuit’s affirmative defenses precludes summary decision

# Express Claim

- Complaint Counsel contend:

Intuit has made, is making, and will be able to continue making, notwithstanding the AVC, the false express claim that TurboTax is free. It is not free for most U.S. taxpayers.

Mot. 36

- “Express claims are ones that directly state the representation at issue.” *Thompson Med. Co., Inc.*, 104 F.T.C. 648, 788 (1984).

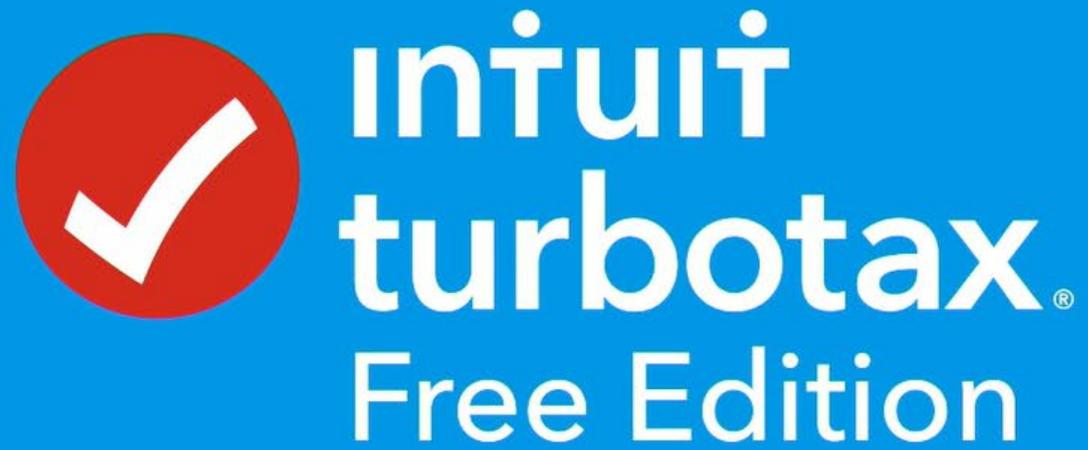
# Actual Express Claim: TurboTax *Free Edition* Is Free If You Qualify

Intuit's Free Edition advertisements do not expressly contain the phrase "all consumers can file their taxes for free with TurboTax,"

CC Response to Intuit SOF ¶ 17

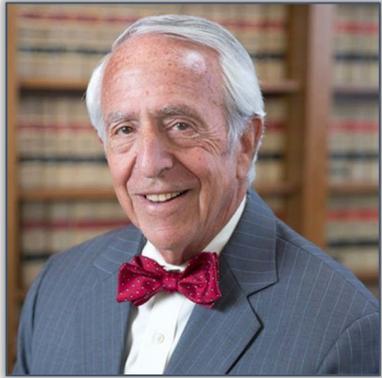
Complaint Counsel admits that Intuit advertises that it has a free product – TurboTax Free Edition. Complaint Counsel further admits that TurboTax Free Edition is available for consumers who qualify. Complaint Counsel further admits that Intuit's ads communicate that the TurboTax Free Edition is free

CC Response to Intuit SOF ¶ 18



TurboTax Free Edition is for simple U.S. returns only. See if you qualify at [turbotax.com](https://turbotax.com). Offer subject to change.

# Judge Breyer Rejected CC's Express Claim Theory



Hon.  
Charles R. Breyer  
U.S. District Judge  
for the  
Northern District  
of California

"[L]ooking at this one as an example . . . It says  
'TurboTax free edition, for simple tax returns only\*' [.]  
That's what it is."

RX 73 – TRO Hearing Tr. 36:18-22

"[T]his ad . . . tells me that it is limited to simple tax returns[.]"

RX 73 – TRO Hearing Tr. 37:8-9

"I mean, it is right there; isn't it? I mean, it is right  
under the word 'free, free, free' or 'zero, zero, zero,' it  
says 'TurboTax free edition, for simple tax returns only.'"

RX 73 – TRO Hearing Tr. 40:3-6

# The Implied Claim: What Is It?

- Complaint Counsel first said:

the unmistakable meaning of Intuit's ads: that TurboTax is free

Mot. 19

- Complaint Counsel then said:

Intuit's ads conveyed the message to reasonable consumers that TurboTax was free for them.

Reply 3

- But Complaint Counsel ultimately conceded:

Complaint Counsel admits that Intuit advertises that it has a free product – TurboTax Free Edition. Complaint Counsel further admits that TurboTax Free Edition is available for consumers who qualify. Complaint Counsel further admits that Intuit's ads communicate that the TurboTax Free Edition is free

# The Only Evidence Contradicts The Purported Implied Claims

- Implied claims should not be found “merely because it could be unreasonably misunderstood by a very small and unrepresentative segment of the audience to whom it was directed.” *Removatron Int’l Corp.*, 111 F.T.C. 206, 292 (1988)
- The **intent of the speaker** is powerful evidence of whether a claim was made to consumers. *See, e.g., Telebrands Corp.*, 140 F.T.C. 27, 304 (2005)
  - There is no evidence that Intuit intended to advance either alleged implied claim.
  - The undisputed evidence is that Intuit intended to communicate that *Free Edition* is free for those who qualify and did so.

# CC's Implied Claim Theory is Disputed by Record Evidence



Cathleen Ryan,  
SVP of Marketing

**intuit.**

- Q. What message did Intuit want consumers to take away from commercials in the Free, Free, Free campaign?
- A. The objective was to communicate that the TurboTax Free Edition is free.
- Q. Why did Intuit want to convey that message to consumers?
- A. We wanted to communicate that our Free Edition was free because we want consumers to use our Free Edition if they qualify.

GX 156 – Ryan Dep. Tr. 130:14-131:1

# CC's Implied Claim Theory is Disputed by Expert Testimony



Peter S. Golder, Ph.D.



BEFORE  
COMMISSIONERS:

Christine S. Wilson  
Alvaro M. Bedoya

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

Docket No. 9408

DECLARATION OF PROFESSOR PETER N. GOLDER, PH.D.  
AUGUST 30, 2022

19. Based on the entirety of my review, it is my opinion that Intuit’s marketing of Free Edition, including its advertising and the representations on the TurboTax website, would not cause reasonable consumers to believe that *everyone* can use TurboTax for free.

Golder Decl. ¶ 19

56. To start, in my opinion, Intuit’s ads did not communicate that TurboTax was free for everyone or all tax situations. For instance, Intuit’s TY 2021 Free Edition ads communicated only that one TurboTax product, TurboTax Free Edition, was free. The ads further communicated that Free Edition was only available to qualifying customers.

Golder Decl. ¶ 56

# Intuit's Extrinsic Evidence Must be Considered

Complaint Counsel improperly ask the Commission to ignore the extrinsic evidence. Reply 1, 4, 7, 11.

- “[I]f extrinsic evidence has been introduced, **that evidence ‘must be considered by the Commission** in reaching its conclusion’ about the meaning of the advertisement.” *Pom Wonderful LLC*, 155 F.T.C. 1, 14 (2013). *See also Bristol-Myers Co.*, 102 F.T.C. 21, 319 (1983); *Thompson Med. Co., Inc.*, 104 F.T.C. 648, 794 (1984).

# Customer Retention And Satisfaction Scores Dispute Deception

TurboTax has consistently high Net Promoter Scores, overall **paid** customer-retention rates of more than 80%, and tens of thousands of 5-star reviews on the TurboTax website.

| Free Edition                                  | Deluxe   | Premier  | Self-Employed  |
|---|--|--|--|
| Simple tax returns only<br>See if you qualify | Maximize tax deductions and credits                            | Investments and rental property                                | Personal & business income and expenses                        |
| \$0 Fed. \$0 State. \$0 to File.              | \$59*<br><small>State additional</small>                       | \$89*<br><small>State additional</small>                       | \$119*<br><small>State additional</small>                      |
| <b>File for \$0</b>                           | <b>Start for free</b><br><small>Pay only when you file</small> | <b>Start for free</b><br><small>Pay only when you file</small> | <b>Start for free</b><br><small>Pay only when you file</small> |
| ★★★★★<br>(4.9   68,836 reviews)               | ★★★★★<br>(4.5   63,252 reviews)                                | ★★★★★<br>(4.4   16,466 reviews)                                | ★★★★★<br>(4.7   18,488 reviews)                                |

RX 61 at 36

RX 9

|                  | Momentum | Affinity | Relevance | Quality | Value | Consideration | Usage | NPS |
|------------------|----------|----------|-----------|---------|-------|---------------|-------|-----|
| Turbo Tax        | 8        | 70.3     | 64%       | 75%     | 70%   | 72%           | 67%   | 68% |
| TaxAct           | 8.4      | 67.3     | 60%       | 64%     | 63%   | 64%           | 57%   | 55% |
| H&R Block        | 9.4      | 66.0     | 49%       | 63%     | 54%   | 55%           | 49%   | 54% |
| Credit Karma Tax | 9        | 71       | 58%       | 64%     | 63%   | 67%           | 60%   | 62% |
| Jackson Hewitt   | 11.2     | 56.1     | 36%       | 45%     | 39%   | 35%           | 32%   | 40% |

# DirecTV Is Directly On Point

“[I]f consumers believed that the terms in DIRECTV’s advertisements did not match the terms disclosed when they sought to subscribe, that feeling of deception would have been reflected in ... DIRECTV’s data collected on pain points, consumer research, sales calls, closing rates, activation rates, and churn.”

*DirecTV*, 2018 WL 3911196, at \*18.

Just like in *DirecTV*, the evidence does not support Complaint Counsel’s theory:

|   |   |
|---|---|
| High NPS (higher than DirecTV’s)              | ✓ |
| Industry-leading customer-satisfaction scores | ✓ |
| Unreliable survey evidence                    | ✓ |

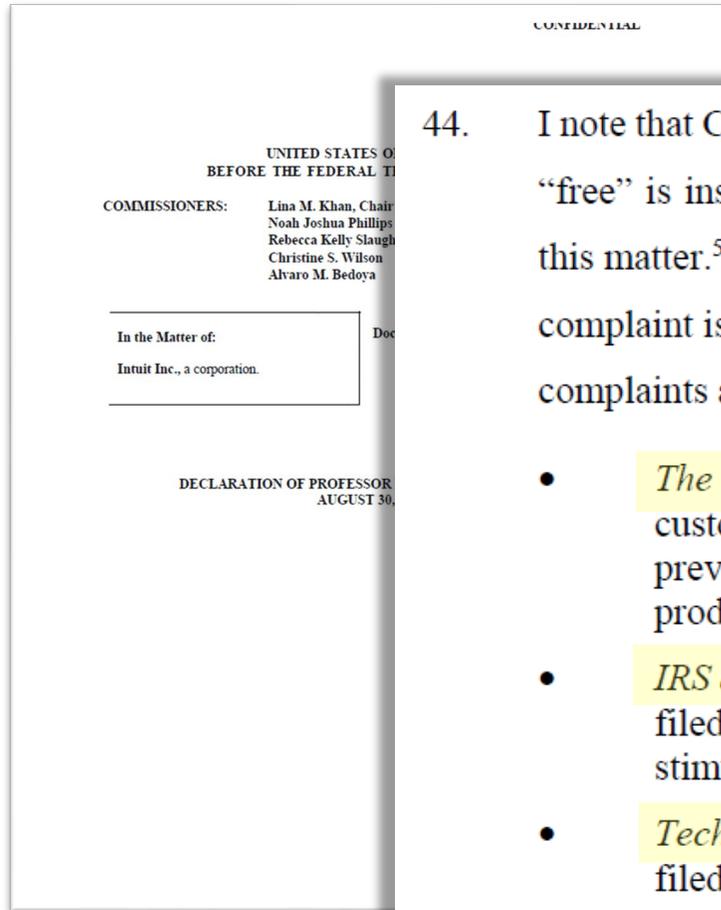
# No Reliable Evidence of Consumer Complaints

- Only 571 hearsay complaints (out of millions of TurboTax customers) were identified.
- Almost 40% (227 complaints) have since been withdrawn by Complaint Counsel.
- Many of the remaining hearsay complaints have obvious flaws:
  - Many relate to the IRS Free File offering - a different and discontinued product that is not at issue in this lawsuit;
  - Several were submitted by Canadian residents, who use a different version of Intuit's products, also not at issue in this lawsuit;
  - At least eleven were judged invalid by the BBB;
  - And many more have **nothing to do with TurboTax's advertising.**

# No Reliable Evidence of Consumer Complaints



Peter S. Golder, Ph.D.



44. I note that Complaint Counsel’s attempt to limit TurboTax complaints to those mentioning “free” is insufficient to identify only complaints that actually relate to the allegations in this matter.<sup>54</sup> A complaint simply including the word “free” does not necessarily mean the complaint is related to Complaint Counsel’s allegations. For example, included in the 571 complaints are complaints that include the word “free” but are about:

- *The customer’s inability to access prior years’ returns.*<sup>55</sup> For example, at least one customer complained because they were unable to retrieve their tax return filed in previous years for free – a feature that Intuit offers to customers purchasing paid products or Free Edition customers purchasing an add-on package.<sup>56</sup>
- *IRS delays that are outside of Intuit’s control.* For example, at least two customers filed complaints related to IRS delays in processing their refund and/or 2020 stimulus checks.<sup>57</sup>
- *Technical issues with the TurboTax software.* For example, at least two customers filed complaints related to issues with closing their TurboTax accounts.<sup>58</sup>
- *TurboTax desktop product.* For example, at least two customers filed complaints related to TurboTax’s desktop product (of which no free version exists).<sup>59</sup>

Golder Decl. ¶ 44

# The Dearth of Consumer Complaints Is Inconsistent With Deception



Peter S. Golder, Ph.D.



UND  
BEFORE THI  
COMMISSIONERS: Lina  
Noah  
Rebe  
Chri  
Alva

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

DECLARATION OF PROFESSOR PETER N. GOLDER, PH.D.  
AUGUST 30, 2022

43. When placed in context of the millions of TurboTax customers each year, clearly these customers do not represent the experiences or views of most TurboTax customers. Considering the 571 complaints identified by Complaint Counsel as related to “free” TurboTax, this represents 0.0007 percent of the 86.4 million TurboTax customers who filed at least one return over the period during which the 571 complaints were filed.<sup>53</sup>

Golder Decl. ¶ 43

17. The level of overall complaints, complaints per customer, and complaints related to deceptive pricing and deceptive advertising for Intuit are all in line with benchmark companies and are inconsistent with the consumer deception alleged by Complaint Counsel.

Golder Decl. ¶ 17

# Expert Testimony Creates A Dispute Over Alleged Deception



Rebecca Kirk Fair

**AG ANALYSIS GROUP®**

UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION

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

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

Docket No. 9408

Declaration of Rebecca Kirk Fair  
August 30, 2022

- My Disclosure Survey demonstrates that consumers upgrade to TurboTax Paid products for reasons other than the allegedly deceptive “free” advertising and being locked into that choice. If consumers had been deceived by Intuit’s ads, as the FTC alleges, I would expect to see substantial, statistically significant differences in respondent choices upon learning about an additional free option at the point of the hard stop screen. In contrast to what would be predicted based on the FTC’s allegation, I find that consumers with more information about alternative filing options, including information about an alternative free solution (the IRS Free File program), chose to upgrade to a TurboTax Paid product at similar rates as when they saw a representative upgrade screen and additionally selected other alternative solutions at comparable rates.

# Expert Testimony Creates A Dispute Over Alleged Deception



Rebecca Kirk Fair

**AG ANALYSIS GROUP®**

CONFIDENTIAL

UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION

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

In the Matter of: Doc#  
Intuit Inc., a corporation.

Declaration of Rebecca Kirk Fair  
August 30, 2022

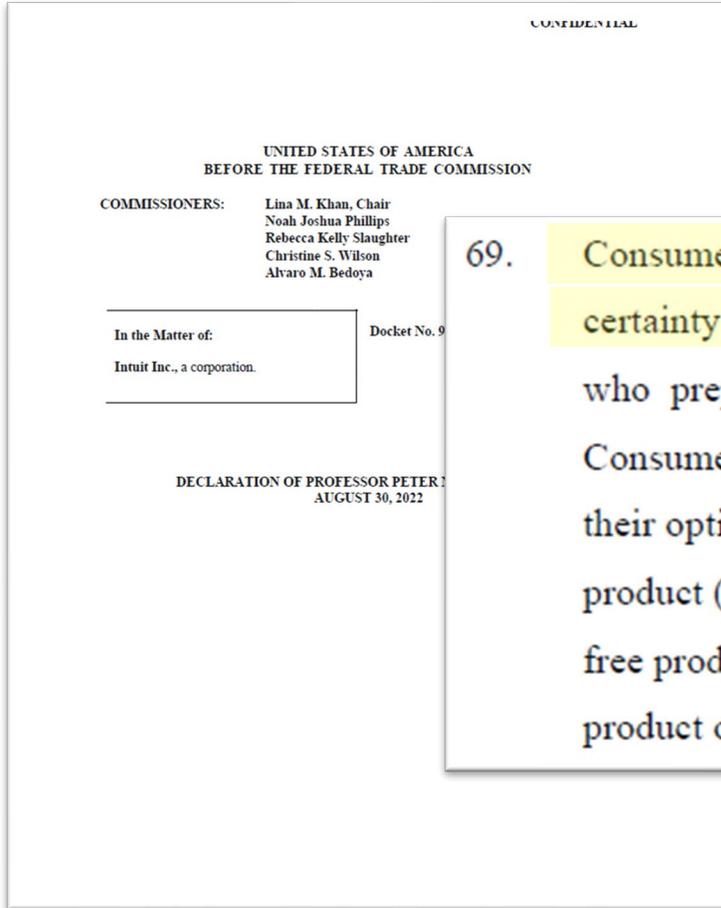
However, as established above in Section V.A, I find that the difference between respondents' selection of TurboTax Paid products between the Representative Screen Group and the Enhanced Screen Group is small and not statistically significant (see Exhibit 2.A). This suggests that consumers upgrade to TurboTax Paid products for reasons other than the allegedly deceptive "free" advertising and that they do not feel locked in.<sup>13</sup> It also provides evidence that finding the cheapest tax solution is not the number one priority for many consumers.

Kirk Fair Decl. ¶ 24

# Expert Testimony Creates A Dispute Over Whether Ads Were Misleading



Peter S. Golder, Ph.D.



69. Consumers are unlikely to view Intuit’s TurboTax Free Edition ads and believe with certainty that they would necessarily be able to file their own taxes for free. Consumers who prepare and file their tax returns each year have likely already completed the Consumer Buying Process in prior years and already have some level of familiarity with their options, including whether their tax situation is likely to qualify them for a free DIY product (whether with TurboTax or a competitor). Moreover, consumers are familiar with free product offerings across a range of goods and services and are in fact skeptical of free product offerings.

Golder Decl. ¶ 69

# Research Confirms Consumers Were Not Misled

intuit turbotax.

## AZ Modal Learnings

{DATE}

Whitney Kalscheur

'See why it's free' comes across as authentic and simple.

RX 44 at 1, 6

GOVERNMENT EXHIBIT 295

intuit turbotax.

## TY17 Win in Free Offering Strategy

August 22, 2017

This will be a good meeting if:

- We align on overall TY17 Free Strategy and can begin providing teams direction on key execution elements
- We share learnings and implications from the research we've conducted to arrive at our recommendations

• **Absolute Zero** messaging is well understood by consumers with no confusion, and indicates free

GX 295 at 1, 15

# The Novemsky Survey Is Fundamentally Flawed

Professor Novemsky **did not show participants any of the challenged ads**



Dr. John R. Hauser



UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION

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

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

DECLARATION OF JOHN R. HAUSER, SC.D.  
AUGUST 30, 2022

32. If, as it appears from my review of the Novemsky Declaration and associated survey script, the Novemsky Survey did not show respondents any stimuli, this is a fundamental flaw in its design. Without showing respondents any at-issue messaging, the Novemsky Survey does not and cannot tie respondents' perception or understanding to any of Intuit's at-issue advertisements, website communications, or disclosures. By failing to test any stimuli, the Novemsky Declaration cannot ascribe the results of the Novemsky Survey to any alleged misrepresentations made by Intuit versus any other source of information that respondents may have encountered. Instead, and ignoring all of its other flaws, the Novemsky Survey at best simply measures general impressions and unsupported guesses that cannot be connected in any meaningful way to Intuit's advertisements, website communications, or disclosures. Additionally, by not providing respondents with any relevant information (or providing them with inaccurate information) through the survey process, respondents are prone to guessing or answering questions based on other unknown information, beliefs, or aspirations.<sup>45</sup> The Novemsky Survey's attempt to solicit such general beliefs about eligibility are contrary to well-established survey design principles.

# The Novemsky Survey Was Transparently Biased

Novemsky’s survey was biased – allowing respondents to **opt out after learning of the survey’s purpose and target.**

Main Questionnaire – OPT OUT

You finished the survey! Thank you for your participation.

This survey is being conducted on behalf of the United States Federal Trade Commission (FTC), the nation’s consumer protection agency, in order to collect information about the reactions and experiences of potential customers to advertisements by Intuit, the maker of TurboTax.

The FTC investigates unfair and deceptive conduct by companies. The information you provide could help us further our mission under the FTC Act to protect consumers.

**[DELETE RESPONDENT DATA IF 1 (“Yes”)]**

1. Please delete my submission, I want to opt-out
2. Please keep my submission, I do not want to opt-out

GOVERNMENT EXHIBIT 305

AND BRACKETS]

(TAT)

brief survey.

re very important to us. If you don’t know an answer to a please indicate this in your response.

he results of this study will not be used to try to sell you

nses when viewing a screen, please wear them before this survey when you have time to complete it uninterrupted

IDENT SELECTS 2 (“I do not understand or do not agree to these

nstructions

ee to these instructions

S05. As an additional security measure, please enter the code exactly as it appears in the image below, and then click the “Continue” button.

Please enter it exactly as it appears, including upper and lower case letters. Do not include any spaces. Type them all together.

[PROGRAMMER: PIPE IN ONE RANDOMLY SELECTED CODE. CONFIRM THAT WHAT THE RESPONDENT TYPES IN MATCHES THE PIPED-IN CODE FOR SPELLING AND CASE.]

TEXT BOX: \_\_\_\_\_

GX 305

# Intuit Clearly Discloses Free Edition's Qualifications



Jack Rubin,  
VP of Marketing  
**intuit.**

Q. Why doesn't Intuit say Free Edition for Form 1040 with no attached schedules?

A. That would be a terrible idea.

Q. Why would it be a terrible idea?

A. It would be more confusing for consumers than just to say, for simple tax returns.

GX 155 – Rubin Dep. Tr. 209:11-16

A. We use simple tax returns to let consumers know that there are eligibility requirements for using the TurboTax Free Edition, let folks know that those eligibility requirements are tied to the complexity of their tax return.

GX 155 – Rubin Dep. Tr. 55:16-20

# Intuit Clearly Discloses Free Edition's Qualifications

- On the TurboTax website, all free claims are accompanied in close proximity by a hyperlinked disclosure.
- The website includes a Free Edition landing page that repeatedly addresses Free Edition's qualifications:



**TurboTax Free Edition**  
For simple tax returns only. [See if you qualify](#)

★★★★★ (4.8/5 | 68,975 reviews)

**\$0 Fed. \$0 State. \$0 to File.**

[File for \\$0](#)

### Why use TurboTax Free Edition?

If you have a [simple tax return](#), you can file your taxes online for free with TurboTax Free Edition. Just import your W-2, answer basic questions about your life, and we'll get you your maximum refund, [guaranteed](#).

# Intuit Clearly Discloses Free Edition's Qualifications

| Free Edition                                  | Deluxe  | Premier   | Self-Employed                                   |
|---|---|---|---|
| Simple tax returns only<br>See if you qualify | Maximize tax deductions and credits             | Investments and rental property                 | Personal & business income and expenses         |
| \$0 Fed. \$0 State. \$0 to File.              | \$59*<br><small>State additional</small>        | \$89*<br><small>State additional</small>        | \$119*<br><small>State additional</small>       |
| <b>File for \$0</b>                           | <b>Start for free</b><br>Pay only when you file | <b>Start for free</b><br>Pay only when you file | <b>Start for free</b><br>Pay only when you file |
| ★★★★★<br>(4.9   68,836 reviews)               | ★★★★★<br>(4.5   63,252 reviews)                 | ★★★★★<br>(4.4   16,466 reviews)                 | ★★★★★<br>(4.7   18,488 reviews)                 |
| <a href="#">Hide Details ^</a>                | <a href="#">More Details v</a>                  | <a href="#">More Details v</a>                  | <a href="#">More Details v</a>                  |

## File for \$0 with Free Edition

You'll pay absolutely nothing to file your federal and state taxes if you have a **simple tax return only**. Start by easily importing your W-2, answer simple non-tax questions about your life, and we'll get you your maximum refund.

# FREE

\$0  
Fed

\$0  
State

\$0  
To File

For simple tax returns only.  
Not all taxpayers qualify.

- ✓ Free filing of your simple federal and state tax returns only. See if you qualify
- ✓ Covers W-2 income, Earned Income Tax Credit (EIC) and child tax credits
- ✓ Jumpstart your return with last year's TurboTax info or import a PDF of your return from another tax software
- ✓ Guidance in case of an audit, backed by our Audit Support Guarantee
- ✓ Get answers 24/7 from our online community of TurboTax specialists and customers

# Intuit Clearly Discloses Free Edition's Qualifications

turboTax / Personal Taxes / TurboTax Free Edition

×

## What qualifies as a simple tax return?

If you have a simple tax return, you can file with TurboTax Free Edition, TurboTax Live Basic, or TurboTax Live Full Service Basic. A simple tax return is one that's filed using IRS Form 1040 only, without having to attach any forms or schedules. Only certain taxpayers are eligible.

**Situations covered (assuming no added tax complexity):**

- W-2 income
- Limited interest and dividend income reported on a 1099-INT or 1099-DIV
- IRS standard deduction
- Earned Income Tax Credit (EIC)
- Child tax credits
- Student loan interest deduction

**Situations not covered:**

- Itemized deductions
- Unemployment income reported on a 1099-G
- Business or 1099-NEC income
- Stock sales
- Rental property income
- Credits, deductions and income reported on other forms or schedules (for example, income related to crypto investments)

If you don't have a simple tax return, we have other paid options to file using TurboTax.

**How does TurboTax make any money?**

We want our customers to love our products and services. Because we have customers who pay for our premium products and services, we can offer simple tax filing. We offer additional paid benefits that go beyond filing your simple taxes for free, but they're optional.

Free!

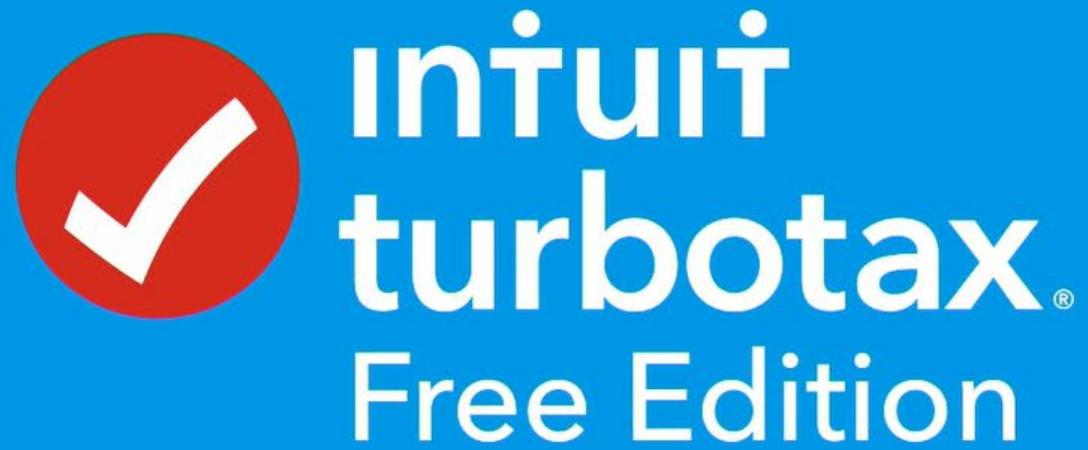
See your 2021 federal & state taxes for free

Ideal for W-2 income

Maximize tax credits for dependents

Get the green light to file

Get your maximum refund guaranteed



TurboTax Free Edition is for simple U.S. returns only. See if you qualify at [turbotax.com](https://turbotax.com). Offer subject to change.

# Expert Testimony Creates A Dispute Over Sufficiency Of Disclosures



Peter S. Golder, Ph.D.



CONFIDENTIAL

BE  
COMMISSIONERS:

In the Matter of:  
Intuit Inc., a corpor

b. I compared Intuit’s TY 2021 Free ads to ads from the same 22 benchmark companies whose BBB complaints I reviewed, and found that Intuit’s disclosures were comparable in size, length, and font color to benchmark companies:

Golder Decl. ¶ 17

DECLARATION OF PROFESSOR PETER N. GOLDER, PH.D.  
AUGUST 30, 2022

# Market Research On Intuit's Disclosures Creates Further Dispute



Jack Rubin,  
VP of Marketing  
**intuit.**

A. I can think of one piece of qualitative research in which the term 'simple tax returns' was part of the research. . . . [T]he respondent responses were about the clarity of the term and appreciating TurboTax showing that right up front at the very beginning of the process...

GX 155 – Rubin Dep. Tr. 58:5-11

- *This makes it abundantly clear who qualifies.*

RX 44 at 7

#### Is Absolute Zero really free?

Yes. We guarantee you'll pay absolutely nothing to file your federal and state taxes—from start to finish.

#### Why?

We're investing in you, by giving you the power to do your own taxes and take control of your finances. We're here to help—now, and in the future.

#### How does TurboTax make any money?

As you go, you'll have an opportunity to add some great features:

- One-on-one help for answers on demand
- Be 50% done in a click by transferring last year's personal info

Get all that goodness and more for about the cost of two movie tickets.

**But you don't have to.** With Absolute Zero, the power to file free is all yours!

#### Join the millions who file for \$0

60 million hard-working Americans can file their federal 1040EZ/1040A and state taxes for free and so can you, if you:

- Made less than 100k
- Don't own a home or rental property
- Didn't sell investments
- Don't own a business or have 1099 income
- Don't have major medical expenses

#### What now?

To get started with Absolute Zero simply click File for \$0, and you're on your way!

File for \$0

See RX 44 at 8

# Intuit's Ads Comply With the FTC's Disclosure Guidelines

Intuit's hyperlinked disclosures closely resemble the examples of acceptable hyperlinks in the FTC's ".com Disclosures" guidelines.

Although hyperlinks generally should not be used to disclose information integral to the claim — such as the existence and nature of additional fees consumers might not expect — a hyperlink can be used to disclose the details if they are too complex to describe next to the basic price information. Here the hyperlink leads to the disclosure, "Monitoring plan price: \$15.95 per month with one camera, \$9.95 per month/per camera with two cameras, \$7.95 per month/per camera with three or more cameras. Save 10% with a 12-month commitment, 20% with a 24-month commitment. Additional 5% discount for seniors and families of active duty military personnel."

RX 96, FTC .Com Disclosures Guidelines at A-7

# The “Deceptive Door Opener” Theory Should Be Shut

Complaint Counsel concede that:

consumers learn that the “freemium” version of TurboTax is not free for them prior to purchasing a paid version of TurboTax

Confidential

UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION

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

In the matter of:  
Intuit Inc.,  
a corporation,  
Respondent.

Docket No. 9408

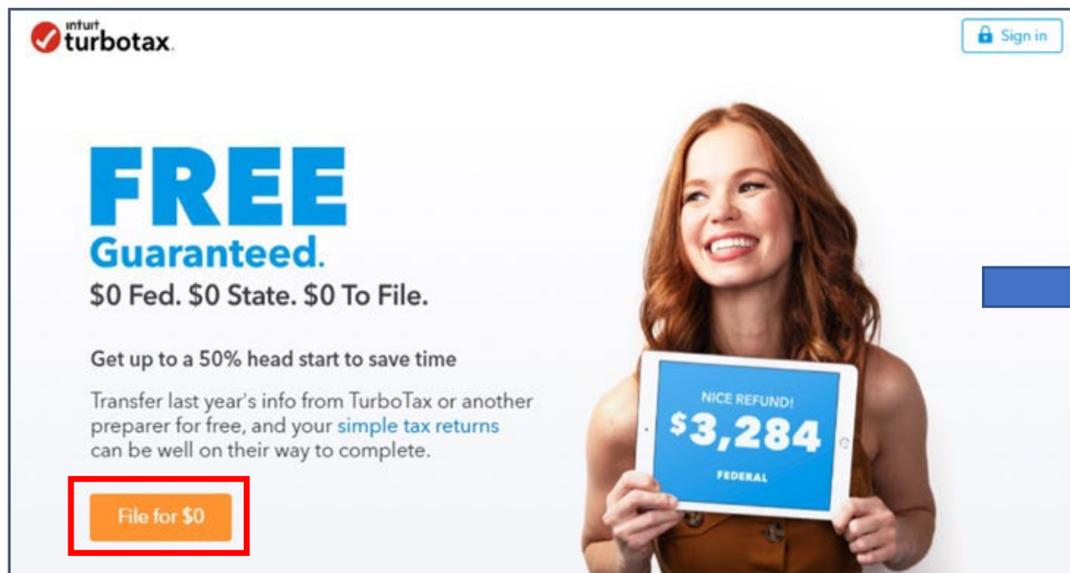
COMPLAINT COUNSEL'S  
MOTION FOR SUMMARY DECISION

- Complaint Counsel claim that Intuit’s representations before the point of sale are “[m]isleading door openers.” Mot. 33.
- That theory does not apply.
  - The ads invite consumers to learn about the product online, which you can do well before purchase. It is not deceptive to ask consumers to learn about your product on your website.
  - Complaint Counsel fail to introduce evidence that consumers were deceived and seek improper inferences regarding consumers who abandon the product.

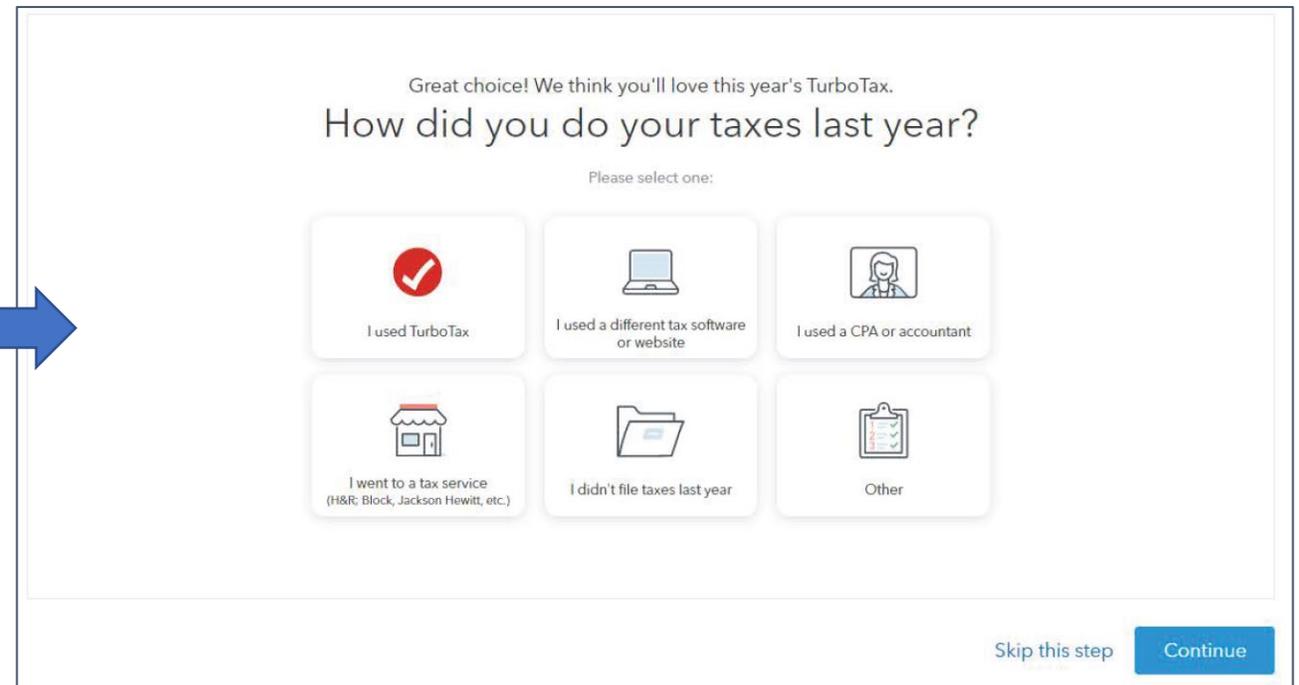
# The FTC Investigator's Credibility Has Not Been Tested

Intuit has not had an opportunity to depose Ms. Shiller, whose declaration includes troubling inaccuracies, such as:

**The Functionality of Intuit's Website:** *Clicking on the orange "File for \$0" brought consumers to a screen to create an account and linked the Terms and Privacy Policy. (Shiller Dec. ¶ 97.)*



CC SOF ¶ 75



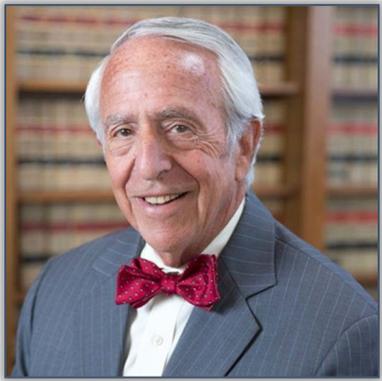
RX 26

# Materiality Is Disputed And Complaint Counsel Have Not Offered Evidence

- Complaint Counsel must show that the alleged misrepresentations were **likely to affect a reasonable consumer's purchasing decision or conduct regarding TurboTax**. *See Int'l Harvester Co.*, 104 F.T.C. 949, 1057-1058 (1984).
  - Complaint Counsel have not put forth *any* evidence of materiality.
- Complaint Counsel rely on an inapplicable presumption.
- Intuit has rebutted any presumption.

# No Presumption of Materiality Applies

- The alleged misrepresentations actually concern Free Edition's qualifications, for which no presumption is appropriate.
- Judge Breyer recognized this important distinction:



Hon.  
Charles R. Breyer  
U.S. District Judge  
for the  
Northern District  
of California

3                   **THE COURT:** But they come back and they say: Look, we  
4 didn't say our system is free to everybody. We said it's free  
5 if the return is a simple return. That's what we said.  
6                   Now, so the deception, I think, at one level has to be  
7 with the term "simple" and not "free," I think.

RX 73 – TRO Hearing Tr. 16:3-7

# Intuit's Evidence Rebutts Any "Presumption" of Materiality

- Presumptions are always rebuttable:
  - *POM Wonderful LLC*, 155 F.T.C. 1, 62 (2013): "A respondent may rebut a presumption of materiality by providing evidence that the claim is not material . . . . **'This is not a high hurdle.'**"
- The presumption is particularly easy to rebut on a motion for summary decision.

# Expert Testimony Rebutts Any “Presumption” of Materiality

Evidence demonstrates that consumers do not choose TurboTax solely because of Intuit’s ads.



Dr. John R. Hauser



CONFIDENTIAL

UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: Lina  
Noah  
Rebec  
Chris  
Alvar

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

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DECLARAT

76. Together, this evidence shows that most consumers do not simply rely solely on a TurboTax advertisement like the advertising at-issue in this matter, and they do not go directly to filing after seeing an advertisement. Instead, most consumers engage in significant research using a variety of methods. During this research, consumers are likely to encounter information about TurboTax Free Edition from Intuit, as well as a variety of popular, reputable consumer-facing sources, and are thus unlikely to be deceived as alleged by Complaint Counsel.

Hauser Decl. ¶ 76

# Expert Testimony Rebutts Any “Presumption” of Materiality

Consumer behavior is inconsistent with Complaint Counsel’s theory of deception:



Peter S. Golder, Ph.D.



UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION  
COMMISSIONERS: Lina M. Khan, Chair  
Noah Joshua Phillips  
Rebecca Kelly Slaughter  
Christine S. Wilson  
Alvaro M. Bedoya

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

Docket No. 9408

DECLARATION OF PROFESSOR PETER S. GOLDER  
AUGUST 30, 2022

36. Complaint Counsel’s theory appears to assume that consumers see a TurboTax TV ad and proceed immediately to paying TurboTax without conducting any other research or considering any other potential providers of tax preparation solutions. This theory flies in the face of the well-recognized Consumer Buying Process.<sup>39</sup>

Golder Decl. ¶ 36

In fact, consumers engaged in the high-involvement Consumer Buying Process are likely to conduct research before selecting a tax preparation provider and are unlikely to weigh advertising as the single piece of relevant information on their search.<sup>49</sup> In light of taxpayers’ motivation to choose an appropriate tax preparation product, reasonable consumers are likely to perform research on tax preparation options, and they may also specifically research conditions for using free product offerings.

Golder Decl. ¶ 38

# Consumer Testimony Creates Dispute Over Materiality

Q. Did you read any reviews before you began using TurboTax?

A. Yeah. [...]

Q. Do you remember how many reviews you read before you began using TurboTax?

A. ... [I]f you had to put a number on it, it would be five or six at least reviews and they were generally from individuals. [...]

Q. And do you recall what the reviews you read about TurboTax said?

A. Just that it was easy to use mostly and that the word that came to mind ... painless, you know, stuck in my head.

RX 72 – Harford Dep. Tr. 57:9-59:16

Q. If we can go to paragraph 5 [of your declaration]. It says, “I began using TurboTax in tax year 2013 because I liked the interface and it was straightforward and easy to use and thought it looked clean.” Is that right?

A. Yes.

RX 71 – Rozar Dep. Tr. 73:5-11

# No Prospective Relief Is Warranted

- The purpose of prospective relief is not to “impose criminal punishment or exact compensatory damages,” but rather to prevent future violations of the FTC Act. *FTC v. Ruberoid Co.*, 343 U.S. 470, 473 (1952).
- Instead of evaluating Intuit’s current advertising practices, Complaint Counsel continue to focus on Intuit ads that aired years ago and are outside the limitations period. *See* Opp. 25-26.
- There is no “cognizable danger” of these ads recurring in the same form. *TRW, Inc. v. FTC*, 647 F.2d 942, 954 (9th Cir. 1981).
  - Indeed, the May 4 Settlement Agreement forbids it.

# The Multistate Settlement Already Prohibits the Allegedly Deceptive Conduct

## ASSURANCE OF VOLUNTARY COMPLIANCE

This Assurance of Voluntary Compliance<sup>1</sup> (the “Assurance”) is entered into by the Attorneys General of the States and Commonwealths of Alaska, Alabama, Arkansas, Arizona, California, Colorado, Connecticut, Delaware, Florida, Georgia, Illinois, Iowa, Idaho, Indiana, Kansas, Kentucky, Louisiana, Massachusetts, Maryland, Maine, Michigan, Minnesota, Missouri, Mississippi, Montana, North Carolina, North Dakota, Nebraska, New Hampshire, New Jersey,

<sup>1</sup> This Assurance of Voluntary Compliance shall, for all necessary purposes, also be considered an Assurance of Discontinuance. The Attorneys General have authority to execute this Assurance. See generally N.Y. EXEC. LAW § 63(15); TENN. CODE ANN. § 47-18-107; FLORIDA STATUTES SECTION 501.207(6); ILLINOIS CONSUMER FRAUD AND DECEPTIVE BUSINESS PRACTICES ACT, 815 ILCS 505/6.1; N.J.S.A. 56:8-1 to -227; P.A. UNFAIR TRADE PRACTICES AND CONSUMER PROTECTION LAW 73 P.S. § 201-5; TEX. BUS. & COM. CODE § 17.58; RCW 19.86.100; ALASKA STAT. § 45.50.511; ALA. CODE § 8-19-4; ARKANSAS CODE ANNOTATED § 4-88-114; ARIZ. REV. STAT. § 44-1530; C.R.S. § 6-1-110(2); CONN. GEN. STAT. § 42-110; D.C. CODE 28-3909(c)(6); 29 DEL. C. § 2525(a) (authorizing cease and desist orders by agreement); O.C.G.A. § 10-1-402; HAW. REV. STAT. SECT. 487-12; IOWA CODE § 714.16; IOWA ADMIN. CODE R. 61-38.1; IDAHO CODE § 48-610; IND. CODE § 24-5-0.5-7; KENTUCKY REVISED STATUTES 367.230; UNFAIR TRADE PRACTICES AND CONSUMER PROTECTION LAW, LA. R.S. § LA. R.S. 51:1410; M.G.L. c. 93A, SEC. 5; MD. CODE ANN., COM. LAW § 13-402; 5 M.R.S.A. § 210; MICH. COMP. LAWS § 445.906; MINN. STAT. § 8.31, SUBD. 2B; §407.030 RSMO; MISSISSIPPI CONSUMER PROTECTION ACT, MS CODE ANN. §75-24-27(1)(g); MONT. CODE ANN. § 30-14-112; N.D.C.C. 51-15-06.1; NEB. REV. STAT. § 59-1610 AND NEB. REV. STAT. § 87-202.05(2); N.H. REV. STAT. ANN. § 358-A:1-7; NEW MEXICO UNFAIR PRACTICES ACT NMSA 1978, §57-12-9 (1971); NEV. REV. STAT. 598.0995; OHIO REVISED CODE 1345.06(F); 15 O.S. § 756.1; ORS 646.632; R.I. GEN. LAWS § 6-13.1-6; SOUTH CAROLINA CODE § 39-5-60; SDCL 37-24-19; UTAH CODE § 13-2-1, *et seq.*; VA. CODE ANN. § 59.1-202; 9 V.S.A. § 2459; WIS. STAT. § 100.18(11)(e); W. VA. CODE § 46A-7-107; and WYO. STAT. ANN. § 40-12-107.

This Assurance of Voluntary Compliance is a Settlement Agreement for the purposes of the North Carolina

RX 76 at 1

The Settlement forbids Intuit from running its “free, free, free” ads, or substantially similar ads:

G. Intuit must not publish, or cause to be published, in any medium (1) its “free, free, free” Video Advertisements (see Appendix A for a list of such advertisements) and (2) Video Advertisements that are substantially similar in their repetition of the word free.

RX 76 at 21

It also requires Intuit to make meaningful enhancements to its “free” disclosures:

A. In any non-Space-Constrained Advertisement of free tax preparation products other than on a TurboTax Website, 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.

RX 76 at 20

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# The Multistate Settlement Mirrors the Prior FTC Proposal

| Category                            | FTC's November 10, 2021 Proposal  | State AG Settlement   |
|-------------------------------------|---|---|
| <b>Non-Space Constrained Ads</b>    | “(1) the existence of material limitations on a consumer’s ability to use that free product;<br>(2) the general nature, category, or type of those limitations;<br>and<br>(3) that not all taxpayers qualify for the free product.”                                       | “(1) the existence and category of material limitations on a consumer’s ability to use that free product; and<br>(2) that not all taxpayers qualify for the free product.”  |
| <b>Space Constrained Ads</b>        | “that eligibility requirements apply.”  | “that eligibility requirements apply.”  |
| <b>Space Constrained Online Ads</b> | “must also include a hyperlink to a landing page or webpage on a TurboTax Website that contains full disclosure of all material eligibility restrictions.”  | “(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.”  |
| <b>Space Constrained Video Ads</b>  | “must [also] verbally disclose ... that eligibility limitations apply and not all taxpayers qualify.”   | “except for such Advertisements that are 8 seconds or shorter, Intuit must [also] verbally disclose ... that not all taxpayers qualify.”  |
| <b>TurboTax Website</b>             | “must disclose ... very near to the representation or through a hyperlink that is very near to the 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.” | “must disclose (1) ... 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.” |

# Intuit's Affirmative Defenses Remain Unaddressed

- Complaint Counsel's motion outright ignored Intuit's affirmative defenses:
  - Mootness: Intuit has discontinued the allegedly unfair and deceptive advertising campaign.
  - Overbroad Relief: Requested relief exceeds the scope of the allegations in the Complaint.
  - Invalid Complaint: The Commission did not vote on the final version of the Complaint.
  - Laches/Estoppel: The Commission unreasonably delayed taking action.
  - Due Process Violations: Prejudgment.
  - Other Constitutional Violations: Substantial separation-of-powers and nondelegation concerns.

# No Continuance Is Necessary or Appropriate

## Rule 3.24(a)(4) provides:

“Should it *appear from the affidavits of a party opposing the motion* that it cannot, for reasons stated, present by affidavit facts essential to justify its opposition, the Commission . . .

[1] may deny the motion for summary decision or

[2] may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had . . . .”

## The appropriate action here is to deny the motion—not to order a continuance.

- There was and is no deception.
- CC have not introduced any evidence—after a three-year investigation.
- Intuit, not the Commission, is entitled to summary decision on this record, but it is time for a fair and contested hearing before the ALJ. Each side should get its day in court after a full and fair record is created.

**CERTIFICATE OF SERVICE**

I hereby certify that on October 24, 2022, I caused the foregoing document to be filed electronically using the FTC's E-Filing system, which will send notification of such filing to:

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

I further certify that on October 24, 2022, 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: crobbins@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

Dated: October 24, 2022

Respectfully submitted,

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